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Judiciary Committee
February 27, 2009

[LB351 LB374 LB375 LB442]

The Committee on Judiciary met at 1:30 p.m. on Friday, February 27, 2009, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB374, LB375, LB351, and LB442. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Mark Christensen; Colby Coash; Brenda Council; Scott Lautenbaugh; Amanda McGill; and Kent Rogert. Senators absent: None.

SENATOR ASHFORD: Welcome to the Ernie Chambers Judiciary Hearing Room. I notice several of you who are regulars (laugh), so welcome back. We have four bills to hear today, three of which, the first three will be introduced by Senator Lautenbaugh, starting with LB374, and then LB375, LB351, and then Senator Council has LB442. Do we have a quorum? I think we do. I declare a quorum (laughter). Senator Lautenbaugh, would you like to introduce LB374?

SENATOR LAUTENBAUGH: Sure. I thought you were going to introduce us.

SENATOR ASHFORD: Well, I was going to wait till the whole group, so we didn't have to introduce.

SENATOR LAUTENBAUGH: Okay. Thank you, Chairman Ashford and a small portion of the committee. [LB374 LB375]

SENATOR ASHFORD: You're quite a draw, Senator Lautenbaugh (laughter). [LB374 LB375]

SENATOR LAUTENBAUGH: Yeah. Apparently so. Can't get this just every day so. My name is Scott Lautenbaugh. I'm here as the introducer of LB374. LB374 was designed so that it would allow a civil court defendant to settle a suit and pay the plaintiff's cost without requiring the entry of a judgment against the defendant. This was in response to, I believe, a federal decision which suggested that collection agencies, plaintiffs could not ask for the costs of suit if it wasn't clear...if it hadn't been taken to judgment, if you will, and costs ordered to be paid. This would come up in the circumstances where a defendant decided to pay a debt after a suit had been filed, but before a judgment had been entered. So, because of some decisions, the only route for plaintiffs would be to take the thing all the way to judgment and to make it clear that costs were collectable as well. And since, you know, costs are a concern and may become an ever greater concern, depending on what this committee does this year, plaintiffs want to recover their costs, so this bill was meant to address that. There were some concerns by some in the legal community regarding the provisions of the bill, whether or not they would be unintended consequences, so there is currently an amendment that is being negotiated by the interested parties to clarify the language and sharpen the language to see that it doesn't cause any unintentional harm. I have not seen that amendment yet. This is a

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recent development, so it's difficult for me to say much about it, but in any event, that's the intent of the bill. I'd be happy to answer any questions you might have. I know there will be some proponents of this as well who would do likewise. [LB374 LB375]

SENATOR ASHFORD: Thanks, Senator Lautenbaugh. Let me introduce my colleagues. From Lincoln, Senator Coash; Senator Christensen from Imperial; Senator Rogert--I'm not even going to...Senator McGill from Lincoln; and Senator Council from Omaha. My legal counsel, Stacey Trout; and my clerk...our clerk, Christina Case. With that, any questions of Senator Lautenbaugh? Thanks, Senator. [LB374 LB375]

SENATOR LAUTENBAUGH: Thank you. [LB374 LB375]

SENATOR ASHFORD: Proponents? [LB374 LB375]

JOHN GUTHERY: Good afternoon, Senators. My name is John Guthery. I'm an attorney in Lincoln, Nebraska, and I'm appearing in behalf today of a proponent of the bill, Credit Management Services, Inc. My practice in Lincoln involves people that represent sellers of products, services rendered, and sometimes money loaned. In this bill, I seek and the proponents, I think, of this seek a clarification as Senator Lautenbaugh mentioned, to clarify that it is not unlawful to attempt to settle a case with recovering the cost. The situation arises in this situation where a product is sold or a service provided, and, unfortunately, for some reason or another, it's not paid for, and a lawsuit is filed which incurs costs, somewhere \$50, \$60, \$70 or more with the service fee and the filing fee, maybe up to \$80 depending on which court. If a settlement is made, and it's paid only as to the principal and interest, then the person who sold the product or who provided the service, really had a net deduction from the recovery. And there's been some question and different interpretations about whether that can be negotiated or asked for in a settlement. Sometimes it happens where a party will simply pay the principal amount after the lawsuit has been filed, but will not agree to pay the costs so that the person who provided the service or the product really receives a net deduction in what their recovery is. We want to clarify that the courts have authority to award costs in those circumstances where the cost was incurred simply because of the lawsuit, and then the payment occurred after that. It's a recognized matter in other statutes in Nebraska which is dealt with in another LB proposal, that if a judgment is entered, the costs will be provided to the party to whom a judgment was entered. What we want to do is simply recognize that concept and clarify it by saying that costs can be recovered and the court may award them. If the settlement arose and the payment was made, whether a settlement or voluntary payment was made after the filing of the lawsuit and after the person who provided the service or the product and filed the lawsuit, and had to try to attempt to collect that. One of my goals in practicing as long as I have is to try and improve and clarify things, so that it's easier for lawyers, it's easier for judges. We have counties now that will have one interpretation, and they'll have another interpretation. In my sense, that is not right. It should be easier for judges to

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understand whether they can or can't do it. It should be easier for lawyers so they can advise their clients. That's going to cut down on lawsuits and disputes, and it should be easier for clients to know what the rules are. We think this will help along with another companion bill, LB375. But there are some questions that people have raised just to me today, and I've agreed, and said that I'm open to clarifying language. If an "a", or "the", or a phrase will improve the goal that I'm seeking and that is clarity, and I believe what would be fairness, continued fairness, then I'm willing to do that and want to do that. So my goal is to propose to move forward with this to have you consider it, but I want to tell you this...or Senator Lautenbaugh did, that there are some potential amendments. I don't think they will change the concept or the goal, but it might improve the drafting of this a little bit, and we're all for that. [LB374 LB375]

SENATOR ASHFORD: Okay. Any questions? The next bill is... [LB374 LB375]

JOHN GUTHERY: LB375, Senator. [LB374 LB375]

SENATOR ASHFORD: ...and when you say it's a companion bill, what is... [LB374 LB375]

JOHN GUTHERY: Well, LB375 dealt with another section, Senator, with the awarding of costs and fees, when a judgment recovered on certain categories. It was for services, materials and supplies, certain labor performed, and it was for categories of...at the current time for \$2,000 or less, and it specifically, again, provides...this one, LB375 dealt with also award of attorneys' fees and court costs, but it's try to make these consistent, because another thing on my clarity issue, Senator, is I don't want to have a situation where somebody's...and we have many creative legal minds and analysis so that this one bill isn't used against the other bill to say they're inconsistent and they don't fit. [LB374 LB375]

SENATOR ASHFORD: Okay. But just so you don't have to come up twice, I was just...is there anything more on the next bill that you... [LB374 LB375]

JOHN GUTHERY: No. You'll see as the second bill, Senator, that deals with raising the level of attorneys fees...the claim size from \$2,000 to \$4,000, and that hasn't changed since 1967. But the concept that I'm trying to reach in proposing... [LB374 LB375]

