MICROFILM DIVIDER

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ROLL NUMBER

DESCRIPTION

1333

2007 HOUSE JUDICIARY

HB 1333

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1333

House Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 1/23/07

Recorder Job Number: 1657

Committee Clerk Signature D Renose

Minutes:

Chairman DeKrey: We will open the hearing on HB 1333.

Rep. Klemin: This is the "I'm sorry" bill. I am a sponsor of this bill. Bruce Levi, ND Medical Association is going to explain the bill. It deals with admissions against interest and how that can affect communications. I am handing out a sheet regarding the ND Rules of Evidence, which relates to hearsay and what isn't hearsay.

Chairman DeKrey: Thank you. Further testimony in support.

Bruce Levi, Exec. Dir./General Counsel, ND Medical Association: (see attached testimony).

Rep. Kretschmar: As the statute is written, wouldn't this prevent unsympathetic gestures from becoming part of the record.

Bruce Levi: What is the definition of sympathetic vs. unsympathetic statement that would become the test as to admissibility. They are statements that suggest sympathy, benevolence, fault, any statement in that manner. This wouldn't address unsympathetic.

Rep. Kretschmar: As an example, what if a doctor told the patient, I'm very sorry this happened, this was all my fault. Would that be admissible.

Bruce Levi: Under the bill, with the amendment, it could not come in. That's probably the classic example, "I'm sorry, it's my fault". Do you split hairs and allow one part of that to come in and not the other part. Under the bill with the fault language, it would allow all of that statement to be inadmissible.

Rep. Kretschmar: I understand that there is a committee at Supreme Court that looks at rules and procedures, and I think also rules of evidence. Have you contacted them or requested their help in changing the rules to do the same thing that this bill would do.

Bruce Levi: No, we have not. I cited Rule 402 of the Rules of Evidence, there is a line of cases talking about the issue and the relationship between the legislature and the Supreme Court with respect to rules of evidence, particularly in admissibility and inadmissibility. I think the cite in my written testimony, Rule 402, is to clarify that piece. But there is a line of cases, and I can bring some of those to your attention.

Rep. Klemin: If a doctor said I'm sorry this happened, it was the fault of my anesthesiologist, would that be admissible.

Bruce Levi: As this is written, I would suggest that it would be inadmissible. The rule applies, as you look at the definition of a health care provider, includes not only the health professionals but the facilities as well, their agents and I would suspect that it would apply there as well.

Rep. Klemin: In a medical malpractice case, aren't these kinds of admissions, really aren't they sort of extraneous. They wouldn't hinge of this, they would have medical evidence that shows malpractice.

Bruce Levi: That would be my view as well. Certainly these are statements that can be used to support other evidence that might be admitted with respect to the actual clinical or medical care that was provided. Under our law as well, in terms of medical liability, experts have to be

brought forward to offer evidence with respect to whether or not what occurred was within reason with respect to medical practice.

Rep. Koppelman: I'm sympathetic to this bill. But I'm wondering about the word "fault". This has been introduced in 30 states, but only 2 have the fault provision, is that correct.

Bruce Levi: I'm aware of 3 or 4 that have specifically put that in. Some use the word "fault", other states include the word "error or mistake" as well. I haven't tallied up the number of states that have actually put any combination of those three words in their law. There are a number of states that include that language.

Rep. Koppelman: I think the idea that most reasonable people would support is if the patient dies, and the doctor feels that he/she cannot come to the family of the patient and say "I'm sorry" for fear that they will be sued, that they can't express sympathy, I think most people would say that's gone too far. I think these bills have gained a lot of popularity throughout the country because of that. Most people would say that it is appropriate for the doctor to say he's sorry that the person died. But if the doctor said, I really messed up I should have done this and I did that and they are dead as a result, I'm not a litigious person and don't favor taking people to court, but that should be admissible.

Bruce Levi: I think the fault language is very important. If the motivation here is to create a legal environment, practice environment that encourages open and frank communication, if we have to split hairs or if a physician or health professional still has to go back to their attorneys or risk managers and talk about what can be said, I think you have lost the opportunity to have that conversation at the time when it is most beneficial to the relationship between that health professional and their patient. I think from that context, you have seen other states that have realized that as well. It is difficult to split hairs on this issue. If you divide them out, really

haven't gained much in terms of changing that practice. I think it is critical to include that language.

Rep. Onstad: Are we looking to protect the medical profession, the medical providers by not allowing those kinds of statements.

Bruce Levi: I think there is a lot of literature out there that talks about these kinds of bills and what they might do to the ultimate outcome in a lawsuit or civil action; whether it's brought in the first place, whether it's settled or whether folks are actively seeking more or less than they would have sought if there was an apology. I think the primary motivation, obviously it is a rule of admissibility or non-admissibility of evidence; but at the same time, I think going back to Rep. Klemin's comment, that there would still be a requirement of other testimony and proof that this was something that rises to medical liability. I think the answer to your question is yes, it does take evidence out from the deliberation of the jury with respect to these kinds of statements. Under the amendment, only for the purpose of an admission against interest or as proof of liability. From our perspective, it creates a different kind of practice environment, and that is our primary motivation in bringing this bill to you.

Rep. Onstad: In a statement between a medical provider and family, are you saying you are in judgment by making a statement to the contrary to the facts and therefore that's inadmissible, but if you did go to a hearing, it would still be inadmissible later on under oath.

Bruce Levi: It would be inadmissible for the purpose of proving that the individual was liable. It might be introduced for other purposes; to show the state of mind of both parties, or the state of mind of the physician at that time. But the jury couldn't use it to prove liability and I suspect they would be instructed in that manner by the judge in that case. It would exclude that evidence for purposes of proving fault.

Rep. Griffin: Do you not think that this might have a tendency to increase litigation if doctors felt more open to be able to say it was their fault. I would assume that patients, once they heard that, would be more likelier to sue.

