SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING

MARCH 3, 1977

The meeting was called to order at 8:09 a.m. Senator Close was in the chair.

PRESENT: Senator Close
Senator Bryan
Senator Dodge
Senator Foote
Senator Gojack
Senator Sheerin

ABSENT: Senator Ashworth, excused out of town on State business.

SB 191 Revises provisions relating to discipline of physicians.

Andy Gross of the Legislative Counsel Bureau stated that this is the bill that Bryce Rhodes testified on and he has submitted a letter from the Board of Medical Examiners as to recommendations to this bill. (see attachment A) He stated they had found that there were certain problems in chapter 630, which is disciplinary provisions for the medical profession. These problems were created in 1975 attempts to increase the disciplinary powers of the Board of Medical Examiners. This came to light when they issued the first draft of their regulations pursuant to the new law. It was clear then that everything in the law was not understood by the Board, as it had been intended by the legislature and it was decided then that some cleanup and clarification was needed. This is primarily the genisus of SB 191.

Jerry Lopez stated the result of the work of the 1975 legislature was to make a distinction between unprofessional conduct and then three types of other conduct; gross malpractice, repeated malpractice and professional incompetence. What the Legislature decided to do in 75 was to treat those types of malpractice and incompetence in a different fashion. They wanted a different procedure to apply to those. Where a complaint alleges gross malpractice or repeated malpractice those are malpractice triggers. To better demonstrate he passed out a diagram (see attachment B). They wanted the board only to look at the complaint itself, decide whether it was fivilous or not and if it were not then they wanted the board to forward the complaint to the AG, who would investigate, see if there were any facts to substantiate the complaint and if so they would present these facts to the board. At that point the board would have three choices; to dismiss the action, decide to proceed administratively, or direct the AG to go into court and have the persons license pulled under a judicial order. Unprofessional conduct was to be treated

differently. The AG would not investigate that type of conduct, there would be no judicial route for that type of conduct. To make the different treatment of those types of triggers even clearer, 630 before 1975 had talked about a complaint and up to that time malpractice was part of unprofessional conduct, and so the complaint would also contain an allegation of malpractice. This has now been seperated out. So we have a complaint that goes before the board that can only allege unprofessional conduct while we have another item that is called an allegation. So the treatment of the complaint and the treatment of the allegation is seperate. The complaint is purely administrative and the allegation is the one that goes through the AG and the courts if the board decides that is the route it wants to go. So SB 191 is trying to make these distinctions clearer, so that the board has clear guidance as to how it should treat different types of complaints or allegations. In section 1 we have set out the grounds for initiating a disciplinary proceeding before the board by complaint. This is where we first encounter the distinction between the complaint and the allegation. We have included items that were already in 630 unprofessional conduct, conviction for various types of crimes, and dealing with controlled substances. 630.310, section 2 of the bill, page 2 line 6 tells the board what can be done with the complaint. This is as opposed to an allegation or malpractice trigger. Section 3, 320 tells the board then that all that they do with this complaint at this point, is to determine whether it is frivilous. In 310 the complaint has gone to the President or Secretary of the Board, if he considers the complaint frivilous then he is instructed to hold it in abeyence and discuss it at the next board meeting. This is following a procedure that has been in 630 for some time.

Senator Bryan said he believed there had been some testimony that the word "frivilous" was objectionable?

Jerry stated that during the sub-committee Mr. Rhodes had pointed out some difficulty with that. This was the term used in the 75 law with respect to the allegations and malpractice triggers. He felt it had a very definite dictionary meaning and thought it was the intent of the Legislature to use the lightest possible standard here. If there is any merit whatever; that if there were facts backing up what was alleged in the complaint or allegation then the board should proceed with it.

Senator Dodge asked if perhaps "without merit" could be used.

Jerry feels that at this point the Board doesn't have the facts, all the board has is a mere allegation. They may have the barest facts here, and all they are telling the board is, from what you have in that complaint does it appear patently absurd. If it isn't then proceed.

