

SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING

MARCH 31, 1977

The meeting was called to order at 8:00 a.m. Senator Close was in the Chair.

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

ABSENT:

AB 128 Permits local governments to self-insure certain risks.

Assemblyman James J. Banner testified in support of this measure. The bill concerns itself with insurance for public entities and provides that counties may adopt a way of transferring the risk by creating a self-insurance fund. There are five basic techniques that can be employed in facing the risk of loss to which municipalities or any other governmental units are exposed: 1) elimination; 2) reduction; 3) assumption; 4) hold-harmless agreements; and 5) transfer. Regular insurance policies are a contract that transfers the risk for a consideration. Because of the experience public entities have had in this field throughout the last 2 or 3 years and the problems of procuring insurance, the time has come for them to start thinking and acting somewhat more like private enterprise; increase their deductibles transfer to complete self-insurance or any combination thereof. In order for them to do that, there has to be this enabling legislation. As an example of the insurance problem, Clark County, in their liability insurance for 1975 went to bid and received only 2 proposals and even then, the rate had increased about 100%. At the present time, the city or county cannot have a reserve for insurance loss. Everything that they pay on deductibles, for example, must be expensed out from the operating budget.

Russ McDonald, representing Washoe County, stated that what they had done in this regard was to draft an ordinance, and, going back to the risk management recommendation of previous years, over a 5-year period attempt to appropriate money into an ordinance-created self-insurance fund; the uses of that fund being spelled out. Whether or not you get a recovery, you can reach into that fund to replace money expended for losses.

AB 128 In order to accomodate a yield for the fund while it is sitting there, the ordinance requires that the money be invested and the interest earned at the end of the year is credited to the fund. This is an attempt to answer demands for premium increases and to reduce, in some cases, the deductibles. Building up a fund like this is always subject to an award by a fact-finder when you get into negotiations and therefore, he felt there should be some limitations built into this which would prevent such an invasion.

He further stated that ACR 9 would authorize a house-oriented study which would look at the whole picture and should be considered as a companion measure to this bill.

Steven Stucker representing the City of North Las Vegas testified in support of this measure because it is permissive and allows the flexibility to mold the insurance program to their individual needs. He requested an amendment which would provide that any self-insurance fund established with the state or any political subdivision, shall not be invaded for any other use. This would serve a two-fold purpose: 1) to protect citizens from an over-large fund and 2) to protect the fund from being invaded by an overzealous fact-finder.

He also informed the Committee that he had been requested by Richard Bunker, representing the City of Las Vegas, to convey their support of this matter.

Bob Warren, Nevada League of Cities informed the Committee that at their annual conference, they passed a resolution supporting both an interim legislative study and the concept of a self-insurance fund.

Tom Moore, representing Clark County stated that they were in support of this measure.

Bill MacDonald, Humboldt County District Attorney stated that they were in support of this measure but wanted to point out that most of the small governments are so small that they, individually, would have great difficulty in funding a self-insurance program.

Senator Close suggested that the bill be amended to provide that reasonable monies set aside will not be available for mandatory awards.

Senator Bryan stated that his only reservation against doing that is that they have not said in any other provision of the law, that an amount of money or certain category could not be reviewed or examined or reached for purposes of negotiations. It was his feeling that the entire act should be reviewed rather than through piece-meal legislation by this committee.

AB 128 Bart Jacka, Las Vegas Metropolitan Police Department stated that they are now at a point where they may have to start making such classifications. Public employees, in their bargaining process, are becoming more active and are looking to more available sources of funds. If you specify a "reasonable" amount and it goes to a fact-finder, that fact-finder then has guidelines and it still provides the local government with the capability to set aside funds.

Senator Ashworth moved to adopt Senator Close's suggested amendment.

Seconded by Senator Dodge.