Bruce Levi: I read literature on both sides of that issue. That's an open question as to whether or not it might increase lawsuits. There is literature on the other side that suggests that in the relationship between the health professionals and patients, all they want are answers to their questions. They want to understand what happened. Some who don't get their answers, then they'll bring a lawsuit to get the answers. I think that's what we are trying to avoid and this just creates a better practice environment for the relationship I can't say one way or the other whether it will increase litigation or not.

Rep. Griffin: Aren't doctors free right now to give answers as to what happened regarding that procedure.

Bruce Levi: Yes.

Rep. Griffin: Then it would be up to the court's determination.

Rep. Klemin: This bill recognizes that doctors are people, they have feelings and psychological needs to grieve and communicate with other grieving people and if there's an issue of medical malpractice, that's going to be shown by evidence.

Bruce Levi: Yes, I agree. I think that's all part of it. We work with physicians and their families when they go through medical liability suits as well. Obviously it takes its toll on anyone.

Chairman DeKrey: Thank you. Further testimony in support.

Tracy Vignaas Coleman: I'm a defense attorney in Bismarck, who does represent doctors and hospitals and nurses who have been sue for medical negligence. I am here today in that capacity and I support HB 1333. The bill is a form of the apology or "I'm sorry" laws that have

passed, or being considered in other states. It would create an evidentiary privilege for certain statements made by health care providers to patients, patient's family members or their representatives, usually in the immediate aftermath of a bad result. Professional malpractice lawsuits are often motivated by powerful emotions and perceptions, such as anger at a physician who is silent after a bad result, who appeared dismissive after a bad results or who did not say "I'm sorry this happened". It is often the absence of an apology that triggers a lawsuit, but it is the fear of a lawsuit that prompts the physician's silence. HB 1333 would allow health care providers to apologize to patients, with some assurance that the statements they say will not be used against them improperly or misconstrued if that patient decides later to bring a medical malpractice lawsuit. I'm sorry laws like HB 1333 are based on the concept that the fear of litigation should not interfere with the physician-patient relationship. It's the concept that should be supported as a matter of public policy because it would promote open and continuing communication between a physician and his/her patient. It is also part of the care and treatment that a physician provides to a patient or patient's family in the immediate aftermath of a bad result. Part of the healing and grieving process is the communication that's going on between the physician and that family. Words like I'm sorry this happened, are a natural and appropriate remark to be made by physicians. Unfortunately if a medical malpractice lawsuit is later brought, those very words later become subject of an evidentiary hearing in which those words try to be used improperly against the physician as evidence of liability or as an admission against interest; or words such as I wish I would have done this or that, and that might have prevented this outcome. Again, it can be used against the physician improperly and unfairly as an admission against interest when in that immediate aftermath, the physician was commiserating with that patient's family and appropriately expressing thoughts about hindsight. It's often a hindsight analysis when someone looks back in retrospect and

wonder if there was something I could have differently, that would have affected this outcome differently. But those words get used against the physician in medical cases as an admission against interest and is an improper use evidence. Because hindsight, for example, is not the standard to be judging a physician's conduct or anyone's conduct for that matter. I would also like to address the issue about the word "fault". When physician's make the statement that suggests that they might have been at fault for a particular outcome, again in retrospect, where the doctor now has the benefit of everything that's happened, and to rethink what has occurred, and wonder if there was something they could have differently. But having said that, it is often the case when a physician does not know what happened. It may not be know what happened until later, if ever. Unfortunately, those types of words again get used improperly and unfairly against the physician. There is a walk-away syndrome sometimes, where physicians just walk away rather than address the question or concern of the patient, they simply remain silent and walk away for fear of litigation. As to the admissibility of these types of statements, Bruce Levi was answering the question, as I understand the bill, with the amendment, the evidence would be not admissible for improper purposes. In other words, they would not be allowed to be used as evidence of liability or as evidence of admission against interest. There may be other purposes for which they could be offered, and I'm certain that there would be plenty of attorneys who could find creative purposes to offer them. But the point is, they will not be used improperly.

Rep. Meyer: You stated in your statement just now, that just certain statements wouldn't be admissible, but the bill the way it is written, it would mean that absolutely everything is excluded. If there is a way to understand "I'm sorry", but if he were in the operating room and makes the statement, I cut off the wrong leg, I should have looked at the x-rays for example, that wouldn't be admissible either, even if it were uncovered in an investigation.

Tracy Vignaas Coleman: As a trial attorney, we represent doctors in lawsuits. I'm sure that there are going to be evidentiary arguments made about the meaning of those remarks. I agree that the way you are reading it, it could arguably cover something like that. However, the statement must be made to a patient, patient's family or patient's representative. So I don't know that it would necessarily cover a statement made to someone else, or that it was intended to actually cover that kind of situation. This is to address the communication and dialog between a physician and a patient, family or representative.

Rep. Meyer: Would this exempt statements made between a doctor and operating room staff, for example. Is what he states and says in the operating room included or is it only what is said between the doctor and the patient. Are those records going to be admissible.

Tracy Vignaas Coleman: Those types of statements are often admitted into evidence because it is part of the care and treatment that occurred. The plain language of the statute says that it only applies to statement made by a health care provider to the patient, their family or representative.

Rep. Onstad: On the family side, death is an unexpected consequence too. If the information you're asking about, isn't going to be admissible, is that not taking a level playing field and weighing it on one side, of the physician.

Tracy Vignaas Coleman: You mean taking away potential evidence by a plaintiff. In a way, but what it is doing is precluding them from offering it for an improper purpose. So is there another purpose for which they could try and offer it, again with the way the bill is amended, it would. I don't know what the purpose would be, but it could exist. It does not, as a matter of law, preclude this type of evidence at all. It simply says it's not admissible for the purpose of showing evidence of liability or as an admission against interest.

Rep. Onstad: But the fact that it's not admissible, all of a sudden that shifts the even playing field.