SENATOR ASHFORD: Oh, is the consistency issue. [LB374 LB375]

JOHN GUTHERY: Yes, sir. [LB374 LB375]

SENATOR ASHFORD: Okay. I don't want to cut you off on the next bill. I just thought if you wanted, if you had comments... [LB374 LB375]

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JOHN GUTHERY: No, I appreciate that, and I'd asked whether you wanted me to...at least I thought, well, maybe protocol says one at a time, so (laugh) I'll do however you... [LB374 LB375]

SENATOR ASHFORD: Well, it normally does, but you're free to comment on the next bill too. [LB374 LB375]

JOHN GUTHERY: And if somebody else has a comment, I'd just reserve, if I could, of LB375, if somebody has something to say that I could address or answer, I'll do that. Otherwise, I won't repeat myself. [LB374 LB375]

SENATOR ASHFORD: Thanks. Any questions? [LB374 LB375]

JOHN GUTHERY: Thank you. [LB374 LB375]

SENATOR ASHFORD: Thank you. Next proponent? And if you want to comment on both bills, Bill, you can. [LB374 LB375]

WILLIAM MUELLER: Okay, thank you. [LB374 LB375]

SENATOR ASHFORD: Even though it hasn't been introduced, but we'll muddle through that anyway. [LB374 LB375]

WILLIAM MUELLER: Mr. Chairman, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today on behalf of the Nebraska Collectors Association in support of LB374. As Mr. Guthery explained, what we are attempting to do with this bill is to make clear that a party can receive its costs if they agree to pay those costs in a settlement. The statutes are clear, and the statute and the bill, 25-1708, provides that a party can receive its costs as part of a judgment. And I think those of us who practice law or have practiced law may wonder, why in the heck do we need a statute describing what the parties can agree to, but there is case law that says that absent a statute allowing the parties to agree to pay costs, that there may not be any legal basis for them to do that. So that's what we're trying to do. The language in LB374...concerns have been raised about the language in LB374, and as Mr. Guthery said, we continue to work on that. We do not have an amendment today, but we will get you an amendment very quickly. As to LB375, the next bill, the association itself is neutral on the bill. I will tell you that the Nebraska State Bar Association supports LB375 that would increase the amount under 25-1801 from \$2,000 to \$4,000. As Mr. Guthery told you, that amount has not been changed. He said 1967; I know it's not been changed as long as I've practiced, and I started practicing in 1980. I'd be happy to answer any questions the committee may have. We will get back to you with an amendment on LB374. Thank you. [LB374 LB375]

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SENATOR ASHFORD: Thank you. Any questions of Bill? Thanks. [LB374 LB375]

WILLIAM MUELLER: Thanks. [LB374 LB375]

SENATOR ASHFORD: Any other proponents? Opponents? [LB374 LB375]

TAD FRAIZER: Good afternoon, Mr. Chairman, Senators. My name is Tad Fraizer, F-r-a-i-z-e-r. I'm a registered lobbyist for the American Insurance Association, a national organization of property and casualty insurers. I'm appearing in what I might term gentle opposition to LB374, as Senator Lautenbaugh and the previous witnesses have testified. There is an amendment that is being discussed as to tweak the language. Our concern is simply with the use of the term "voluntary payment" in the initial draft of both bills. Insurance companies obviously enter into a large number of settlements as part of their process, and we just have a concern that voluntary payment could be seen as applying to all settlements. And the draft language says that costs will be allowed as a matter of course in the event of such a voluntary payment and, obviously, in the course of settlements, you'll sometimes waive costs; sometimes you'll allocate costs or negotiate them, and we just want to make sure that the language does not prevent an allocation or waiving of those costs under the rubric of "voluntary payment" and, obviously, we'll be working with the interested parties to tweak the language to address those concerns. [LB374 LB375]

SENATOR ASHFORD: Doesn't "shall be entitled" take care of that? I mean, if they're entitled to it and don't ask for it, then they don't get it, I guess. [LB374 LB375]

TAD FRAIZER: Well, we just...it's... [LB374 LB375]

SENATOR ASHFORD: I mean, that seems fairly clear in its face, but you have a concern. [LB374 LB375]

TAD FRAIZER: We had a little concern that the "shall" language when referring to a voluntary payment made it...that court costs always had to be recovered any time there was any sort of voluntary payment including a settlement regardless of what the party is stipulating. [LB374 LB375]

SENATOR ASHFORD: Okay. Thanks, Tad. Any questions for Tad? Seeing none, thank you. [LB374 LB375]

TAD FRAIZER: Thank you. [LB374 LB375]

SENATOR ASHFORD: Any other opponents? Neutral? Neutral. [LB374 LB375]

JUSTIN BRADY: Senator Ashford and members of the committee, my name is Justin

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Brady, J-u-s-t-i-n B-r-a-d-y. I appear before you today as the registered lobbyist for the Nebraska Realtors Association and for PCI which is a group of property casualty insurance companies. I won't go through it all. I will act with similar comments that Mr. Fraizer had, and we are working with the proponents. We'll work with Senator Lautenbaugh in coming up with an amendment that we all can agree to. With that, I'll try to answer any questions. [LB374 LB375]

SENATOR ASHFORD: Okay, good. Seeing none, thank you. [LB374 LB375]

JUSTIN BRADY: Thank you. [LB374 LB375]

SENATOR ASHFORD: Senator Lautenbaugh. [LB374 LB375]

SENATOR LAUTENBAUGH: Thank you, Senator Ashford. Do you want me to go ahead and open on LB375 and then close on LB374 and then close on LB375 or what do you want me to... [LB374 LB375]

SENATOR ASHFORD: Or you could close on both of them together afterwards (laughter). [LB374 LB375]

SENATOR LAUTENBAUGH: Well, I don't know. Was there any...I can't ask. Is there anybody who wants to speak on LB375 who didn't want to speak on LB374? [LB374 LB375]

SENATOR ASHFORD: Just go ahead and open on LB375. [LB374 LB375]

SENATOR LAUTENBAUGH: Okay. LB375 is a companion bill to LB374. You met it? Again, makes it clear that there is an award of costs that can be had even if the payment is voluntarily made of the matter, of the amount in debt, if you will, amount in question. It also in LB375 adjusts from \$2,000 to \$4,000, the amount under which you can recover attorneys' fees for certain claims based upon the formula set forth therein. This doesn't even come close to keeping pace with inflation. It's just an overdue adjustment. [LB374 LB375]

SENATOR ASHFORD: Any questions of Scott? Okay, thank you. Proponents of LB375 other than the two that have been here before (laugh). You can certainly come back again if you'd like. [LB374 LB375]

JUSTIN BRADY: Senator Ashford and members of the committee, my name is Justin Brady, J-u-s-t-i-n B-r-a-d-y, appear before you today as the registered lobbyist for the Nebraska Realtors Association in support of LB375. With that, I'd try to answer any questions. [LB374 LB375]

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SENATOR ASHFORD: Any questions? Thank you. [LB374 LB375]

