

ARIZONA STATE SENATE

46TH LEGISLATURE
FIRST REGULAR SESSION

MINUTES OF COMMITTEE ON JUDICIARY

DATE: February 12, 2003

TIME: 8:30 a.m.

ROOM: SHR 1

CHAIRMAN: Senator Weiers

VICE CHAIRMAN: Senator Verschoor

ANALYST: David Lujan

INTERN: Michelle Morales

ASSISTANT

ANALYST: Lace Collins

COMMITTEE

SECRETARY: Carol Dager

ATTENDANCE

BILLS

Committee Members

	<u>Pr</u>	<u>Ab</u>	<u>Ex</u>	<u>Bill Number</u>	<u>Disposition</u>
Senator Aguirre	X			SB 1047	DPA/SE
Senator Bee	X			SB 1098	HELD
Senator Binder	X			SB 1099	HELD
Senator Brotherton	X			SB 1100	HELD
Senator Jarrett	X			SB 1101	HELD
Senator Miranda	X			SB 1102	HELD
Senator Rios	X			SB 1143	DPA
Senator Verschoor, Vice Chairman	X			SB 1203	DPA
Senator Weiers, Chairman	X			SB 1205	HELD
				SB 1223	DP
				SB 1226	DISCUSSION/HELD
				SB 1274	DPA
				SB 1291	HELD
				SB 1304	HELD
				SB 1328	DPA
				SB 1333	HELD
				SB 1338	HELD

GOVERNOR'S APPOINTMENTS

Name

Position

Recommendation

Chairman Weiers called the meeting to order at 8:41 a.m., and attendance was taken.

APPROVAL OF MINUTES

Senator Weiers moved the minutes of February 5, 2003 be approved. Without objection, the minutes were approved as distributed.

CONSIDERATION OF BILLS

SB 1047 – affidavits; expert testimony; health care professionals – DO PASS AMENDED/ STRIKE EVERYTHING

Lace Collins, Judiciary Committee Research Assistant Analyst, explained the 25-line strike-everything amendment dated 02/10/03 at 11:38 a.m. to SB 1047, which removes the exemption from expert opinion certification laws for actions relating to healthcare.

Senator Brotherton asked for clarification that there already is a certification process in place. Ms. Collins responded that after speaking to the professionals in this field, she does not believe there is an expert certification law for medical malpractice lawsuits. Prior to 1989 there was a panel that reviewed these types of cases.

Senator Leff, sponsor of the bill, provided a handout (Attachment A) and noted that this bill relates to lawsuits that require expert testimony. This law was passed in 1999 to stop lawsuits that did not have merit but were costing licensed professionals a great deal of money and time before the case was ultimately dismissed. This bill is asking that the healthcare professionals be included in the current statute.

In response to Senator Brotherton, Senator Leff replied that the old statute was struck down in 1997 and in 1999 a new statute was created.

Senator Weiers announced the individuals who registered their position on the bill (Attachment B). Also in attendance in support of the bill was **Mike Low, Attorney, MICA**.

Janice Burnett, Executive Director, American Council of Engineering Companies of Arizona, testified that the opinion filed December 26, 2002 ruled that this particular statute is constitutional. It has helped many industries in preventing lawsuits being filed that have no merit. Doctors were excluded in the first bill because it was believed that they were covered under another part of the law. Since that time, the panel has been disbanded and that is why doctors are being included in this bill.

Barry Halpern, Legal Counsel, Arizona Medical Association (AMA), noted that AMA supports the bill that brings healthcare providers into the statute. Early assessment and evaluation of claims against professionals is essential, important, and cost effective. Litigation is the search for the truth and there is no downside to express the position of a claimant early in the case. In the past few years, things have changed: 1) there no longer are administrative panels that previously screened these claims; and 2) there is a crisis in the cost of medical malpractice insurance.

Senator Brotherton inquired as to what has changed since 1999. Mr. Halpern replied that no cases have changed except the ones that have upheld the constitutionality of the statute as it relates to other professionals. The cost of defending these cases and the indemnity costs associated with

medical malpractice cases have soared. Frivolous cases are also cluttering the docket. There is much to gain with early resolution of specific claims.