Tracy Vignaas Coleman: I don't think that that necessarily precludes it. There are lots of evidentiary privileges in the law that define certain types of statements or conduct, etc. that say you can't use this as evidence of liability, but you may use it for the purpose of showing something else; bias of a witness, etc. You have to look at what was going on at the time of the incident.

Chairman DeKrey: Thank you. Further testimony in support.

Shelly Peterson, President, ND Long Term Care Association: (see attached testimony).

Rep. Griffin: Are you aware of any cases that hinged on, where a statement of empathy, sympathy, was used.

Shelly Peterson: We have very few lawsuits in long term care, and they generally don't come under professional liability or malpractice. They come under our general liability. I really can't say. I'm not aware of any, but that doesn't mean they haven't had a case.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition to HB 1333.

Jeff Weikum: I am a plaintiff's attorney in Bismarck. We routinely handle medical malpractice cases in ND, SD, MT, MN. The concern that we have with respect to this bill, is that it combines feelings of sympathy and expressions of sympathy, with expressions of fault. Those are two very different items and those are items that have different impacts on the medical malpractice side of litigation. 1) ND juries are very adept at being able to determine if someone is expressing sympathy or condolence because of their feelings, the human side of what they're saying. Just as adept as juries are at that, they are also adept at looking at fault. When a physician or other medical provider comes in and says I'm sorry for your loss, I'm

sorry for what happened, I'm sorry about the result. That is one thing. When a physician comes in and says I messed up, I'm at fault. I needed to do this, and I didn't do it. Those are statements that hold great weight with the jury and those are statements that hold great weight with the insurance companies that are representing their clients. The insurance companies take those statements to heart and those cases are at fault. That's why we have this bill. That's why fault is in this bill, because there is a combination of playing between the sympathies which are important. I, as a plaintiff's attorney, have much less problem with the bill from the standpoint of the sympathy, the doctor expressing sympathy, than I do with fault. There was some commentary back and forth regarding whether or not a physician's statement of fault was extraneous or not really incident to medical malpractice actions. They are absolutely relevant to medical malpractice actions. What typically happens in medical malpractice claims, I get a phone call, someone explains to me what happened. The result was not as anticipated. So you go through the process to figure out whether or not it was outside the accepted standards of medical practice; where they did something they weren't supposed to do. The vast majority of cases are within those accepted standards and so it ends right there. But what happens after that, is especially in a situation where a patient calls me or client calls me and says that the nurse told me this, or the doctor told me this, and they provide me with an admission of fault. We then go and look up in ND law to get what is called a medical expert to give an opinion as to where exactly fault occurred. The doctors do the same thing. The insurance companies for the doctors hire an expert to do that. It becomes a war of experts. Very often, ND juries see experts fighting. Rep. Klemin is correct in that. That is where the central battle is. ND juries want to hear from the patient or the patient's family and they want to hear from the doctor. When there is a statement from the doctor at the time when it happened, coming in and not expressing I'm sorry, but saying I messed up, that carries

huge weight and to take that away from an injured patient or an injured patient's family, absolutely tips the scales and we have significant uneven playing field. It goes back to a situation of what we're trying to hide. I can sympathize realistically with the human emotions that happens in the practice of law that happens in every profession that would be in here. That's good and that's fine. Juries see through that, insurance companies see through that and see it for what it is. But to hide statements of fault is just wrong. There are provisions in the rules of evidence that talk about what is called "excited utterances". It is when there is an accident and somebody goes through a stop sign and hits a car and that person hops out of the car and says I'm sorry, I was playing with the CD player and as a result of that I didn't see you, and I hit you. This kind of excited utterance is given credibility with juries based on the fact that it is extemporaneous. Rules of evidence already handle this area and handle it well. If the committee wants to look at the sympathy aspect of it and address that, I have less issue with that. Fault is a big concern. I was handed the proposed amendments that Mr. Levi talked about, and I think they address some of the issues and if the committee decides to explore that amendment, I think it is a good idea. I think that removing fault from this proposed bill is an absolute to maintain the position that the patient has right now and make sure that the bill is close to that. There isn't a level playing field now. Just trying to find a medical expert is difficult, especially in ND. We have to find an expert outside the state. This would tip the scales too far in that direction.

Rep. Kretschmar: In the states where you practice, are there any rules or statutes like this.

Jeff Weikum: SD has one, MN has a version of it.

Rep. Kretschmar: Is it more difficult in those states.

Jeff Weikum: I haven't had a claim in those states where that has come up. I can't tell you dynamically how that would work in those states.

Rep. Meyer: How many medical malpractice suits are there going on in ND in an average year.

Jeff Weikum: I don't have that information in front of me. It is remarkably few. The vast majority of medical malpractice cases, especially through our office, is a small amount. They are typically in a discovery type process, where you are going through and determining whether or not there is medical negligence. Most of the claims are in that phase, where you are trying to sort out that information.

Rep. Meyer: Are there any awards in ND that went to plaintiffs that were astronomical, has there ever been a medical malpractice suit where the plaintiff was awarded over a million dollars.

Jeff Weikum: My understanding is that there have been claims where ND people have been awarded more than a million dollars in medical malpractice claims. The vast majority of the claims, however, that are significant and where liability is resolved are settled in settlement negotiations. Typically you don't see very bad cases, because those get resolved. Everybody is just trying to work for a mutually agreeable solution.

Chairman DeKrey: Thank you. Further testimony in opposition to HB 1333. Neutral.

Bill Neumann, State Bar Association of ND: (see attached testimony). We neither support or oppose HB 1333.

Chairman DeKrey: Thank you. Further testimony. We will close the hearing.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1333

House Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 1/24/07

Recorder Job Number: 1779

Committee Clerk Signature

Minutes:

Chairman DeKrey: We will look at HB 1333.

Rep. Koppelman: I would think that if we removed the word "fault", line 7, page 1.