JUSTIN BRADY: Thank you. [LB374 LB375]

SENATOR ASHFORD: Any other proponents? Opponents? Neutral? Senator Lautenbaugh. All right. Senator Lautenbaugh (laughter). LB351. [LB374 LB375]

SENATOR LAUTENBAUGH: (Exhibit 1) Thank you, Mr. Chairman and members of the committee. My name is Scott Lautenbaugh. I'm the introducer of LB351. This one is a little more substantial perhaps than the last two. As you know, a few years back--I'm probably dating myself by just saying a few years--we allowed limited liability companies in Nebraska, and we've had to update things as time has marched on, and we've touched upon different issues. This is one of those issues. Very simply put, what this allows to have happen is, if you obtain a judgment against a person who is a member of an LLC, your judgment is chargeable against his interest only without impairing the ongoing operation of the LLC. The concept is known as a charging order, I guess, and I will say that this was brought to me by the state bar. Mr. Mueller is here from the bar to explain more. I'll be happy to take your questions, if I can, but so will he. [LB351]

SENATOR ASHFORD: Yes, Senator Lathrop. [LB351]

SENATOR LATHROP: Did you determine whether or not everyone in the bar was on board with this idea before you... (Laughter) [LB351]

SENATOR LAUTENBAUGH: I didn't think it was my place. [LB351]

SENATOR LATHROP: Oh, really? (Laughter) That's the only question I have. [LB351]

SENATOR ASHFORD: Every day is a new day, Senator Lathrop. [LB351]

SENATOR LAUTENBAUGH: I'm not here on behalf of the bar, you understand. I'm just at their behest, so. [LB351]

SENATOR ASHFORD: No, you're just recognizing that the bar... [LB351]

SENATOR LAUTENBAUGH: No. No, no. But I am a member (laugh). [LB351]

SENATOR ASHFORD: Yes. As we must be, yes. Very well. All right. Thank you. Any proponents of this bill, LB351? [LB351]

NICOLE HANSON: (Exhibit 2) Good afternoon, Mr. Chairman, members of the committee. My name is Nickie (phonetic) Hanson, H-a-n-s-o-n, and I'm here on behalf of Fraser Stryker Law Firm. I'm actually a law student at the university. I'm a law clerk at

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Fraser Stryker. We're here supporting the bill. We suggested that the Nebraska State Bar Association bring this bill and to add a charging order basically to correct which, as Senator Lautenbaugh said, was kind of an oversight in the earlier versions. Charging order statutes similar just limit a creditor to the judgment debtor's transferable LLC interest, which is just the economic rights without any of those management rights or voting rights, which is really there to protect the other members of the LLC from having a new member forced upon them that would have a voice in management. Nebraska doesn't have one. We formed our LLC act on an early version of the Wyoming act. Wyoming has since added a charging order statute, as have 48 other states. And the Uniform Limited Liability Act, the only states without one are Nebraska and Pennsylvania. We do just think it's simply an oversight that it hasn't been added. Nebraska already has a charging order in its partnership statutes and we have similar restrictions on transferability in other provisions of the LLC act, so it's something that the Nebraska law generally has been approving of in other contexts. On behalf of law firms, we're concerned that commentators at this point say that you...they suggest not forming an LLC in a state that doesn't have a strong charging order. So if you look at commentary from business planning experts and asset protection experts, they will specifically state that Nebraska and Pennsylvania don't have LLC statutes, something we just simply want to correct. The version we presented is very closely drafted based on Iowa and Virginia and the Uniform Limited Liability Company Act. The amendment that was passed out is simply clarifying that any third parties that would make a distribution or a payment directly to a member of the LLC would not be held liable if they did so at the direction of the LLC. No other states that we surveyed have that. We just wanted to, out of an abundance of caution, make sure that in no way would this affect any other parties besides the judgment creditor, debtor and the LLC members. Are there any questions? [LB351]

SENATOR ASHFORD: I don't know. Senator Lathrop, you seem to be warming up to one. [LB351]

SENATOR LATHROP: No, I was just...you got it all in before the red light came on. [LB351]

NICOLE HANSON: All right. [LB351]

SENATOR ASHFORD: Yeah. Yeah, that was... [LB351]

SENATOR LATHROP: You said the state bar has looked this over and they're in favor. [LB351]

NICOLE HANSON: Yes, and... [LB351]

SENATOR LATHROP: Because I don't understand LLCs. [LB351]

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NICOLE HANSON: ...Bill will be speaking shortly. So thank you. [LB351]

SENATOR ASHFORD: I think I get it. Thanks, Nickie (phonetic). I hope they hire you. [LB351]

NICOLE HANSON: Thanks. [LB351]

SENATOR ASHFORD: Yeah. Bill. [LB351]

WILLIAM MUELLER: Mr. Chairman, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear today on behalf of the Nebraska State Bar Association in support of LB351. Senator, I'm certain that every lawyer in the bar would support the charging order bill that's in LB351, if they understood what a charging order was (laughter). The reason that they call this a charging order is if you'll look at the bill on page 2, line 3, this bill charges the transferable interest of the judgment debtor in the limited liability company with payment of the unsatisfied amount of the judgment. Thus, the reason that this is called a charging order. We do support this. The previous witness was correct that we patterned our LLC statute several years ago after Wyoming's and since then, other states have included charging order provisions in their LLC statutes. We did look at this and believe that it is a positive change to our LLC statutes. I'd be happy to answer any questions the committee may have. [LB351]

SENATOR ASHFORD: And I assume this applies to a case where there's been a dissolution of the partnership or of the LLC, and then there would be...it doesn't? This is only distributions made during the course of the... [LB351]

WILLIAM MUELLER: That's my understanding. My understanding is the purpose for this is that if you do obtain a judgment against a member of an LLC, your recourse as to that member's LLC interest is to obtain a charging order, and then you can derive the distributions to that member... [LB351]

SENATOR ASHFORD: Right. No, I get that part, but if there's a dissolution of the... [LB351]

WILLIAM MUELLER: If there's a dissolution, I suppose, at that point, the charging order would dictate or the presence of a charging order would affect where that member's distributions went. [LB351]

SENATOR ASHFORD: And there's no way this charging order can interfere with the dissolution or transfer of the... [LB351]

WILLIAM MUELLER: Well, it shouldn't, and I think that is...that is one of...no, you've

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identified an issue, and that's the reason for the amendment... [LB351]

SENATOR ASHFORD: Okay. [LB351]

WILLIAM MUELLER: ...is that if the LLC makes a distribution in violation of the charging order, a third party could not be held responsible for that if they were acting pursuant to what the LLC distributed. [LB351]

SENATOR ASHFORD: Okay. Thanks, Bill. [LB351]

WILLIAM MUELLER: Thank you. [LB351]