In response to Senator Brotherton, Mr. Halpern indicated that Rule 11 is a popular topic among attorneys. However, Rule 11 is difficult to argue and seldom is the judiciary inclined to award sanctions where there is any colorable claim. Not all frivolous claims find their way to the appellate court. This bill would obviate the need to file a motion, because there would be early disclosure of the specific basis for the claim and that there is a competent expert available to support it. There are many frivolous cases filed and it takes thousands of dollars to dispose of them.

In response to Senator Brotherton, Mr. Halpern noted that he has approximately 30 to 50 medical malpractice cases at one time. He explained that they generally do not learn who the expert is until many months into the litigation. Less than 10% of the cases do not have an expert witness.

Senator Binder stated that although early disclosure is what is needed to stop the frivolous suit, if an expert witness testified early it would save time and money. Mr. Halpern explained that early evaluation also allows for legitimate cases to be settled earlier which is beneficial to the court system, injured parties, and society.

Senator Brotherton asked about how many cases end up being settled. Mr. Halpern replied that many cases that go forward with an expert have two possibilities – summary judgment and summary dismissal. Historically, less than 10% of the malpractice cases filed are tried. The overwhelming number of cases are resolved.

Jim Dearing, Family Physician, testified that he supports this bill. Most primary physicians are in a small group or solo practice. When a suit is filed, multiple doctors are brought into the cases. Multiple lengths of time away from their practice occurs in order to defend the suit. In most cases these lawsuits are dismissed. He related a story regarding a lawsuit filed where many doctors were sued for malpractice and after many months of testimony, no expert witness was able to testify that any wrongdoing had occurred. The case was ultimately dismissed. This bill would prevent these types of cases from occurring. If an expert witness is needed to testify to the credibility of the case, the credibility of the case could move forward and anything that was not credible could be eliminated.

Ladonna Courtney, Executive Vice President, Arizona Academy of Family Physicians, testified that she supports the bill and introduced **Jack LaSota, Counsel, Arizona Academy of Family Physicians**. He suggested that in 1999 there was a misunderstanding that the medical malpractice panel was still functioning; however, it had been declared unconstitutional a short time before.

Senator Verschoor moved SB 1047 be returned with a DO PASS recommendation.

Senator Verschoor moved the Weiers 25-line, strike-everything amendment dated 02/10/03, 11:38 a.m. be ADOPTED. The motion CARRIED by voice vote. (Attachment C)

Senator Verschoor moved SB 1047 be returned with an AS AMENDED, DO PASS recommendation. The motion CARRIED with a roll call vote of 6-2-1. (Attachment 1)

Senator Weiers announced he would be holding the following bills:

SB 1098 – domestic violence; privileged communications; training – HELD

SB 1099 – punitive damages; abolish – HELD

SB 1100 – limitations; privilege; expert witnesses – HELD

SB 1101 – medical malpractice actions; elder abuse – HELD

SB 1102 – revised uniform arbitration act – HELD

SB 1205 – drug and gang policy council – HELD

SB 1291 – sentence reductions; nonviolent drug offenders – HELD

SB 1304 – juveniles; open court proceedings – HELD

SB 1333 – education and recreation property; liability – HELD

SB 1338 – law enforcement officers; representation – HELD

SB 1143 – dog bites; liability exception – DO PASS AMENDED

Michelle Morales, Judiciary Committee Research Intern, explained that SB 1143 provides that an owner of a dog that bites a person is not liable when the person is bitten in an area of the owner's property that is enclosed and reasonable notice has been posted indicating the presence of a dog. She also explained the Verschoor three-line amendment dated 2/4/03 at 2:40 p.m.

Senator Brotherton brought up that current law indicates that if a person is on the property without permission, there is no liability for the owner. Ms. Morales replied that the only time a person is liable is when an invitee, guest, or person performing a duty imposed upon him by law is bitten by the owner's dog. Senator Binder countered that it does not matter. If a burglar walks onto the owner's property and the owner's dog bites them, the owner can be sued. This bill would change that law.

Senator Brotherton noted that his understanding of the law is that burglars cannot sue for being bitten by a dog. Mr. Lujan explained that if someone is not lawfully on the property, there would not be any liability.