Rep. Wolf: Seconded.

Chairman DeKrey: It has been moved by Rep. Koppelman and seconded by Rep. Wolf to remove the word "fault" on page 1, line 7.

Rep. Klemin: I heard testimony as to why we should take this out, but this is a very commonly used word when somebody says, "it's all my fault". They may not mean it in that context. I think Bruce Levi said we're kind of splitting hairs when we say that fault has some legal context and not a common usage. It's a commonly used word. I think it should stay in there. I am going to vote against the motion to amend.

Rep. Koppelman: On that point, my point is that when the word is removed, the law would be silenced on that point. Since we're talking about attorneys today, I think a good attorney, if the doctor did come in and say "gee I'm sorry, it's all my fault", they could still make a case to say that couldn't be admissible based on the other language in this statute that it would remove. It would just be silent on that word. I think if there's a case where a physician comes out of surgery and says, "I'm really sorry about what happened, I should have cut to the left

instead of to the right and I killed him". Should that be excluded. I think that is where we are going with us. I think the amended bill is still gets at the intent without going that far.

Rep. Klemin: Going back to Lev's written testimony, said not including the word fault, would continue to discourage a health professional from expressing any statement, apology whether it included a reference to fault or not. That's their position.

Rep. Koppelman: I heard the testimony, but you know what, also in his testimony it talks about the 30 states that have adopted this and I think there are only 2 that included that word. Certainly, if this becomes an issue, we can come back to it. I am very supportive of the bill, of the idea. I don't like our litigious society. I think if we get to the point where the doctor has to clear it, by telling the family he's sorry that the patient died, and has to appear for a malpractice suit, I think that's a bad statement there, so I do think we need to pass the bill. Most other states have not gone with this word.

Rep. Meyer: I guess I just have to go back to Kenton's statement during the hearing. You aren't on a level playing field. I don't think because a doctor comes out and says "I'm sorry" that you're going to have any basis at all for a lawsuit. Maybe it will pass in other states, but I just don't see it happening here. There have been 24 medical malpractice lawsuits in the last two years; 22 of them have ruled in favor of the doctor.

Rep. Koppelman: Are you talking about the amendment, now or just the bill in general.

Rep. Meyer: Well, especially if you leave the word "fault" in there. Even amending that out, I'm not real keen on this piece of legislation; but with it in, it's just blanket immunity.

Rep. Griffin: I just want to make a point on fault. If a doctor admits fault, rules of evidence and in all circumstances in life where you admit you were at fault, the reason the court lets it in, is because they believe it a trustworthy enough form of evidence. For a doctor not to be able to understand the difference between I'm sorry or be at fault. I don't think you can find a case

where the case hinges on a doctor saying "I'm sorry". I don't think we need the bill is at all necessary.

Rep. Delmore: Question.

Chairman DeKrey: The question has been called on the proposed amendment and removing the word "fault". Voice vote, motion carried.

Rep. Kretschmar: I would move the Medical Association's amendments; pg 1, line 8, replace "into evidence or subject to" with "as evidence of liability or as an admission against interest", pg 1, line 9, remove "discovery".

Rep. Delmore: Seconded.

Rep. Klemin: The first one, says not subject to discovery, which means that you couldn't even ask about it during the course of litigation. So they're taking that out, which means it is subject to discovery. Then the other one, at the end of line 9.

Rep. Delmore: That is what the Medical Association people wanted it done, because at the end you added, as evidence of liability or as an admission against interest. That's the one that he asked to do.

Rep. Klemin: That means that those would be the circumstances under which it might not be admissible but there might be other circumstances under which it could be admissible, to show something else. This is a restriction on this paragraph, it's only not admissible as evidence of liability or as an admission against interest. It may then leave the door open for the admissibility of some other evidence. The way it is written right now, it's not admissible at all, so I think they are loosening it by adding that language.

Rep. Delmore: Why then would he ask for that to be put on there, if you think it's opening the door, why would he ask for that to be put on there.

Rep. Klemin: So it's less restrictive, I assume.

Rep. Koppelman: How would this kind of thing be admitted.

Rep. Klemin: The doctor was there and said it.

Chairman DeKrey: We will take a voice vote. Motion carried. We now have the bill before as amended.

Rep. Delmore: I move a Do Pass as amended.

Rep. Koppelman: Seconded.

Rep. Onstad: I am going to vote against the bill because I don't think it is needed. I don't think their testimony was compelling enough for me.

10YES 4 NO 0 ABSENT DO PASS AS AMENDED CARRIER: Rep. Koppelman

Adopted by the Judiciary Committee
January 24, 2007

House Amendments to HB 1333 (78266.0101) - Judiciary Committee 01/25/2007

Page 1, line 7, remove "fault,"

Page 1, line 8, replace "into evidence or subject to" with "as evidence of liability or as an admission against interest"

Page 1, line 9, remove "discovery"

Renumber accordingly

Date: 1-24-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1333

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Rep. Delmore Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin		✓
Rep. Boehning	✓		Rep. Meyer		✓
Rep. Charging		✓	Rep. Onstad		✓
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 10 No 4

Absent 0

Floor Assignment Rep. Koppelman

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1333: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1333 was placed on the Sixth order on the calendar.

Page 1, line 7, remove "fault,"

Page 1, line 8, replace "into evidence or subject to" with "as evidence of liability or as an admission against interest"

Page 1, line 9, remove "discovery"

Renumber accordingly

2007 SENATE JUDICIARY

HB 1333

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1333**

Senate **Judiciary Committee**

☐ Check here for Conference Committee

Hearing Date: February 12, 2007

Recorder Job Number: 3361 & 3363

Committee Clerk Signature Mara L Solberg

Minutes: An Act to provide that expressions of empathy by health care providers are inadmissible in civil actions.