Motion carried. The vote was as follows:

| | | | |
|-------------|------------------|-------------|-----------------|
| VOTING AYE: | Senator Close | VOTING NAY: | Senator Bryan |
| | Senator Dodge | | Senator Gojack |
| | Senator Foote | ABSENT FROM | |
| | Senator Ashworth | THE VOTE: | Senator Sheerin |

Senator Ashworth moved to amend and do pass.

Seconded by Senator Dodge.

Motion carried unanimously. Senator Sheerin was absent from the vote.

AB 36 Strengthens recoupment provisions and conforms powers of county and state public defenders.

Tom Susich, Chief Deputy, State Public Defender, stated that this would allow the state public defender to contract with counties with public defender's offices to handle cases where the local public defender is not able to act for some reason. This bill would be fiscally advantageous to both the state and counties. They had been approached by Clark County concerning the heavy expenditures being laid out by them for appointment of private counsel in indigent cases where their office was unable to act. Also, the new facility in Jean will create an added case load for Clark County and their public defender will have inherent conflicts with a great many of the cases arising. The state will probably open up a branch office in Las Vegas as it is to their advantage, logistically.

In response to a question from Senator Bryan concerning any budgetary problems with staffing an office in Las Vegas, Mr. Susich stated that he did not believe it would have any affect upon the state; they would expect the county to provide whatever would be necessary in setting up an office

He also expressed concern over subsection 2 of section 4 which would give the state public defender the responsibility for handling juvenile cases as well. He stated that they were not opposed to it but that when they had prepared the fiscal note, they were not aware that this was included and had not calculated its cost.

AB 36 Senator Bryan stated that if it were necessary for them to recalculate the fiscal note and go back through both money committees, they may not get the bill passed this session.

Bill MacDonald, Humboldt County District Attorney stated that he would like to see the provision concerning juveniles retained in that the smaller counties do not have enough defense attorneys available and it makes it that much more difficult for the courts to appoint counsel. Additionally, he felt that there should be included, some guidelines for the justice courts in determining who should get counsel. He stated that one of the most frequent criticisms of the system is the amount of people who are given free legal services.

Mr. Susich concurred with this and stated that in some of the rural counties, they have requested a court order that the indigent defendants should pay for their services. It is their position that the best way to handle this is to make it a part of parole and probation. He suggested that the counties put the money in a fund which would be dispersed toward the annual fee to the county.

Senator Close had a question as to how the lien was to be determined; the amount of money involved; the amount of the attorney's fee; and how it is obtained.

Mr. Susich stated that the statute doesn't set out specifically what procedures would have to be followed.

Senator Close also had a question as to why the statute of limitations is only for one year and not consistent with existing law.

Mr. Susich stated that that was just an arbitrary figure and that he was not opposed to amending it.

In discussion by the Committee, it was their decision to amend the bill as follows: 1) allow the judge to determine the amount of legal services rendered and attach an appropriate lien; 2) conform the statute of limitations to existing law; and 3) with regard to representation of juveniles insert "within the limits of available funds."

Senator Ashworth moved to amend and do pass.

Seconded by Senator Bryan.

Motion carried unanimously. Senator Sheerin was absent from the vote.

AB 270 Provides for collection of statistical data concerning certain civil actions.

With the modification of previous Senate bills in this area,

AB 270 it was the feeling of the Committee that this was duplicative of those measures.

Senator Dodge moved to indefinitely postpone.
Seconded by Senator Foote.

Motion carried unanimously. Senator Ashworht was absent from the vote. Senator Sheerin abstained from the vote.

AB 379 Limits testimonial privilege of husband and wife.

Larry Hicks, Washoe County District Attorney, stated that this is a house-keeping measure to clarify the exceptions to the husband and wife privilege, which is a privilege rule in the rule of evidence. They have run into a defense argument, which they feel may be valid, that the exceptions only apply to what is listed in the bill as subsection b on line 7 of page 1. This would clarify that the exception applies to both. It also provides that the exception applies to a child who is in the custody of either, as in a foster child.

Senator Dodge moved a do pass.
Seconded by Senator Foote.