Senator Weiers announced the individuals who registered their position on the bill (Attachment B).

Duane Adams, Director of Operations, Arizona Humane Society, pointed out that dog bite liability has rarely been a primary issue of the Humane Society. However, they do support this bill. He noted that people surrender their animals because insurance companies have mandated that they could no longer keep a specific breed of dog because of its propensity to bite. He indicated that they are not supportive of breed-specific laws, but believes there are dogs that are a danger to the public.

In response to Senator Brotherton, Mr. Adams replied that the Humane Society is not the keeper of records of dog bites or vicious attacks. He suggested that there were dog attacks 20 years ago but they were not heavily publicized.

Senator Brotherton asked if the Humane Society is concerned about law enforcement shooting a dog. Mr. Adams replied that the Humane Society has always been a supporter of a person's right to protect themselves. The Humane Society offers police more assistance in keeping that type of situation from happening.

Kevin Fine, Attorney, Arizona Trial Lawyers Association, suggested that this bill is about what to do when a dog does bite a person. He related a story regarding an individual who lost a leg after being attacked by a client's dog. Unfortunately, the law cannot undo the damage; however, it can make decisions as to who will ultimately bear the responsibility of the damage. Prior to any statutes, as a society, it had been decided that the dog's owner should bear the responsibility not the victim of the attack. Current law indicates that regardless of whether the dog's owner was aware of the dog's propensity to bite, the responsibility is on the dog owner. This bill would undo that law. He pointed out that the bill makes it impossible to be lawfully on the property of someone with a fence and a sign posted that reads "beware of dog." The amendment does fix that awkwardness; however, in the vast majority of cases, the amendment would shift the responsibility of the attack back to the victim. He said that he opposes that as a policy change. He stated that he believes the affect of the attack should be borne by the owner of the dog.

Senator Weiers commented that he was hoping the amendment would address many of the concerns the attorneys had with the bill. Some people have dogs for protection and would expect the dog to respond to an unwanted person on the property. Mr. Fine explained that with the amendment, the people most exposed to harm would be those lawfully on the premises without owner's knowledge, such as, utility workers and police officers. He suggested that is not a wise policy change.

Senator Binder mentioned that she has been told differently by her attorneys and insurance companies and feels this is a good bill.

Senator Brotherton suggested that anyone can bring a lawsuit that has no merit and most are disposed of through the court system. He related several scenarios of a dog attack occurring on his property where he would not be liable under this bill. He pointed out that current law states that if a person does not have a lawful right to be on the property and files a suit, they would ultimately lose the case.

Senator Verschoor moved SB 1143 be returned with a DO PASS recommendation.

Senator Verschoor moved his three-line amendment dated 2/4/03, 2:40 p.m. be ADOPTED. The motion CARRIED by voice vote. (Attachment D)

Senator Verschoor moved SB 1143 be returned with an AS AMENDED, DO PASS recommendation. The motion CARRIED with a roll call vote of 7-2-0. (Attachment 2)

SB 1223 – utility franchise; expenditures – DO PASS

Ms. Collins explained SB 1223 exempts, from campaign contribution and expense laws, a public utility that spends only its own money in support of its proposed franchise.

Senator Tibshraeny, sponsor of the bill, noted that this bill is trying to put into statute what is the practice in the industry now. Cities and towns have franchise agreements with companies, such as, Arizona Public Service (APS) and Southwest Gas, etc. The city or town councils must go through a process of approving and voting on the agreements. That group is responsible for paying for that franchise election. This bill exempts them from filing reports when they are spending their own money, which is what they are currently doing.

**Senator Verschoor moved SB 1223 be returned with a DO PASS recommendation.
The motion CARRIED with a roll call vote of 8-0-1. (Attachment 3)**

SB 1203 – DPS; parity compensation fund – DO PASS AMENDED

Ms. Morales explained that SB 1203 creates the parity compensation fund, to be used for annual salary adjustments for law enforcement personnel. She also explained the Weiers four-line amendment dated 2/11/03 at 10:33 a.m.

In response to Senator Binder's question, Ms. Morales replied that the fund is just being established and it has not been determined where the funds will come from.