Relating to **Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

Recorder Job Number: 3361

Testimony in Favor of the Bill:

Rep. Larry Klemin, Dist. 47 Introduced the bill and calling it the "I'm sorry Bill". This is about admissions made prior or during the course of civil actions. He referred to rule of evidence 8-01 Definition of Statements. These are the things a party can say that can be admissible in court.

Sen. Nelson asked (meter 1:42) spoke of a scenario of a patients death and a Dr.'s condolences as being human and having feelings of compassion. They discussed the difference between an "I'm sorry" and an "I screwed-up", concerns of the degradation of apology verses admission of guilt (bill does not cover this).

David Peske – submitted and read testimony from Bruce Levi, Executive Director/General Counsel of the ND Medical Assoc. and a Bismarck Tribune newspaper article – Att. #1.

Tracy Bigness Kohl – Defense Attorney in Bismarck who represents medical personal reviewed the bill (meter 9:11) stating that this bill has been in acted in other states. The statements "I wish I would have", self analysts can not be used against them. The bill creates an evidentiary privilege for certain types of statements to the patient/family not an advantage. In the immediate after math the patient/family is full of emotion and the Dr. may not have all of the information in front of them when making a first statement. This would promote open and continuing communication with the doctor and patient, they are natural and appropriate statements. I wish I would have, is a statement of empathy made in self analysis and can be used against the doctor. This would allow a physician to not have to go before court to defend there words of condolences. Spoke of what would be used or not used.

Sen. Fiebiger asked if this would be a potential nightmare for the courts to try to figure out what was admissible or not? (meter 14:35) Yes, initially there will be some issues but common sense should prevail.

Clyde Leimberer, pastor at the Baptist Home. (meter 17:14) spoke of a 1965 incident that went all the way to the Supreme Court. The staff should be caring, not afraid of it being mistaken for an admission of guilt.

Shelly Peterson , President of the ND Long Term Care Assoc. (meter 19:01) gave her testimony – Att. #2

Testimony Against the bill:

None

Testimony Neutral to the bill:

None

Senator David Nething, Chairman closed the hearing.

Recorder Job Number: 3363

Sen. Lyson made the motion to Do Pass and **Sen. Nelson** seconded the motion. All members were in favor and the motion passes.

Carrier: **Sen. Nething**

Senator David Nething, Chairman closed the hearing.

Date: 2-12-07

Roll Call Vote # 1

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1333

Senate **Judiciary** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Sen. Lyson Seconded By Sen. Nelson

Senators	Yes	No	Senators	Yes	No
Sen. Nething	✓		Sen. Fiebiger	✓	
Sen. Lyson	✓		Sen. Marcellais	✓	
Sen. Olafson	✓		Sen. Nelson	✓	

Total Yes 6 No 0

Absent 0

Floor Assignment Sen. Nething

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1333, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1333 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

HB 1333

Testimony on HB 1333
House Judiciary Committee
January 23, 2007

Chairman DeKrey and members of the Judiciary Committee, I'm Bruce Levi, Executive Director/General Counsel of the North Dakota Medical Association. The Medical Association is the professional membership organization for North Dakota's physicians, residents and medical students.

In recent years, many states have begun to address concerns that physicians and other health care providers have become cautious about offering expressions of empathy or sympathy to their patients who have experienced adverse outcomes from their medical care. These outcomes may be the result of known or anticipated complications or risks, errors, or other circumstances.

On one hand, health care providers have become reluctant to explain to patients and their families what happened when medical procedures go wrong because they fear the information will be used against them in court. Many healthcare providers have struggled with their desire to explain and apologize to their patient, but have often been strongly advised against such open discussions by their risk managers or attorneys.

On the other hand, recent studies have suggested that failing to apologize may prompt more liability claims – that an important factor in people's decisions to file lawsuits is not negligence but ineffective communication between patients and health care providers. Patients bring lawsuits when they can't get answers.

Physicians are ethically bound to inform patients of all facts necessary to assist the patient in understanding what has occurred with their medical care [E-8.12, *AMA Code of Medical Ethics*]. However, physicians understandably have a difficult time determining appropriate communication techniques in this current legal environment to convey concern for the patient without inadvertently implying their own fault. It is not unusual for a physician's compassionate and empathetic actions to be misunderstood and later described to a jury as an admission of liability.

The North Dakota Medical Association views HB 1333 as important legislation to help create a practice environment that encourages physicians and other health care providers to apologize to patients with respect to an outcome of their medical care,

without the apology and related statements being taken as evidence of liability or an admission against interest.

Rule 402 of the North Dakota Rules of Evidence provides in part: "All relevant evidence is admissible, except as otherwise provided ... by statutes of North Dakota." HB 1333 would exclude from admissibility as evidence in any civil action, arbitration proceeding, or administrative hearing "*a statement, affirmation, gesture, or conduct of a health care provider or health care provider's employee or agent, that expresses apology, sympathy, commiseration, condolence, compassion, fault, or benevolence to a patient or to a patient's relative or representative.*"

The bill includes a definition of a "health care provider" which would include health professionals; a hospital, ambulatory surgery center or clinic; and a licensed nursing, basic, or assisted living facility. The bill also defines the terms "relative" and "representative." The bill would apply only to actions or other proceedings commenced on or after the effective date of the legislation.

While adverse outcomes in health care usually do not mean that negligence or liability has occurred, HB 1333 would allow physicians and patients and their family to communicate frankly during times when the threat of litigation might otherwise prevent it. Often an apology leads to better disclosure about what happened, the causes associated with the adverse outcome, plans for ongoing investigation, and changes to policy or other steps that might prevent what happened from happening again. It allows a patient to seek answers about what happened instead of having to file a lawsuit to get those answers.

At least thirty states have enacted laws excluding expressions of sympathy as proof of liability. Those states with apology statutes include Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virginia, Vermont, Washington, West Virginia, and Wyoming.