Motion carried unanimously. Senator Ashworth was absent from the vote.

AB 382 Provides penalty for possession of certain credit cards.

Larry Hicks, Washoe County District Attorney and President of Nevada District Attorney's Association, informed the Committee that this bill was supported by the DA's Association, state law enforcement agencies and the check writer's association. He stated that this is almost a house-keeping measure in that when the legislature enacted its credit card laws, it overlooked a crime for possession of a stolen credit card. He stated with a stolen card, in the possession of someone who knows how to use one, they can run up thousands of dollars worth of purchases.

Senator Foote moved a do pass.
Seconded by Senator Ashworth.

Motion carried unanimously. Senator Close was absent from the vote.

AB 383 Allows courts to sentence certain habitual criminal to life imprisonment with or without possibility of parole.

Larry Hicks stated that this was supported by the District Attorney's Association. This proposal allows for a provision for life with or without possibility of parole for a person who is sentenced as an habitual criminal and sets a 10 year minimum.

AB 383 Senator Close asked if there wouldn't be a problem with the statute in that the court has no guidelines as to whether or not it is to be with or without possibility of parole. Pat Walsh, Deputy Attorney General stated that there is a pre-sentence investigation report prepared in every felony case which recommends punishment for each charge. The pardon and parole board also looks at the report at a later date so the sentencing is not really as open-ended as it may appear.

No action was taken at this time.

AB 385 Prohibits possession, custody or control of dangerous weapons by prisoners under specified circumstances.

Pat Walsh, Deputy Attorney General presented a display of weapons that had been taken from prisoners at the Nevada State Prison, as an example of what can be produced from the materials they have on hand. Some of the items were: soup spoons that had been broken off and sharpened; shot gun barrels; and drug paraphernalia. At the present time, any weapon has to be concealed to be a violation of law. A prisoner could have any of the items indicated and be committing no crime.

Larry Hicks testified in support of this measure and stated that the District Attorney's Association and the law enforcement agencies were all in favor of this bill.

Senator Close stated that the term "sharp instrument" was too broad and could include anything. Mr. Walsh stated that the problem is they can make a dangerous weapon out of anything. He further commented that there are enough cases involving real weapons that they are not going to go out looking for a guy that has a tooth pick.

Bart Jacka, Las Vegas Metropolitan Police Department appeared in support of this measure. In response to Senator Close's concern, he stated that whatever the instrument, it is the sharpness that is the problem.

Senator Ashworth moved a do pass.
Seconded by Senator Foote.
Motion carried unanimously. Senator Close was absent from the vote.

AB 43 Provides for compensation of masters in district courts at public expense.

Assemblyman Robert Barengo stated that this was the result of an interim study where they tried to give a little more impetus

AB 43 to the use of masters by the courts. It was their feeling that there were a lot of powers that the judges could be delegating which would free them for more time in trial. He also stated that the county commissioners were opposed to this as they felt that all the judges would want their own master and there weren't the funds available at the present time.

After discussion, it was the decision of the Committee to send a letter to the Chief Justice of the Supreme Court advising them that rather than come before the legislature with requests for additional judges, that they should be encouraged to expand the use of masters in the perfunctory areas. A record of this letter is to be filed with the fiscal analyst for future reference.

Senator Ashworth moved to indefinitely postpone.
Seconded by Senator Gojack.
Motion carried unanimously. Senator Sheerin was absent from the vote.

SB 220 Provides condition for imposition of capital punishment.

Senator William J. Raggio and Larry Hicks resumed discussion of this measure with the Committee.
For further remarks on this matter, see minutes of meetings for February 23, March 10, March 11, March 14, March 16, and March 30, 1977.

Senator Dodge: Beginning on page 3, line 28, we understand the reasons for leaving the "other mitigating circumstances" in there, but we wonder if we shouldn't delete "of a like nature or recognized by law." If you are going to permit testimony on other mitigating circumstances, it seems to us that it ought to be without limitation.