Senator Weiers announced the individuals who registered their position on the bill (Attachment B).

Jack Lane, Lieutenant, Arizona Department of Public Safety (DPS), provided a handout (Attachment E), noting that during the last decade DPS has used a classification compensation maintenance review system attempting to bring employee salaries up to market, using whatever funds were available. During the past nine years, only two salary adjustments have been accomplished for each of the classifications. Currently, DPS law enforcement salaries are between 10% to 17% below market. Although DPS sets standards as a leader, not only within state law enforcement but also the nation, salaries for their personnel consistently remains below market.

In response to Senator Weiers, Lt. Lane explained that the DPS salaries through the Lieutenant level are between 16% to 17% behind market; at the captain level, it is approximately 15% behind; and at the assistant director level, it is approximately 10% behind. Senator Weiers suggested that it is difficult to recruit for DPS positions for many reasons, one of which is the salary.

Senator Weiers noted that currently when DPS officers write tickets, DPS receives no compensation. This bill states that DPS will receive a percentage of the fines to use for compensation and equipment for their officers. Lt. Lane replied that DPS is not earmarking any funding or effective date on the bill because of the current budget constraints.

Senator Rios questioned if the fees would be part of the existing fine or would there be another surcharge. Senator Weiers replied that there would not be an additional surcharge. In response to Senator Rios, Lt. Lane noted that the State's top five law enforcement agencies in regards to salaries at the officer level were all valley police departments; Paradise Valley, Scottsdale, Avondale, Peoria,

and Chandler. He added that the top five law enforcement agencies changed within each job classification. At the officer level, DPS ranks 20th in the State for compensation.

Senator Brotherton moved SB 1203 be returned with a DO PASS recommendation.

Senator Verschoor moved the Weiers four-line amendment dated 2/11/03, 10:33 a.m. be ADOPTED. The motion CARRIED by voice vote. (Attachment F)

Senator Verschoor moved SB 1203 be returned with an AS AMENDED, DO PASS recommendation. The motion CARRIED with a roll call vote of 8-1-0. (Attachment 4)

SB 1226 – ASRS; legal counsel – DISCUSSION/HELD

Sharad Desai, Finance Committee Research Intern, explained SB 1226 allows the Arizona State Retirement System (ASRS) to employ legal counsel independent of the Attorney General (AG).

In response to Senator Brotherton's question, Mr. Desai noted that the AG has represented the ASRS since its inception in 1953.

In response to Senator Jarrett, Mr. Desai replied that according to ASRS, they require legal counsel experienced in their specific tasks and independent of political cycles. ASRS is already paying the AG for legal counsel.

Richard Stephenson, ASRS, introduced **Alan Maguire, Chairman of the Board, ASRS**. Mr. Maguire provided some background information on his positions with ASRS and explained that he believes that they currently receive excellent representation from the AG. The character and nature of what ASRS does has changed over the years. When ASRS was created, it was a simple process. However, the federal government has intervened many times in the past several decades to create complex new laws governing retirement both in the private activity under ARISA and in the public sector through the income tax code. Their current legal counsel has been engaged in learning that complex law. However, in addition to the in-house counsel, ASRS retains private outside counsel to help with income tax matters. He suggested that if the in-house counsel decides to retire anytime soon, ASRS will lose invaluable knowledge.

In response to Senator Brotherton, Mr. Maguire replied that he would anticipate that ASRS would use the exemption to bring internal counsel to be retained on the ASRS staff and paid within the system. He explained that ASRS has 18 external equity managers, some of them manage index funds which would have held Enron stock. He noted that the AG had requested that ASRS take a lead plaintiff position in the Enron class action lawsuit. After the board, counsel, and staff discussed the issue, there are several larger retirement systems that have routinely served as lead counsel. ASRS does not have the staff to accommodate serving as lead counsel and the board decided it would not be appropriate to serve as lead counsel.

Senator Brotherton suggested that since ASRS is currently receiving excellent representation from the AG, he is not sure why there needs to be a change and is not supportive of the bill.