SENATOR ASHFORD: Any other proponents? Opponents? Neutral? Senator Lautenbaugh. [LB351]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman and members of the committee. Just briefly again, what this is designed to do is to make it so that if you get a judgment against a member of an LLC, you don't necessarily become a participant in the management of that LLC. You're just attaching, basically, the economic benefit. That, presumably, will carry through in the event of a dissolution as well, keeping again the economic benefit, but the remaining members of the LLC would not be forced to have a new member/partner to use the improper word, if you will. [LB351]

SENATOR ASHFORD: Thank you. Thank you. [LB351]

SENATOR LAUTENBAUGH: Thank you. [LB351]

SENATOR ASHFORD: That concludes the hearing on LB351. LB442, Senator Council. I see there may be some of you who haven't been here before, so let me just go over the rules on our testimony. The light system will indicate to you when we would ask you to start summing up your testimony, and that's the yellow light. We'd ask you to confine your comments to three minutes or so, and when the red light comes up if you could sort of finish your comments you're making so we can go on to the next witness. Senator Council, welcome, and LB442. [LB351]

SENATOR COUNCIL: Thank you, Chairman Ashford and members of the Judiciary Committee. I appear before you this afternoon to introduce LB442. And LB442 is designed to address and correct a problem that was revealed last year during the course of review by the Department of Housing and Urban Development relative to the operations of the Nebraska Equal Opportunity Commission under its agreement with the Housing and Urban Development agency. For those of you who don't know, the Nebraska Equal Opportunity Commission has an agreement and memorandum of understanding with the U.S. Department of Housing and Urban Development to conduct

investigation of cases involving housing discrimination occurring within the state of Nebraska. And one of the provisions of that agreement and memorandum of understanding with the Department of Housing and Urban Development is that the NEOC satisfy the definition of a substantially equivalent agency, meaning that it's operating pursuant to state legislation that is substantially equivalent to the federal Fair Housing Act. And in 1991, this Legislature took action to conform Nebraska's fair housing law to the provisions of the federal fair housing laws so that those laws were deemed substantially equivalent. NEOC could conduct housing discrimination investigations on behalf of HUD and receive payment for those services. The incident that gives rise to the need for the amendment of the Nebraska Fair Housing Act occurred when the NEOC referred cases to the Attorney General's Office where NEOC had made a determination that there was reasonable cause to believe that housing discrimination had occurred. According to the statute as it currently reads, then that would trigger the requirement that the Attorney General would initiate whatever civil action was considered or appropriate to address that particular complaint. Well, the situation that arose was that the Nebraska Attorney General declined to initiate civil action, which then placed NEOC in violation, technically, of its agreement with Housing and Urban Development to operate pursuant to a substantially equivalent act to the federal Fair Housing Act. What this legislation would do would be to address the situation where the NEOC has determined that reasonable cause to believe that housing discrimination has occurred, that in the event that determination is forwarded to the Nebraska Attorney General's Office to pursue appropriate civil litigation, if the Attorney General refuses to take that action, then under LB442 NEOC would have the right to either obtain its own outside counsel on a fee-for-service basis to initiate that civil action, or to utilize in-house counsel to do that. Now there will be some question raised as to the necessity for LB442 in view of that fact that NEOC and the Attorney General entered into a memorandum of understanding in June of 2008 that, in the minds of many, resolved this situation as to what would occur when cases of housing discrimination are referred to the Attorney General's Office for civil action. While admittedly the memorandum of understanding does provide a mechanism for addressing that situation in the event the Attorney General refuses to act, there's still some question as to whether it covers all situations where the Attorney General refuses to act. But the larger issue is that it is just that: a memorandum of understanding that only binds the parties who are signatory to that memorandum of understanding, and that's currently Attorney General Jon Bruning and the chairman of the Nebraska Equal Opportunity Commission. It does not bind future Attorney Generals, so if Mr. Bruning should leave that office for some reason prior to or at the end of his current term, that memorandum of understanding does not bind any subsequent Attorney General. However, LB442 would impose the obligation on the Attorney General, whoever that individual would be, to pursue those cases. And in the event he or she failed to, then it would authorize the Nebraska Equal Opportunity Commission to use its own in-house counsel or to retain outside counsel on a fee-for-service basis. There are people who are prepared to offer testimony on this matter who are much more intimately involved in

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the situation than I am, but I will entertain any questions that the committee may have at this time. [LB442]

SENATOR ASHFORD: I don't believe so other than this only fair housing cases, is that... [LB442]

SENATOR COUNCIL: These are only fair housing cases. [LB442]

SENATOR ASHFORD: Okay. Thanks, Brenda. How many proponents do we have for this bill? Okay. And opponents? A couple. All right. Oh, you're asking a question. You're not an opponent. [LB442]

SENATOR LAUTENBAUGH: No. [LB442]

SENATOR ASHFORD: Okay. (Laughter) I was...fine, go ahead. (Laugh) [LB442]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman. Where does the NEOC's funding come from? [LB442]

SENATOR COUNCIL: Well, for purposes of these housing discrimination cases, they're paid by the Housing and Urban Development of the U.S. Department of Housing and Urban Development. It's on a case-by-case basis. [LB442]

SENATOR LAUTENBAUGH: In the circumstance where the NEOC had to use an in-house attorney, is that person paid for by HUD? [LB442]

SENATOR COUNCIL: Now that would be my understanding that would be a part of whatever the reimbursement that the NEOC receives for handling those cases on behalf of Housing and Urban Development. I would think that someone from the department would have to answer how that fee...how that reimbursement is determined, whether they feel it would be substantial enough to cover the costs associated with that litigation. I would...all I can do is speculate that it would. [LB442]

SENATOR LAUTENBAUGH: Okay, I'll wait. [LB442]

SENATOR COUNCIL: And then I guess one point I need to add: At least as far as my understanding from the U.S. Department of Housing and Urban Development, as the current memorandum of understanding is drafted, they feel that it satisfies their concern about our laws being substantially equivalent but not to the extent of avoiding or preventing any further scrutiny on behalf of HUD. In fact, it's my understanding that there is some question as to whether they'll extend that determination beyond a six-month period. [LB442]

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SENATOR LAUTENBAUGH: Thank you. [LB442]

SENATOR ASHFORD: Okay. Proponent testimony. Go ahead. [LB442]