In reviewing these other states' laws, it has been suggested to the Association that the bill be amended to clarify or narrow the exclusion to render the apology statements inadmissible "as evidence of liability or as an admission against interest" on page 1, line 10 of the bill. At the same time, the inadmissibility of these apology statements should not apply to discovery on page 1, line 8 and 9 of

the bill. There is attached to my written testimony a proposed amendment to accomplish those changes.

Several states' apology laws also protect an expression of fault, mistake or error as an admission of liability. For example, Colorado and Georgia protect the entire disclosure conversation from being considered an admission of liability or an admission against interest even if the statement could be construed as a statement of fault, mistake or error. HB 1333 would also protect a statement expressing "fault" in this context on line 7 of the bill. The inclusion of this language creates the legal environment envisioned for open and frank communication, avoiding concern by the health care provider that he or she might inadvertently imply their own fault along with the apology. Not including the word "fault" would continue to discourage a health professional from expressing any statement of apology, whether it included a reference to fault, or not.

HB 1333 is part of an effort to embrace the concept of apology and disclosure as a means to avoid future adverse medical outcomes, and to promote open communication between patients and their families, and physicians and other health care providers.

Chairman DeKrey and committee members, thank you for this opportunity to provide background on HB 1333. On behalf of the North Dakota Medical Association, I urge you to move a "do pass" on the bill with our proposed amendments.

Proposed Amendments to HB 1333
North Dakota Medical Association
January 23, 2007

Page 1, line 8, remove "or subject to"

Page 1, line 9, remove "discovery"

Page 1, line 10, after "provider" insert "as evidence of liability or as an admission against interest"

Renumber accordingly

North Dakota Rules of Evidence

Rule 801. Definitions.

The following definitions apply under this Article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony but, if offered in a criminal proceeding, was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity, (ii) a statement of which the party has manifested an adoption or belief in its truth, (iii) a statement by a person authorized by the party to make a statement concerning the subject, (iv) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by these rules, by other rules adopted by the North Dakota supreme court, or by statute.

Apologies foster communication

By TIMBERLY ROSS
Associated Press Writer

OMAHA, Neb. — I'm sorry.

Some say those two little words can go a long way in fostering communication between physicians and their patients when something goes amiss. But health care providers in Nebraska, North Dakota, Iowa and 18 other states have had no assurance that such apologies would not be used against them in a medical-malpractice case.

Legislation introduced this year in Nebraska and North Dakota would make it easier for physicians to utter those magic words. The legislation would prevent a health care provider's apology or other expression of fault, sympathy, condolence or a "general sense of benevolence" from being used as an admission of liability in court.

"We're very supportive of these 'I'm sorry' laws," said Dr. Rebecca Patchin, an American Medical Association trustee. "We think that they help the patient-physician relationship and allow the physician to express emotion and open up a dialogue with a patient."

If state senators approve the bill, Nebraska will join a long list of states that have "I'm sorry" laws. In North Dakota, Rep. Lawrence Klemin, R-Bismarck, has introduced a similar bill this year.

According to the Sorry Works! Coalition, an apology-law advocate, 29 states have such laws in place. Delaware, Hawaii, South Carolina and Vermont passed their laws last year, and South Dakota and 11 other states enacted legislation in 2005.

"Physicians in those states feel freer to discuss the details and tell the patient and the family they are sorry about what happened," Patchin said.

"Feeling bad doesn't mean you ran a medical red light," said Vince Powers, a Lincoln lawyer who handles malpractice cases.

Rather, he said, "it means they're human."

In 2005, Nebraska ranked 17th in the nation for medical malpractice claims that resulted in cash settlements, with 194, according to an analysis by the Kaiser Family Foundation, a nonprofit that studies health care policy.

Top-ranked New York had 1,768. South Dakota had 31, while North Dakota had 26, the foundation's data says. Vermont had the fewest, with 15.

Sorry Works! spokesman Doug Wojcieszak said apology laws bring down the number of malpractice claims filed in states that have them.

"It's been shown that when doctors do apologize and do the right thing and take care of people rather than push them out the door, it is better for everybody," he said.

Sandy Reynolds, of Salyersville, Ky., agrees.

When her father, Claudie Holbrook, died in 1997 from complications from emphysema, the family was left with questions about the medication he was taking just before his death. An investigation showed that the hospital's pharmacy was giving Holbrook the wrong dosage of heparin.

While the news was somewhat vindicating for Reynolds — she had been her father's caregiver and administered his daily shots of heparin — it naturally led to some hostility toward the hospital.

"I was out for blood, to say the least," she said. "Somebody's head had to roll."

A few weeks later, Reynolds said, hospital officials owned up to their mistake, apologized to the family and enacted changes to prevent a similar medication error from happening again.

"That was the first point I could start healing, start grieving," she said, because she had suffered such guilt from injecting her father with a drug that eventually led to his death.

Testimony on HB 1333
House Judiciary Committee
January 23, 2007

Chairman DeKrey and members of the House Judiciary Committee, thank you for the opportunity to testify in support of HB 1333. My name is Shelly Peterson, I'm President of the North Dakota Long Term Care Association. We represent assisted living, basic care and nursing facilities.

In North Dakota we have many individuals spending their last months, days and sometimes years in a long term care facility. While families stay very connected and close, most visiting on a regular weekly and sometimes daily basis; North Dakota caregivers (those caring for the resident) become an extension of the traditional family. Staff employed by a long term care facility often choose that employment because of the opportunity to make a difference, establishing caring and nurturing relationships with residents.

Hospice care in nursing facilities has more than doubled in the last three years. One quarter of all residents discharged from a facility are rehabbed and sent back to their own homes. For each achievement of walking again, talking again after a stroke and working diligently toward independence, staff are leading the way and cheering residents on. When there are set backs, deaths (50% of all admissions resulted in death) or negative outcomes, staff grieve the loss. It is the norm for staff to attend funerals and support families through this difficult time. It is also a time of celebrating a life well lived and sharing with the family positive memories of their loved one.