Mr. Hicks: I agree. It is always within the court's discretion as to whether it is relevant to a mitigating circumstance or not. That is going to be the guideline regardless of the language.

Senator Bryan: We rather narrowly circumscribed those circumstances which were deemed to constitute aggravating circumstances on page 2, section 3. It seems to me that you almost emasculate that list if we have the language on page 4, lines 5-8, in the case that the state may introduce evidence of additional aggravating circumstances other than the aggravated nature of the offense itself at the penalty hearing.

Senator Sheerin: When you put your case on, you might not bother with some aggravating circumstances. They might not be part of your case, in chief, in order to get a conviction of guilty, even though they are listed back in this other section. Now you get to the penalty hearing and you have to put in additional items,

even though they should still be on the laundry list back here.

Mr. Hicks: Prior felony convictions would be a classic example in a case where a defendant hadn't taken the stand.

Senator Dodge: Is that one of the aggravations listed?

Mr. Hicks: Yes.

Senator Dodge: Would you have any objections if we said "evidence of additional aggravating circumstances as set forth in" so that we stay on the laundry list?

Mr. Hicks: It would probably be interpreted that way anyway but it is better with the language in there.

Senator Dodge: On page 2, having to do with whether we needed to mandate the time in which we are going to ask the court to conduct the penalty hearing. It seems to us that there is a pretty strong consideration here for not letting the jury disperse after the trial. We were suggesting that the penalty hearing had to proceed the day following the day of the finding of guilt.

Mr. Hicks: Or provide that the penalty hearing would proceed immediately thereafter, subject to a motion to continue upon good cause shown by either the defense or the prosecution.

Senator Raggio: I would suggest against it. The court, as a practical matter, would have to set it within a day or two.

It was the consensus of the Committee to retain the present language.

Senator Sheerin: On page 4, lines 15-19, I'm not sure if the word "or" should be added after line 18 because the word "and" is written at the end of line 17. I think that that means that you presume "and." So that the jury or the panel of judges "shall" determine whether sufficient aggravating circumstances are found "and" whether sufficient mitigating circumstances were found "and" based on those findings. What we are really talking about is a weighing process.

Senator Dodge: As a matter of structure, why don't we go back to the language in the middle of page 2, which says that you can sentence to death only if one or more aggravating circumstances are found and any mitigating circumstances that do not outweigh the aggravating.

Senator Raggio: The language you are talking about is what they must determine before they can impose the sentence of death, but they have to still find those a, b and c.

Senator Bryan: On page 4, line 26, I recall some discussion as to whether or not we wanted to require a jury to, in effect, render a special verdict as to which particular circumstance of aggravation they find. My concern is, does that make the verdict vulnerable to court review. There may be 3 or 4 circumstances and the jury chooses one and on review, the court says "we don't agree to that circumstances although the other ones are sufficient." I thought that perhaps it may be better not to require them to make a specific finding as to what circumstance but to generally instruct them that they must find one of the circumstances enumerated in the laundry list. If there was evidence to support that in the record, that would be sufficient on review.

Mr. Hicks: I agree, because I can see a situation where the defense is going to pick and pull apart at every single aggravating circumstance that has to be listed. If the jury make a mistake in listing one, even though they knew in their hearts that it was an appropriate case for the death penalty, you would have an appellate nightmare.

Senator Dodge: The reason why this was included was to complete the record for review by the appellate court. If the jury comes in and says we find more aggravating circumstances than there are mitigating, and if that particular point is challenged, it makes the court go back through the record and make its own finding, rather than to assess what the jury's finding was.

Senator Sheerin: And that finding would be a factual finding which the constitution doesn't allow them to do. I think you will have a worse appeal problem because you are going to have a decision being made; the court's not going to know what it was and they are going to kick it back and tell that jury to spell it out.