ANNE HOBBS: (Exhibit 3) Thank you for your time this afternoon, Senators. My name is Anne Hobbs; it's A-n-n-e H-o-b-b-s, and I'm the executive director of the Nebraska Equal Opportunity Commission. And Senator Council has already filled you in on kind of the beginning of this issue so I won't revisit that. The documents that I've distributed to you are all from this year, they're all from 2009, and I'll reference them just very quickly. Our contract with HUD was jeopardized and the state lost roughly \$127,000 last year. We are not permitted to recoup any of those funds. LB442 has designed a solution so that will never happen again. In their report this January 2009, one of the reasons that the...one of the concerns that HUD raises can be found on page 15 and 16 of the report which I have provided you. And this is how they outlined one of their biggest concerns: Quote, during the review period, the NEOC submitted four cases to the Attorney General's Office for review and adjudication. The Attorney General's Office reviewed the four cases NEOC submitted and declined further civil action, end of quote. We did, in June of last year, develop an MOU to address some of these concerns, and I think that overall it's worked fairly well. I think it addresses many of the concerns, however it's silent on one absolutely key issue. The issue is when the Nebraska Equal Opportunity Commission and the AG do not see a case as meritorious. So if our commission views a case as having cause and that AG's Office does not, there's no solution for that. In fact, the MOU which you have a copy of specifically states, quote, that in this case where we don't agree, quote, written legal analysis to the NEOC and HUD, that the AG's Office will provide written legal analysis to NEOC and HUD will not file the case. That can be found on page 3 of the MOU. So what that tells us is we'll get a written report of why they won't file but it doesn't give us the solution on what to do next. As you can imagine, sometimes when you work with the federal government you get conflicting pieces of information, and this has been fairly rampant in the last two months. In January, we received this report that said Nebraska is not in compliance. Later, in February, we received an e-mail stating you are in compliance but we're going to watch this relationship with the AG and the NEOC very closely. I have been speaking with HUD headquarters office because HUD's headquarter office dictates to the Kansas City office whether or not our agency is in compliance. Now February 24, the Attorney General's Office received a letter from Kansas City saying, quote, we're unaware of any current problems or any concerns under this MOU but this bill speaks specifically to something beyond the MOU, a situation that may arise outside of that. Just this morning, Ken Carroll who is the director of FAC FHAP agencies, so he dictates whether or not Nebraska has a contract...at 9:30 this morning what he told me is he commends us for looking to resolve a problem legislatively before it erupts again. He...this is a quote: He believes it's, quote, an alternative framework and a good backup plan, end quote, if problems arise again. So this is really meant to be preventative medicine to prevent the state from losing any funds in these tough economic times. I'd be happy to

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address any questions that you have. [LB442]

SENATOR ASHFORD: I may wait. Go ahead. [LB442]

ANNE HOBBS: I would like to add HUD did have some recommended amendments. Overall, they commended us but they had some recommended time frames. They thought the NEOC should step in sooner. We shouldn't wait 90 days, for instance. And clearly I'll bring those amendments to Senator Council's office and they're amenable. HUD would like...HUD's D.C. office headquarters will review any changes or any amendments that are made to make sure we don't pass a law. [LB442]

SENATOR ASHFORD: Well, does the...I guess my questions then, Anne, is does the AG in its own discretion have the ability to turn down any case that they...I mean, they have no...they must take any case that's referred to it, in your opinion or the Kansas City's opinion, is that what you're... [LB442]

ANNE HOBBS: Actually under current...the Fair Housing...the Nebraska Fair Housing Act, that's how it reads. And the Supreme Court addressed this issue in 2000 in the NEOC Minter v. Jensen. [LB442]

SENATOR ASHFORD: So in your view the Attorney General has no discretion once you refer a case over? Is that...am I misreading? Is that too general a statement? [LB442]

ANNE HOBBS: The way it currently reads, the law...correct. That's the way the law currently reads. [LB442]

SENATOR ASHFORD: Okay. [LB442]

ANNE HOBBS: This bill, however, would provide that back door. It would allow the opportunity for them not to take a case if they don't want to. [LB442]

SENATOR ASHFORD: The legislation would? [LB442]

ANNE HOBBS: LB442 states that if the Attorney General does not take a case, does not file it within 30 days, then our agency has the burden of finding that person an attorney. [LB442]

SENATOR ASHFORD: And the money from HUD pays for that other attorney under this bill? You don't know that yet but... [LB442]

ANNE HOBBS: Actually, HUD reimburses us at a higher amount if a case is going to go through civil election or civil action, so they bump those funds up now and we use those

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funds now for filing fees and those things. [LB442]

SENATOR ASHFORD: Okay. I think I get it. Thanks, Anne. Seeing no other questions, next proponent. [LB442]

ANNE HOBBS: Thank you very much. [LB442]

TIMOTHY BUTZ: (Exhibit 4) Senator Ashford, members of the committee, my name is Tim Butz, B-u-t-z. I'm the assistant director of the Fair Housing Center of Nebraska and Iowa. We provide private fair housing enforcement for the entire state of Nebraska and the 50 western counties in Iowa. We're very concerned about this ongoing controversy between the NEOC and the Attorney General's Office. Ms. Hobbs talked to you about the economic impact of that controversy and what can happen to the NEOC's budget if there isn't a permanent solution that's found. I have a slightly different spin on that. I'm worried about the people that are denied their rights. Every time the NEOC makes a finding that discrimination has occurred and refers a case to the Attorney General, it should be litigated. That NEOC decision is the civil equivalent of a grand jury. I mean, they sit there, they review the evidence, they apply the law. The commissioners are trained in how to apply the law. Their staff is one of the best-trained staffs in the country. There should be no doubt that there is sufficient evidence to put that question of discrimination in front of a court to reach a final determination. As a matter of fact, the Attorney General's Office has really failed to litigate any of these cases over the last four or five years. We did a freedom of information...or open records request--the Nebraska equivalent of a Freedom of Information Act request--to both the AG and the NEOC, seeking records on cases that had been prosecuted where reasonable cause had been found. We came up with 17 cases, and four of those were actually cases where there had not been an election for civil action but the case had gone through the NEOC's administrative hearing process. A final order was reached and the NEOC was seeking to enforce its own final order. The Attorney General litigated in those cases. But the rest of the cases, four of them they settled after the 30-day period for filing was over. One they found to be nonjurisdictional and didn't file that, and I don't think anybody would argue with that. And in eight cases, where they found sufficient evidence of discrimination, no action was taken. People lost their rights. Housing is one of the most basic human rights, and this state has made a commitment to make sure that housing is made available to everybody in a fair and nondiscriminatory manner. Now we have the situation where this state, by inaction, is compounding the discriminatory actions of landlords. We have to come to some solution here. It's not just a matter of \$250,000 for the NEOC's budget. It's a matter of how we're going to defend people's rights. [LB442]

SENATOR ASHFORD: Thank you, Tim. Any questions of Tim? Senator Lathrop. [LB442]

SENATOR LATHROP: Do you have a sense of why that's not happening? [LB442]

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TIMOTHY BUTZ: I don't have the data in front of me, but when I queried the NEOC, I asked for all cases referred to the Attorney General. And under the state Age Discrimination in Employment Act, there is a similar situation where the Attorney General is supposed to litigate a civil action based on a reasonable cause finding. And we found that they're not litigating age discrimination cases either, and I can provide you with those numbers. [LB442]

SENATOR LATHROP: And I'm an amateur on this one but it seems to me that I heard this controversy brewing last year, and what I heard from the other side, being the Attorney General's Office, is that the information coming from the NEOC was not...the investigation wasn't complete or thorough or proper or in some way they were deficient and they didn't have what they needed to file those claims. And so I know Mr. Cookson is here to talk about that and we'll hear what they have to say, but have you looked at the work product of the NEOC and what they're turning over to the AG? [LB442]