During this time, no matter the circumstances, staff express sympathy, condolences, and show tremendous compassion. Some residents may have felt pain that was difficult to control at the end, and it's not uncommon in those circumstances to say "you're sorry" and "I wish we could have done more." We are human and sometimes horrible events occur. I've been involved in some of those issues and it is hard on everyone.

One where a 55 year old certified nursing assistant (CNA) was assisting a resident with her toileting needs. A CNA who was a model employee, loved and cared for by staff, residents and families. A CNA who was standing by the side of the resident, a

resident who needed human support whenever she moved or transferred. In one second where the resident asked her caregiver to leave her side and retrieve something from the dresser. In the next moment, the resident rose, with her caregiver not at her side. The resident fell and broke her hip. It was awful for the resident, she was in tremendous pain and rehab was difficult.

For the caregiver, she never did recover. This model CNA was fired for neglect, placed on the abuse registry, and shortly thereafter became disabled. The caregiver should not have left the side and she blamed no one other than herself for the needless pain and suffering a resident went through. At the time, she thought she was responding to the simple request of her resident, "would you please get that item," just a few steps, not more than a few seconds and forever lives were changed.

In that situation a lawsuit was not pursued. For the healing process to occur, there wasn't enough that could be said by the caregiver. During these times of when a negative outcome occurs or a death under any circumstances we want to freely express sympathy and support to families. It would be helpful to have a "comfort zone" to express and show genuine condolences as outlined in HB 1333.

When we have faltered or made an error and we are human an no matter how hard we try accidents and incidents will occur, we would like to be evaluated and judged by our specific actions related to the incident. Hold us accountable for our standards of care, treatment and actions, but please give us support to help families and caregivers say good bye to a person who was loved by many. Allow us to provide needed words of support and condolences of sorrow for the loss.

In today's environment of protecting the organization of a real or perceived fear of a lawsuit, cutting off communications and expresses of sympathy is not the way North Dakotans care for each other. Your support of HB 1333 is appreciated.

Shelly Peterson, President
North Dakota Long Term Care Association
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(701) 222-0660
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January 23, 2007

Sixtieth Legislative Assembly
House Judiciary Committee

HB 1333

CHAIRMAN DeKREY AND COMMITTEE MEMBERS:

My name is Bill Neumann, and I am appearing on behalf of the State Bar Association of North Dakota regarding House Bill 1333.

The State Bar Association neither supports nor opposes HB 1333. We do, however, offer technical assistance, because of a single word in the bill as presently proposed.

The whole point of this bill is to protect doctors and other health care providers who want to say "I'm sorry" to a patient who has had a bad outcome. This bill says that doctors should not have to worry that such an expression of sympathy and compassion will be misinterpreted later as an admission of fault.

The doctor-patient relationship is a caring relationship. When things go badly, a patient needs to hear an expression of sympathy and compassion from the professional he trusts, and the health care professional equally has a need to give that expression to the patient he or she cares for. The fear that such an expression might be transformed and reinterpreted later into an admission of fault should not be allowed to chill that caring relationship. This bill allays that fear, it says such expressions of sympathy and compassion cannot be used as evidence of fault in later proceedings.

However, this bill goes just one word too far. Section 1 includes not only expressions of apology, sympathy, commiseration, condolence and compassion. It also includes admissions of fault. That word "fault" is in line 7 of the bill, sandwiched into that long list of other expressions, and it should not be there.

I personally agree with the proponents of HB 1333 that an expression of sympathy or apology is not an admission of fault, and it should not be interpreted as an admission of fault. But it is equally true that an admission

of fault is not an apology or an expression of sympathy, and this bill should not treat them as if they were the same. There's a big difference between the two, a distinction we all deal with every day in our relations with others, and it's a distinction we have no trouble making. It is logical to say that an expression of sympathy should not be interpreted as an admission of fault. It is not logical to say that an admission of fault should not be interpreted as an admission of fault.

As I said, SBAND neither supports nor opposes HB 1333, but as a matter of technical assistance we do urge you to delete the single word "fault" from line 7, in order to make this bill internally logical and consistent.

Thank you for your time. If you have any questions, I will be happy to try to answer them.

PUBLIC CITIZEN PRESS RELEASE

For Immediate Release: Contact: Laura MacCleery (202) 454-5130
Jan. 10, 2007 Robert Yule (202) 588-7703

Medical Malpractice Lawsuits Not the Cause of Health Care Crisis, Public Citizen Report Shows

Public Citizen Recommends Addressing Patient Safety, Preventing Medical Errors and Improving Physician Oversight to Save Lives and Cut Costs

WASHINGTON, D.C. - Despite claims by business and medical lobbying interests and the Bush administration, there is no medical malpractice lawsuit crisis in America, according to analysis released today by Public Citizen. The new report, The Great Medical Malpractice Hoax, dispels oft-repeated myths of dwindling doctors and spiraling insurance premiums used to support limits on the ability of injured patients to seek redress in the courts.

The real problems are a lack of attention to patient safety, the high incidence of preventable medical error and the lack of accountability for a small set of doctors who account for a majority of medical malpractice payments, the report reveals. The report also presents several recommendations for Congress, state governments and hospitals to reduce health care costs and save lives.

Over the past few years, the Republican-led Congress has repeatedly attempted to curtail the legal rights of medical malpractice victims by capping damage awards and imposing other limits on access to the courts by consumers, said Public Citizen President Joan Claybrook. This report shows that lawmakers were misguided; in fact, Congress should work to reduce medical errors.

Public Citizen reviewed publicly available information from 1990 to 2005 from the federal governments National Practitioner Data Bank (NPDB), which contains data on malpractice payments made on behalf of doctors as well as disciplinary actions taken against them by state medical boards or hospitals. According to the analysis, the total number of malpractice payments paid on behalf of doctors, with judgments and settlements, declined 15.4 percent between 1991 and 2005, and the number of payments per 100,000 people in the country declined more than 10 percent. In addition, the average payment for a medical malpractice verdict, adjusted for inflation, dropped eight percent in the same period.