Senator Raggio: We cant to the conclusion that there was a necessity for making this special finding, especially since the requirement is that at least one aggravating circumstance must be found. I recognize that you might always have the possibility of "they didn't prove this one but they proved another one." The way it is written they would have to list not only the aggravating circumstance that they found, but the others. It "shall designate the aggravated circumstance or circumstances which were found beyond a reasonable doubt" and they should be instructed that they ought to list not only the one, but any that they found beyond a reasonable doubt.

Senator Sheerin: They are going to be smart enough that if there are 2 or 3 things involved in a laundry list, they are going to put them all down as long as there is any evidence in the record to support those findings.

Senator Dodge: I think it poses a real problem for the jury unless they make the finding that each of those circumstances, standing by itself, outweighs the mitigating circumstances. If they say that the combination of the aggravating circumstances, which is what this language is on line 27, outweighs the mitigating circumstances and the appellate court knocks one of them out, then it seems to me that you are correct. Unless they say "any one of these" outweighs the mitigating circumstances.

Senator Raggio: I think we came to the conclusion that to omit it created bigger problems.

Mr. Hicks: I am still concerned about the San Francisco-type murder problem and that is, the motiveless, thrill-killing murders. I don't feel that is covered under aggravating circumstances.

Senator Raggio: That was in SB 220 originally on page 3, lines 6-7, subsection d of section 3 "murders one or more persons at random and without apparent motive."

It was the consensus of the Committee to put that language back in.

Mr. Hicks: Bill McDonald (Humboldt County District Attorney) just mentioned that maybe there should be some provision in section 7, bottom of page 3, providing for who shall hear a new penalty hearing if it is sent back on appeal. As worded it would imply that you are talking about the same jury but when you are a couple of years down the road that would be a virtual impossibility. It should just provide for a panel of 3 judges in the event that the original trial jury is unavailable.

Senator Dodge: Can't we do the same thing with the panel for the impasse situation.

Senator Raggio: If it was a jury, you ought to return it to a new trial before a jury.

Mr. Hicks: I agree. I think if the jury passed capital punishment one time, it should be up to a jury the second time.

Senator Raggio: As a practical matter, it may be called a penalty hearing but you have to try the whole case over.

Mr. Hicks: On page 4, section 8, lines 9-14 seem to require a comment by the court on the evidence, which is one of the judicial no-no's.

Senator Dodge: Have him read the laundry list. The problem is that the jury doesn't know about the laundry list. If you just have him read the laundry list, they can pass judgment on what constitutes the aggravating and mitigating circumstances.

Senator Raggio: I think the difficulty is that it says "shall include in its instructions, the aggravating circumstances which the state has presented."

Mr. Hicks: Why not just change "presented" to "alleged" because that is what you are talking about.

Senator Dodge: No, the reason I think this is in here is because, when that jury is in there, they might not know anything about this statute. Someone has got to tell them, by way of instruction, these are the aggravating circumstances which you are entitled to consider under the law, and these are the mitigating circumstances.

Senator Raggio: Say something like "shall include in its instructions, the law as to the aggravating circumstances." But when you say "the aggravating circumstances which the state has presented" it almost sounds like you are telling the judge "look, the state has proved these aggravating circumstances."

Senator Dodge: Is there anything wrong with saying you shall instruct the jury as to the aggravating circumstances? Unless someone instructs that jury, they don't know what the law permits them to consider by way of aggravating and mitigating circumstances.

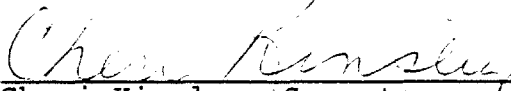
Senator Raggio: They should be instructed that these are the aggravating circumstances which they can consider.

Discussion on this matter will continue tomorrow, April 1, at 8:00 a.m.

BDR 3-1378 which limits civil actions based upon products liability was approved for Committee introduction.

There being no further business, the meeting was adjourned.

Respectfully submitted,


Cheri Kinsley, Secretary

APPROVED:

SENATOR MELVIN D. CLOSE, JR., CHAIRMAN