Senator Sheerin stated in the first part of this bill you are letting the president or secretary, one person, make the decision whether or not the complaint has merit. As far as the Lawyers policing themselves, it's the board that makes the decision. He doesn't like the idea of a single member making that initial decision as to whether or not it is frivilous.

Jerry felt that they have to hold it in abeyence (line 21) and discuss it at the next board meeting and then it is the board in sub-section 2 that will determine whether or not it is frivilous. If they find it is not patently absurd then they can proceed with it. This is where we do the combining, in sub-section 2. This states what the board is to do with a complaint as opposed to an allegation. He stated that under triggers 2, 3 and 4 it can trigger judicial action, whereas trigger 1 can't.

Senator Bryan felt it would be clearer to say a complaint or allegation, with respect to unprofessional conduct the provisions of 630.310 are invoked, and with respect to gross malpractice, repeated malpractice or professional incompetence, the other occurs. The allegation and complaint are synonymous. In an allegation you are making a complaint, you are alleging something.

Andy Gross stated that on page 3 line 20, this goes from section 330, it uses the language complaint or allegation and then it says based on what the board may do. He stated it was Jerry's thinking that an allegation was a little bit heavier than a complaint.

Senator Bryan said he felt on the scale of culpability, a person would feel that a complaint was more serious than an allegation. Allegation is actually like a charge, and a complaint, in the law in certain context, has a higher dignity because it is a formal pleading.

Senator Sheering stated that if it was the patient filing the complaint or allegation, he would have to go to an attorney and he feels even an attorney would have a difficult time reading this chapter and coming to a decision whether he should file a complaint or allegation with the court.

Senator Dodge stated that if it were the judgment of the Committee to structure this along the lines of whether it it is a question or unprofessional conduct, or some degree of incompetency or malpractice, then it could be set up so you follow the same procedures that you have outlined here where it stays within the Administrative decision of the board, if it is unprofessional conduct it follows this other route of investigation by the board or potentially by the court in case of malpractice.

Senator Bryan stated that his impression of this was almost like going back to the common law forms of action. If you elected to file under trover when it would trespass on the case, then you are in a completely different ballpark. He feels we ought to say if this is a complaint for unprofessional conduct, such and such happens with respect to gross malpractice or repeated malpractice or professional misconduct. Allegation is used here as a word of arc, and he dosen't feel it is generally viewed as such. He doesn't really think it has a precise meaning that allerts you to something different than a complaint.

Senator Dodge felt it was too complicated and that could be why the Board of Medical Examiners is so confused. He felt the bill needed to be overhauled substantially as far as outlines and procedures.

Senator Close questioned why the word complaint couldn't as easily be the one used and then let the Board decide which category it falls into.

Mr. Rottman questioned why there should be any difference in proceeding if one files a complaint, with regard to any of the four triggers.

Senator Dodge stated that on the unprofessional conduct it is a proper matter for that regulatory board to handle this as an internal procedure. When you get into the area of malpractice, and particularly where there is a potential of revoking a license, he thinks you need to shield the practicing physician with more safeguards then just a decision of the administrative group. He feels there is validity to the procedures set up here with potential recourse to the courts.

Senator Sheerin stated that it seemed to him the reason for the distinction is that unprofessional conduct should be handled by the peers, whereas these other things were difficult and the process is perhaps necessary.

Senator Close stated that unprofessional conduct could be simply overcharging.

Andy stated that no one's health would be impaid whereas if he is amputating the wrong leg then you had better pull his license immediately, that is why you have the other three greater safeguards. The thrust of those with recourse to the courts is to make sure there are no stays or injunctions or anything like that on the action of the Board.

Mr. Rottman felt there was a practical problem. The board only meets quarterly. They are full time physicians and their primary thrust, in the past, was only dealing with giving licenses and examinations. They are really coming into a new era, they are puting on this disciplinary bit

and this is what he thinks may be complicating part of the problem.