The numbers show that patients do not win large jury awards for less serious claims but that payments usually correspond to the severity of injury. In 2005, less than three percent of all payments were for million-dollar verdicts and more than 64 percent of payments involved death or significant injury - while less than one-third of one percent were for insignificant injury.

Despite assertions by the medical and business lobbies that physicians are leaving practice because of burdensome malpractice lawsuits, the number of doctors is increasing faster than the population, said Laura MacCleery, director of Public Citizens Congress Watch group. In recent years, medical malpractice insurers have been reaping huge profits, not paying out excessive jury awards. The false claims of a malpractice lawsuit crisis are really about putting profits ahead of patients. They distract from real health care reform designed to improve patient safety, enhance efficiency and cut costs.

Public Citizens analysis indicates that to limit preventable patient deaths and injury and rising health care costs, reforms should reduce medical errors and tighten lax doctor discipline and oversight.

To improve patient safety and prevent errors, Congress should establish a national mandatory adverse event reporting system so that hospitals share information that can help them correct faulty systems and practices. To combat medication errors, hospitals should invest in computer physician order entry systems. This would avoid mistakes associated with illegible handwriting and automatically check for errors or bad drug interactions. Despite a 2006 study by the Institute of Medicine concluding that medication error is one of the most common preventable mistakes and costs as much as $3.5 billion annually, fewer than five percent of hospitals have implemented such a system. Hospitals and medical practices should also limit physicians workweeks to reduce fatigue-induced error.

Improving physician oversight is vital to addressing the small percentage of repeat offenders who continue to practice despite being responsible for a majority of malpractice claims in America. The report documents that just 5.9 percent of doctors have been responsible for 57.8 percent of the number of malpractice payments from 1991 to 2005, with each of these doctors making at least two payments. The vast majority of doctors - 82 percent - have never had a medical malpractice payment since the NPDB was created in 1990. State medical boards, which are largely responsible for doctor discipline, should be given greater funding and staffing, and be required to provide stricter oversight to prevent dangerous doctors from practicing in their own or other states.

Greater disclosure of offenders would also provide consumers with the information necessary to make informed decisions about their health care. Congress should lift the veil of secrecy on the national database by allowing the public access to the names of doctors - which are now kept secret - and state legislatures should require state medical boards to improve their Web sites to provide better quality and accessibility of information about doctor discipline.

To read the report, visit http://www.citizen.org/documents/NPDB%20Report_Final.pdf .

Check the NABE web site http://www.nabenet.org for information about upcoming meetings and handouts from past meetings, as well as to find policies from other bar associations on various issues. Bookmark this URL so you can access it quickly and easily! To search the NABEGR archives, go to http://mail.abanet

Att # 1a
2-12-07

Testimony on HB 1333
Senate Judiciary Committee
February 12, 2007

Chairman Nething and members of the Judiciary Committee, I'm Bruce Levi, Executive Director/General Counsel of the North Dakota Medical Association. The Medical Association is the professional membership organization for North Dakota's physicians, residents and medical students.

In recent years, many states have begun to address concerns that physicians and other health care providers have become cautious about offering expressions of empathy or sympathy to their patients who have experienced adverse outcomes from their medical care. These outcomes may be the result of known or anticipated complications or risks, errors, or other circumstances.

On one hand, health care providers have become reluctant to explain to patients and their families what happened when medical procedures go wrong because they fear the information will be used against them in court. Many healthcare providers have struggled with their desire to explain and apologize to their patient, but have often been strongly advised against such open discussions by their risk managers or attorneys.

On the other hand, recent studies have suggested that failing to apologize may prompt more liability claims – that an important factor in people's decisions to file lawsuits is not negligence but ineffective communication between patients and health care providers. Patients bring lawsuits when they can't get answers.

Physicians are ethically bound to inform patients of all facts necessary to assist the patient in understanding what has occurred with their medical care [E-8.12, *AMA Code of Medical Ethics*]. However, physicians understandably have a difficult time determining appropriate communication techniques in this current legal environment to convey concern for the patient without inadvertently implying their own fault. It is not unusual for a physician's compassionate and empathetic actions to be misunderstood and later described to a jury as an admission of liability.

The North Dakota Medical Association views HB 1333 as important legislation to help create a practice environment that encourages physicians and other health care providers to apologize to patients with respect to an outcome of their medical care, without the apology and related statements being taken as evidence of liability or an admission against interest.

Rule 402 of the North Dakota Rules of Evidence provides in part: "All relevant evidence is admissible, except as otherwise provided ... by statutes of North Dakota." HB 1333 would exclude from admissibility as evidence in any civil action, arbitration proceeding, or administrative hearing "*a statement, affirmation, gesture, or conduct of a health care provider or health care provider's employee or agent, that expresses apology, sympathy, commiseration, condolence, compassion, or benevolence to a patient or to a patient's relative or representative*" as evidence of liability or an admission against interest.

The bill includes a definition of a "health care provider" which would include health professionals; a hospital, ambulatory surgery center or clinic; and a licensed nursing, basic, or assisted living facility. The bill also defines the terms "relative" and "representative." The bill would apply only to actions or other proceedings commenced on or after the effective date of the legislation.

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HB 1333 is part of an effort to embrace the concept of apology and disclosure as a means to avoid future adverse medical outcomes, and to promote open communication between patients and their families, and physicians and other health care providers.

Chairman Nething and committee members, thank you for this opportunity to provide background on HB 1333. On behalf of the North Dakota Medical Association, I urge you to move a "do pass" on the engrossed bill.

Att #2
2-12-07

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Senate Judiciary Committee
February 12, 2007

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