TIMOTHY BUTZ: Yes, we have. In fact, I spent 14 years working for the NEOC from 1980 to 1994, and I...when I left, I was the supervisor of the Omaha office and I know how things were trained back then. I...from talking to their staff, it doesn't seem that there's been any change. These men and women that work for the NEOC get the same training as HUD investigators. They're very competent. When you go in and look at files where they've investigated, you don't find much in the way of missed opportunities for following up leads or incompetence in the accomplishment of investigations. They're a fairly competent staff and we have a great deal of confidence that when we turn a case over to them, things are going to be done right. [LB442]

SENATOR LATHROP: I have one more question. Is there a class of people whose cases are or are not being prosecuted or is it across the board without respect to... [LB442]

TIMOTHY BUTZ: It's across the board. The primary...in the ones that we looked at that weren't prosecuted, most of them involved disability based on--I'm sorry--discrimination based on disabilities. [LB442]

SENATOR LATHROP: So it's not an illegal immigrant? We had that issue last year too. [LB442]

TIMOTHY BUTZ: Yeah, and I think that's a red herring. I mean that's one isolated case. That doesn't explain all the disability and race cases that haven't been prosecuted. [LB442]

SENATOR LATHROP: Okay. Thank you for your testimony. [LB442]

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SENATOR ASHFORD: Just for the record, Tim, one last question following up with Senator Lathrop. Do you audit...do you have audit responsibility over NEOC? [LB442]

TIMOTHY BUTZ: No, we don't. We review files when... [LB442]

SENATOR ASHFORD: But does HUD do any kind of performance evaluation? [LB442]

TIMOTHY BUTZ: Yes, they do. [LB442]

SENATOR ASHFORD: And that's separate from your job. [LB442]

TIMOTHY BUTZ: It certainly is. [LB442]

SENATOR ASHFORD: And they come in and... [LB442]

TIMOTHY BUTZ: HUD does both a financial audit and a PAEs audit. [LB442]

SENATOR ASHFORD: Right. I mean I remember when we were running OHA, that HUD was always auditing. I don't recall a time when they didn't audit OHA, but. [LB442]

TIMOTHY BUTZ: When they do audit, they're fairly thorough and ask a lot of questions. It's not just a rubber-stamp operation. [LB442]

SENATOR ASHFORD: I'm generally familiar with their degree of intensity in their questioning. [LB442]

TIMOTHY BUTZ: I'm sure you are. [LB442]

SENATOR ASHFORD: Thank you, Tim, for your...any other comments? Scott. [LB442]

SCOTT MOORE: Chairman Ashford, members of the committee, my name is Scott Moore. I'm an attorney with the Baird Holm law firm in Omaha, Nebraska, and I'm here on behalf of the Apartment Association of Greater Omaha and Lincoln. Just to give you some background, I worked in the equivalent of the Attorney General's Office at the federal level, that is for the U.S. Department of Justice in the fair housing and civil enforcement section. We support this bill to the extent Senator Council wants to amend the act to make sure that the NEOC keeps control over investigations and still receives those FHAP grants. Quite frankly, we'd much rather have local or state control over these things, because if the funding is lost through FHAP funding, all the enforcement would be done by HUD out of the Kansas City office and the United States Department of Justice, and that's something that we think, both for the industry, the Apartment Association, as well as for folks who are filing fair housing complaints here in Nebraska, would be best for the state. We want to keep local control over this. However, the bill

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presented in LB442 is quite a bit broader than that, in our opinion. Instead of just dealing with the cases in which there's an election or a reasonable cause finding, this bill expands the NEOC's authority in pattern of practice cases and in other cases in which the federal statute gives the United States Attorney General discretion to file those cases where this bill would be a requirement under state law. So as an example, looking at the bill, looking at Section 20-343, in that particular case under federal law the Attorney General has discretion to file cases in which the Attorney General, he or she, believes there's a pattern of practice or an issue of general public importance. In that case it's clearly discretionary on federal law. We believe it should be the same under state law. Under this bill it would make it mandatory that either the Attorney General files it or the NEOC then has the pattern of practice authority. We believe that an administrative agency should not have that type of authority nor does it need that authority to remain substantially equivalent. So to the extent, and we would focus on 20-334 and 20-331, those amendments to those sections would be needed to become substantially equivalent, but the others would not be and expand the Nebraska state law beyond federal law, and are not needed to remain substantially equivalent. We're more than willing to provide counsel with the proposed changes. But again we're in support of having those FHAP funds, the fair housing assistance program funds remain with Nebraska and have local control, but we don't want the bill to expand it beyond what the federal government would require. [LB442]

SENATOR ASHFORD: Senator Lathrop. [LB442]

SENATOR LATHROP: Why? Has the Attorney General filed any of those? [LB442]

SCOTT MOORE: I'm not familiar with the Attorney General filing any pattern of practice cases... [LB442]

SENATOR LATHROP: Have any of them been sent to them from the NEOC? [LB442]

SCOTT MOORE: That's normally not a determination that the NEOC would make. The bill...one of the amendments to the bill would give the NEOC the authority to recommend a pattern of practice. That's unprecedented as far as I'm aware, at the federal level or other state levels. [LB442]

SENATOR LATHROP: You said it becomes...I appreciate that the AG has some discretion under existing law to make a decision about whether they want to make a claim or not make a claim. And I don't want to make a judgment or prejudge what Mr. Cookson is going to say, but I'm not going to have a chance to talk to you after he's done so I'm going to ask you these questions in this fashion. If we have an Attorney General who is not filing discrimination claims after the NEOC says we have reasonable cause to believe, this it looks to me...and pattern of practice would be if we went into a...these are all housing cases? [LB442]

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SCOTT MOORE: Yes. [LB442]

SENATOR LATHROP: Okay. So we have a landlord and he has a bunch of houses that are all in a...he has an apartment complex with a thousand units and there's not a person in there that isn't Caucasian, okay? But nobody can nail him down by...you know, he said, well, you're African-American, go away. I mean, they don't do it that way. It's oftentimes discrimination is established through a pattern or practice. If he's not...if he's demonstrated an unwillingness to file discrimination cases and all we're doing is giving the NEOC the authority to do it--not mandating that they file it, but "may" is the language used in the provision--what's the harm? [LB442]

SCOTT MOORE: Sure. Twofold. Number one, I think we...the purpose of the bill as I understand it is to ensure that the state law is substantially equivalent with federal law and to save the funding. I don't understand the purpose to be to expand it beyond what the federal law requires. [LB442]

SENATOR LATHROP: And it may be that there's two things, and I'm not going to speak for Senator Council who will have an opportunity to close, but it may be there's two things that's trying to be accomplished with this. One is to bring us into compliance so that we have the equivalent, but the other is maybe to address a problem which is, if he's not going to file them, somebody ought to or ought to have that option or opportunity to. [LB442]

SCOTT MOORE: First, to address the concern of...the first concern, if you have an apartment complex that's all white, for example. If an individual election case is referred to the Attorney General and the Attorney General takes it or the NEOC then takes it under this new bill on an election claim, even in those cases you can seek and receive injunctive relief that would be...that would take care of the problem if there was a pattern going on. So that wouldn't go unaddressed. [LB442]