Senator Sheerin stated he could see less reason to have the distinction of having one route for unprofessional conduct and another route for the other three. They should all be put into the same category with this procedure. The sanctions can limit their practice, suspend their license or revoke, essentially they do the same whether it is a complaint or allegation.

Senator Dodge said it looks like they just went with the old law. He felt we should get Bryce Rhodes to come over and rewrite this procedure thing in a manner which would be acceptable to the Board of Medical Examiners. For example, maybe you should give them some flexibility in these charges even the unprofessional conduct. It is possible that they may even want the AG involved in this.

Senator Bryan asked if there was some mandate in here that requires referral to the AG in the cases of gross malpractice?

Senator Close stated the gross malpractice, repeated malpractice and incompetence, under 343-3B, goes directly to the AG according to the chart.

Senator Dodge stated he thought the point here was that the BME wanted to divorce itself from the investigatory procedure. He felt it was not necessarily a time saving or judicial time involvement, but it was to divorce the investigative aspect. He felt if we could get Bryce Rhodes, Jerry Lopez and Bill Isaeff all together we could, perhaps in an hour, structure a simplified bill.

Senator Bryan stated he was not clear on one other point. Suppose a person files a complaint or allegation, now the document presumably is very general in character, but contains sufficient information for the board to act upon. There should be a formal pleading file that is served upon the responding physician so that he will have something a little more precise. It seems to him that someone facing a revokation has a right to expect that the board will prepare a plea.

Andy stated that presumably this is what the AG will provide to the board and the same thing will be provided to the physician. He is not going to be served in the form of the original compliant from the private party. When they serve the 20 day notice, this is with the findings of the AG.

Senator Bryan thought it had to be something that is analogous with a pleading so you know if the guy is being charged with over-charging, a flashing neon sign, or taking someones leg off without permission.

Senator Dodge felt it be structured like anything else. The board can make a determination which is then subject to judicial review. The recourse to the courts should be preserved in the case where they want to restrain a guy from practice.

Senator Close felt we should get all the people together and have Andy prepare a rewritten version and then the Committee could review it.

SB 187 Provides for periodic payment of certain damages recovered in malpractice claims against health care providers.

Andy Gross stated that Senator Hilbrecht had given the Committee the findings of the interim committee as to why future income was not there. He felt that was the only significant thing brought up in the joint hearing on this.

Senator Close stated he was really concerned on the second page of the bill, "adequate security". The insurance companies were concerned about being named a party to the action. He felt it could be clarified by saying "after the trial", and before the periodic payments were asked for.

Senator Bryan said he was a little concerned about the due process. If you have a named defendant, say a physician or hospital, and a judgment is awarded, it seems to me that we can not say that is ipso facto at that point. The insurance company becomes a party at that point for any future orders. It seems to him they need some opportunity, some kind of device.

Senator Dodge felt there ought to be a different procedure. If the party is insured a good way to do this is reduce it to a contract, whereby the party who is going to get the benefits knows exactly what to expect in the order of the payments, and have that contract approved by the court.

Senator Bryan stated that perhaps you could create a post judgment proceeding. At that time the insurance company could be brought in and made a party to that proceeding. Then you can have the full range of contempt powers and other judicial tools to enforce the order entered against the insurance company. The insurance company has to come in somewhere, because they are the ones making the payments so if there is a default, you have got a contempt or some other type of summary procedure to enforce it.

Senator Close felt the language needed clarification. As a precedent to having a structured settlement the insurance company must submit itself to the jurisdication of the court. If it refuses to submit itself to the jursidction of the court, you cannot have a structured settlement.

Mr. Rottman stated he would have no objection to it being spelled out. However, he thought they should keep in mind that there are litterly thousands of contracts in Nevada, where you have periodic type payment, annuity contracts for example, where these people paid large sums and are getting their money back on a daily basis. So it isn't the type of thing where we are running around trying to catch a company to make a payment. He felt some of the Committees fears were a little bit unfounded.