George Diaz, AG, testified that they are opposed to the bill. If the bill were to pass into law, it would preclude the existing counsel to remain on staff. The AG has offered to provide a second attorney to continue the excellent service ASRS receives. There is a cost savings when the attorney comes from

the AG office, because the administrative costs are at the AG office. He emphasized that the AG is the lowest paid law firm in Arizona.

Senator Martin, sponsor of the bill, commented that the retirement system is not owned by the government, rather it is owned by the retirees. As a result, it is important to look at how the system will serve the retirees best. Their special needs are different than at any other government agency. He suggested that there is a surcharge added to what ASRS pays for the AG representation.

Senator Weiers announced that he would be holding SB 1226.

SB 1274 – elections; public resources – DO PASS AMENDED

Ms. Morales explained SB 1274 prohibits persons from using publicly owned resources to solicit campaign contributions, or from collecting such contributions in a publicly owned building. She also explained the Weiers four-line amendment dated 2/11/03 at 2:46 p.m.

Senator Martin, sponsor of the bill, pointed out that if a legislator should not use a phone paid for by taxpayers to solicit campaign funds. He suggested that it is unethical to ask for contributions while on government property or using government resources.

Barry Aarons, Consultant, Americans for Tax Reform, pointed out that the purpose of this bill is the federal government states that it is inappropriate and illegal to solicit, receive, or make a contribution on federal property. There should be no impression that taxpayer dollars are being used for political purposes. He noted that propositions are not covered by this bill and he would be happy to work on the bill to clarify that issue.

Senator Brotherton suggested that he sees various problems with the bill and feels that the issues should be dealt with over the interim. Senator Weiers indicated that he does not feel there is much that can be done about the philosophy of the bill.

In response to Senator Rios, Mr. Aarons replied that the members of Congress are closely monitored because they want to avoid the appearance of misusing taxpayer funds. That same level should be applied for State elections as well.

Eleanor Eisenberg, Executive Director, Arizona Civil Liberties Union (ACLU), stressed that this bill is too broad and interferes with rights of association and free speech.

Helen Purcell, Maricopa County Recorder, testified that she supports the bill with the amendment.

Senator Weiers announced the individuals who registered their position on the bill (Attachment B).

Senator Verschoor moved SB 1274 be returned with a DO PASS recommendation.

Senator Verschoor moved the Weiers four-line amendment dated 2/11/03, 2:46 p.m. be ADOPTED. The motion CARRIED by voice vote. (Attachment G)

Senator Verschoor moved SB 1274 be returned with an AS AMENDED, DO PASS recommendation. The motion CARRIED with a roll call vote of 5-4-0. (Attachment 5)

SB 1328 – state purchases; liability limitations – DO PASS AMENDED

David Lujan, Judiciary Committee Research Analyst, explained that SB 1328 permits vendors who contract with the State to limit their liability to the amount of the contract price of the goods, software or services provided, and to disclaim any incidental or consequential damages. He also explained two amendments: 1) Verschoor three-line amendment dated 2/11/03 at 8:48 a.m. and 2) Brotherton two-line amendment dated 02/11/03 at 2:02 p.m.

Senator Weiers announced the individuals who registered their position on the bill (Attachment B).

Robert Shuler, Senior Vice President of Public Affairs, Arizona Chamber of Commerce, pointed out that when they wrote the bill, it was intended to be permissive language. He suggested that the Brotherton amendment does address that issue.

Senator Verschoor moved SB 1328 be returned with a DO PASS recommendation.

Senator Verschoor moved his three-line amendment dated 2/11/03, 8:48 a.m. be ADOPTED. The motion CARRIED by voice vote. (Attachment H)

Senator Verschoor moved the Brotherton two-line amendment dated 02/11/03 2:02 p.m. be ADOPTED. The motion CARRIED by voice vote. (Attachment I)

Senator Verschoor moved SB 1328 be returned with an AS AMENDED, DO PASS recommendation. The motion CARRIED with a roll call vote of 9-0-0. (Attachment 6)

There being no further business, the meeting was adjourned at 10:53 a.m.

Respectfully submitted,

Carol Dager
Committee Secretary

(Tapes and attachments on file in the Secretary of the Senate's Office/Resource Center, Room 115.)