SENATOR LATHROP: It would at least stop the pattern is all but it wouldn't... [LB442]

SCOTT MOORE: Sure. You can get an injunction... [LB442]

SENATOR LATHROP: And injunction is only going to stop something from happening. It's not going to remedy a past wrong though for any person (inaudible). [LB442]

SCOTT MOORE: Well, those individuals would have the right to do it so it wouldn't go unaddressed is what I believe. Secondly, if we look at I think both the intent of the Nebraska Fair Housing Act, as well as the federal Fair Housing Act, the Legislature were very concerned and really wanted, when you're looking at a pattern of practice, to make that a more narrow authority rather than having it...that's why they separate

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individual complaints from pattern of practice cases. So in certain instances they wanted to reserve that right with the chief law enforcement officer of the United States in the case of federal law, and the attorney general in the state. They wanted the chief law enforcement officer to retain that, where there was carved out for individual investigations through administrative complaints for the NEOC to deal with those, and I think that was deliberate because we're treading on...when you are talking about pattern of practice, which were the cases that I enforced with the U.S. Department of Justice, a lot more resources were needed and a lot more money went into that, and I think a lot more thought. And they wanted that to remain with the chief law enforcement officer, and I think that was the intent of the Nebraska Fair Housing Act, as well, in those narrow cases. Knowing that with the administrative individual complaints, many times you could get the same result or the same relief to ensure that the discrimination didn't occur, but in my opinion, as I looked at that and as I see that, they always wanted it to remain with the chief law enforcement officer. So in expanding beyond that... [LB442]

SENATOR LATHROP: Do you think that there's anything unlawful about this? We're not violating federal law or a constitutional prohibition with this provision are we? [LB442]

SCOTT MOORE: There's nothing unlawful that I see. [LB442]

SENATOR LATHROP: In other words, we can do this if we choose to or if we... [LB442]

SCOTT MOORE: Yeah, you could expand the rights beyond...there's no doubt that you could expand the rights and make the Nebraska Fair Housing Act provide broader protections than federal law and still be substantially equivalent. Yes. [LB442]

SENATOR LATHROP: Okay. One more question for you...if I can remember it. I appreciate that you're not with the Attorney General's Office and you're in private practice... [LB442]

SCOTT MOORE: Yes. [LB442]

SENATOR LATHROP Do you know, in those instances where the Attorney General has brought a claim, and it sounds like there have been some, although rare, has he hired that out and retained a lawyer in private practice to do it or does somebody actually in the AG's Office handle those? [LB442]

SCOTT MOORE: That I don't know. That I don't know. [LB442]

SENATOR LATHROP: Okay. I'll ask Mr. Cookson when he comes up. [LB442]

SCOTT MOORE: But...yeah, that I don't know. [LB442]

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SENATOR ASHFORD: Senator Council. [LB442]

SENATOR COUNCIL: And I just have one question to kind of piggyback on Senator Lathrop. And first I want to thank you for appearing and providing your testimony, and it's important that we hear the full range of positions on this issue. But getting to 20-343, and I appreciate your point with regard to...as 20-343 reads, it is currently the substantial equivalent of the federal Fair Housing Act. And the amendment would expand it to provide a right for, quite frankly, an option that's not available under the federal Fair Housing Act. But my question is--and you may not be able to answer it--would there be anything that would prevent NEOC, if this expanded provision is enacted, from pursuing those pattern and practice cases where the Attorney General has chosen not to, and being reimbursed by HUD? [LB442]

SCOTT MOORE: Again, Senator Council, thank you for allowing me to be here. I don't think so. I mean, I don't know...I think the NEOC would have to answer that question. But my understanding of it, the FHAP grants, the Fair Housing Assistance Program, is that reimburses folks for election cases but would not reimburse the NEOC for that expanded. So we'd have to come up with state funds to pay for that. [LB442]

SENATOR COUNCIL: We need to get an answer to that question. I appreciate your response, and thanks again for appearing. [LB442]

SENATOR ASHFORD: Thank you, Scott. [LB442]

SCOTT MOORE: Thank you very much. [LB442]

SENATOR ASHFORD: Next proponent. [LB442]

LAUREL MARSH: Good afternoon, members of the Judiciary Committee. My name is Laurel Marsh, spelled M-a-r-s-h, and I'm here today on behalf of ACLU Nebraska to give a short statement of support for LB442. ACLU Nebraska strongly supports LB442's provisions that would allow the NEOC to employ counsel on a fee-for-service basis in order to pursue a housing discrimination case through the civil action process. Our main interest is to make sure that people have access to the due processes guaranteed to them by the United States and Nebraska Constitutions, and we believe that those who are discriminated against should have access to all of the remedies available to them under the Fair Housing Act, and that the ability of both the Attorney General and the Nebraska Equal Opportunity Commission to move forward on these cases will enhance that goal. So we urge you to support LB442. [LB442]

SENATOR ASHFORD: Thanks, Laurel. Seeing no questions, thank you. [LB442]

LAUREL MARSH: Thank you, and I'll fill this out. [LB442]

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SENATOR ASHFORD: Okay. Opponents. Did I...is there any other proponent? I think I asked but it looks like opponents. [LB442]

DALE COMER: (Exhibit 5) Senator Ashford, members of the committee, my name is Dale Comer, D-a-l-e C-o-m-e-r, and I'm an assistant attorney general with the Nebraska Department of Justice. I am here today to appear in opposition to LB442. Our opposition is based upon our conclusion that those portions of the bill which allow the NEOC to employ counsel or to use in-house counsel to file enforcement actions directly in court violate Article IV, Section 1 of the Nebraska Constitution. And we're distributing some copies of previous Attorneys General Opinions, and there are points in those that I would like to discuss very briefly to sort of explain my analysis or our analysis as to the constitutional difficulties with the bill. Opinion 98006 essentially says that all state constitutional officers--that includes the Governor, Secretary of State, State Treasurer, Attorney General--all have inherent core constitutional functions which cannot be taken away from them by legislative enactment. The notion really sort of is that the constitution creates the office, and because of that it must contemplate that there are some duties for those constitutional officials. So as a result, there are some core constitutional duties for all constitutional officers which cannot be taken away from them. Opinion 93012 indicates that the Nebraska Supreme Court has repeatedly recognized that the Legislature may not transfer duties vested in one officer under the constitution to another officer or entity. Kind of the same notion that those constitutional duties, core constitutional responsibilities can't be transferred from one officer to another if they're set forth or part of the constitutional duties of the office in question. And then finally Opinion 92004 pertains to the core responsibilities or duties of the Attorney General of Nebraska. And what it indicates is, and the authorities that are cited therein--and I should say that all of these opinions have ample authority cited--the Attorney General's basic core responsibilities are to manage the legal business of the state of Nebraska, and that includes to go into court on behalf of the state of Nebraska as the state's exclusive legal representative in court proceedings. And I've been with the AG's Office since 1979. As best I can recall during that time, we've always taken the position that if we go into court on behalf of the state of Nebraska, it has to be someone from our office or designated by our office to do so. So in our view, LB442 would take litigation for the NEOC, which is a state agency--and that's a core responsibility of our office--it would take that core responsibility, give it to the NEOC or their appointed counsel, and we believe that that violates Article IV, Section 1 of the Nebraska Constitution. That's all I had to say and I'll be happy to answer any questions or attempt to do so if the committee has some. [LB442]