Senator Close stated that as he understood it then, as a condition precedent to the court order of the structured settlement, the insurance company must subject itself to the jurisdiction of the court to be a part of that judgment, in so far as the structured settlement is concerned.

Senator Bryan stated that at the same time try to flush out what the procedure is and build a mechanisim into the statute itself to procedurally accomplish that.

Senator Raggio stated that in many cases the jury doesn't make a specific finding of the future damages. Are you going to require that they do?

Mr. Rottman stated he felt the way the language reads that the insurance company would be a party during the suit, and feels that is untenable under most circumstances. However he doesn't think there would be a problem if they were brought in after the judgment has been rendered.

Senator Raggio said what if the jury comes in with a verdict which includes $75,000 future damages, and all the condition procedures have been met, if I understand what you say, what about the right of defense counsel to make the motion that the damages awarded are excessive? Then suppose the court has that right and then determines that the damages that the jury assessed are excessive and reduces future damages to $45,000?

Senator Sheerin stated then there is no structured settlement.

Senator Raggio stated then that should be indicated.

Senator Close raised the question of who was going to hold the security. Would it be posted with the court, posted with the Insurance Commissioner, with a bank; whether it must be cash, whether it can be government bonds; who gets the earnings during that time, he would assume that would go back to the insuracne company; who monitors the value of the bond if it goes up or down and how often is it monitored? There must be some way of gurantying payment.

Mr. Rottman stated there were several options in terms of securities. One, and here you have to allow for non-insurance cases, is a surety bond in the total amount of the payment. If a doctor was not an insured doctor and

you were to make use of this structured settlement at all, this might be his only avenue of providing security.

Senator Sheerin stated we should go back to the genisus of the bill. With these future damages somebody might die earlier, and so their estate is getting a windfall, so it seems to me that what we should do is require that the insurance company put up a TCD, or cash deposit, and the earnings from the cash deposit go to the plaintiff and the only thing the insurance company should get is if there is a death, that cash deposit should be refunded to them. My understanding is that the only thing we are trying to do here is get that windfall back to them. There is no reason why they shouldn't have to put the money up front where it belongs, so there is no question or problem about security.

Mr. Rottman stated there is really a two pronged approach to the bill. One was to permit the insurance company, to in fact have the earnings on the specific sum over a period of time and the other was that the windfall, rather than go to the estate, go back to the insurance company. Both of these items would tend to reduce to some degree the tremendous risk that you have on a large malpractice case.

Senator Close stated that as they had to be downstairs, these matters would be continued for future meetings. The meeting was adjourned at 10:59 a.m.

Respectfully submitted,

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Virginia C. Letts, Secretary

APPROVED:

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SENATOR MELVIN D. CLOSE, JR., CHAIRMAN

MIKE O'CALLAGHAN, Governor

Nevada State Board of Medical Examiners

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February 28, 1977

The Honorable Melvin Close, Jr.
Nevada State Senator
Legislative Building
Carson City, Nevada 89710

Dear Senator Close:

RE: SB 191

This Board recommends:

1. That NRS 630.315 not be repealed (as provided by Sec 8 of SB 191).

2. That Sec. 7 of SB 191 not be inacted.

3. That NRS 630.315 be amended by adding thereto a new sub-section as follows:

> 5. In the event the Board shall determine, following said mental or physical examination, that the physician lacks the ability to safely practice medicine, the Board may suspend the physician's license to practice medicine until there has been a hearing on the allegation, provided that said suspension pending a hearing on the allegation shall not be for a period of more than 90 days.

The Board further recommends that SB 191 be amended by the addition of a new section, amending NRS 630.340 by adding thereto the following new sub-section:

> 3. Until the Order of Revocation or Suspension is modified or reversed, as provided in this section, the Court shall not stay the same by temporary restraining order or preliminary injunction.

It is submitted that the above requested new sub-section is indicated to protect the public health, safety and welfare pending judicial review. Otherwise, a physician whose license to practice medicine has been revoked or suspended after a full hearing and who has been found to lack the ability to safely practice medicine due to indulgence in the use of alcohol or drugs or who willfully disregards established medical practices or fails to exercise

proper care, diligence and skill in the treatment of patients, may be permitted to practice medicine during the period of judicial review to the detriment of the public health, safety and welfare.

RE: SB 190

The Board concurs in the suggestions of William E. Isaeff, Esq., Deputy Attorney General, made at the hearing on February 14, 1977 and as set forth in his letter to you of February 24, 1977; that Sec. 1 of SB 190 be amended to cover gross malpractice, malpractice, professional incompetency and unprofessional conduct, rather than the simple term "malpractice", as it now appears in said section.

The Board also concurs in Mr. Isaeff's suggestion that the figure "$2,000.00" in Sec. 2 of SB 190 be amended to read "$5,000.00" or even higher if the Committee deems that appropriate.

Further, Sec. 3(2) provides that the Commissioner shall report each claim to the Board of Medical Examiners. This would appear premature if every claim made under a policy of insurance had to be reported to the Board prior to any settlement, award or judgment. It would appear premature to have every claim forwarded with all of the excessive paper work involved and a more workable approach would be to have only those claims forwarded upon which a settlement or award was made or a judgment rendered.

RE: SB 188

The Board concurs in the suggestion of William E. Isaeff, Deputy Attorney General, as detailed in his letter to you of February 24, 1977, that SB 188 not be approved because it would work to the detriment of the public and would cause a serious handicap to the Office of the Attorney General and to the Board of Medical Examiners in proceeding with hearings involving allegations of gross malpractice, malpractice, professional incompetency and unprofessional conduct.

RE: SB 185 and Sec. 1 of SB 190

The Board concurs in Mr. Isaeff's suggestion that both of these statutes be effective on passage and approval.

The Board will appreciate consideration by the Joint Committees of the above recommendations.

Sincerely,

Bryce Rhodes

Bryce Rhodes
Legal Counsel

BR/mm

PHYSICIAN DISCIPLINARY ACTION UNDER NRS CHAPTER 630

	Board of Medical Examiners Administrative Action As in NRS 630.310-630.340	 As in Proposed Regulations	Judicial Action NRS 630.341-630.349
TRIGGERS:	1. Unprofessional Conduct (NRS 630.030) 2. Gross Malpractice 3. Repeated Malpractice } (NRS 630.343 (3)(b) 4. Professional Incompetence (actually investigated by B.M.E.)	Unprofessional Conduct: --Unethical Conduct: (NRS 630.030 (5)) Reg 7: Consistent use of procedures, services, treatment departing from prevailing standards (Gross/Repeated Malpractice?) Reg 8: "Single Instance of Malpractice" (See NRS 630.013)	1. Gross Malpractice (NRS 630.012) 2. Repeated Malpractice (NRS 630.013) 3. Professional Incompetence (NRS 630.022)
ACTION:	Investigations and Trial by BME (NRS 630.330(1)).		1. Initial investigations by BME or CMS. 2. Further investigation by A.G. 3. (a) BME Admin. Action (Trigger transfer) or (b) Judicial proceedings
RESULTS:	1. Permanent or temporary revocation 2. Permanent or temporary suspension 3. Probation on terms 4. Public or private reprimand → Other terms, conditions, provisions (NRS 630.330(3)).	1. Limit practice 2. Suspension } (Reg. Sec. X,1(a) 3. Revocation	1. Limit practice 2. Suspension } (NRS 630.349) 3. Revocation
REINSTATEMENT:	1. Available for unprofessional conduct under NRS 630.330(3) and 630.350(1) 2. Available for gross malpractice, repeated malpractice and professional incompetence by virtue of NRS 630.343(3)(b), NRS 630.330(3).		1. Not available for gross or repeated malpractice and certain professional incompetence. 2. Available for professional incompetence based on mental illness only (NRS 630.350(2)).