SENATOR ASHFORD: Thanks, Dale. Senator Lathrop. [LB442]

SENATOR LATHROP: Don't we have agencies of the state that have their own counsel that are independent of the Attorney General; for example, Health and Human Services,

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the Department of Roads? [LB442]

DALE COMER: Yes, we do. There are a number of state agencies which have counsel that hire lawyers routinely and they have some legal function. That's not what we're saying here. We're not saying that they can't have lawyers in-house or have their own lawyers available. What we're saying is to go into court on behalf of the state of Nebraska you have to be designated as an AG or allowed to do so by our office. [LB442]

SENATOR LATHROP: So let me interrupt you if I can to make my point or at least to get to the point, and that is you're telling me then that the lawyer for the State Patrol can't go into court? Only the AG can do that? [LB442]

DALE COMER: If it's counsel for the State Patrol and he or she wants to go to court on behalf of the State Patrol, they have to be designated as a special assistant attorney general, and that is frequently the case. It's not at all unusual for our office to have attorneys for one reason or another. For example, in-house counsel, many times may have worked on a case, and it goes to an administrative appeal under the Administrative Procedures Act, so they're designated as special assistants. [LB442]

SENATOR LATHROP: So the distinction you are making is and your interpretation of the law is if it involves going into court or choosing to go into court or not going into court, the only person under the Nebraska Constitution that can do that or make that judgment is our Attorney General. [LB442]

DALE COMER: That's correct, because in our view it's a core responsibility of the Attorney General. [LB442]

SENATOR LATHROP: Okay. And you are now with the Department of Justice and not with the... [LB442]

DALE COMER: The Nebraska Department of Justice. Excuse me. I'm sorry, I'm with the... [LB442]

SENATOR LATHROP: Are you with Bruning's office? [LB442]

DALE COMER: Yes. [LB442]

SENATOR LATHROP: Okay. So you're basically...I got it. All right, I misunderstood. When you said the Department of Justice I thought you might be a fed and then I was going to ask you if you could do anything about getting them to prosecute these cases. (Laughter) [LB442]

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DALE COMER: Technically, I think in most cases, our office, people refer to us as the Attorney General's Office. Technically, the name under the statute is the Nebraska Department of Justice. I'm sorry for the confusion, Senator. Excuse me. [LB442]

SENATOR LATHROP: Well, I saw Mr. Cookson here and now you're double-teaming. [LB442]

DALE COMER: Yeah. You've got two of us today. [LB442]

SENATOR LATHROP: Okay. Well, we'll look forward to his remarks. [LB442]

SENATOR ASHFORD: Dale, I do...or, sorry, Senator Council. [LB442]

SENATOR COUNCIL: Mr. Comer, I appreciate your appearing today and certainly anticipated it would be some issues raised as to whether or not this is constitutional. But the question I have is, under the statute as it's currently written, there is--and the Supreme Court of the state has held that the Attorney General's duty to file these civil actions is mandatory--if the...and unless...I'm not talking about the pattern or practice cases. I'm talking about cases where NEOC has made a reasonable cause determination. Under this statute as it's currently written, the Nebraska Supreme Court says the Attorney General's duty to pursue those cases civilly is mandatory. Now, help me understand what constitutional authority does the AG have to abdicate his constitutional authority? [LB442]

DALE COMER: Okay. Let me attempt to do so, and I should preface my comments by indicating to you that I'm the bureau chief for our legal services bureau so I do not...my bureau does not represent the NEOC, and so a lot of the particulars with the debate and the things that have gone on here I'm simply not familiar with. I was asked to look at this purely from a constitutional standpoint. With response to your question, there is a case out there as I understand it where the Nebraska Supreme Court has said that it does not violate Article II, Section 1, of the Nebraska Constitution, which deals with the separation of powers, to have a statute which says that the AG has to bring these actions if asked to do so by the NEOC. My analysis today is a different constitutional provision. I'm not talking about Article II, Section 1, which deals with separation of powers; I'm dealing with Article IV, Section 1, which enumerates the various constitutional officers of the state. And so, in essence, I guess what I'm saying, and I think the case you've referenced, the court really...the analysis by the Supreme Court focuses on Article II, Section 1. I don't think there's any comment in there or any discussion that I'm aware of, of Article IV, Section 1. [LB442]

SENATOR COUNCIL: No, let me...maybe I didn't make it clear. I understand what section of the constitution you are basing your argument on. I am asking you, with that as a given, by what authority does the AG have to abdicate what you have identified as

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his constitutional authority. I mean, because no one has questioned that the constitution grants the Attorney General that authority. I'm asking you by what authority can he abdicate his constitutional authority, because you have a statute. That's why I bring in the Nebraska Supreme Court decision because you have a statute that mandates that under these conditions he exercises that constitutional authority that you so correctly referenced. My question is by what authority can he abdicate that constitutional authority, and if he does, what remedy do we have? I mean, if you're telling me that the Attorney General has the authority to decide simply not to exercise his constitutional authority, then there has to be some corresponding remedy or recourse, because in that case then we've provided some constitutional insulation. We could have somebody who sits in that office 24 hours a day, 7 days a week, and does nothing. And so my point is, doesn't he have a constitutional duty to carry out the legislative mandate? [LB442]

DALE COMER: Well, I think my answer to that is, with all due respect, no. I mean, I think his duty under the constitution, under Article IV, Section 1, is to manage the legal business of the state, and that includes... [LB442]

SENATOR COUNCIL: And if the legal business is mandated... [LB442]

DALE COMER: ...and that includes, Senator, making a decision about whether is it appropriate to bring this lawsuit or is it not appropriate to bring this lawsuit. [LB442]

SENATOR COUNCIL: Okay. Aye. That's where reasonable minds differ because the statute doesn't... [LB442]

DALE COMER: Well, then we do. [LB442]

SENATOR COUNCIL: ...because the statute doesn't say, Mr. Attorney General, you may decide to do this. It says you shall do this. [LB442]

DALE COMER: Right. And I think what I'm suggesting to you is, under the constitutional provision that I mentioned today, Article IV, Section 1, I don't think you can read that statute to mandate that our office has to bring these cases, and that relates to something that Senator Ashford asked earlier: Are we required to do so? I don't believe that we are. With all due respect, I think the opinion from the Supreme Court deals with a different constitutional issue that was not raised in that case. [LB442]

SENATOR COUNCIL: But with all due respect, the logical extent of your argument is the Attorney General can decide never to do anything and this Legislature can't do anything about it. [LB442]

DALE COMER: I think the Attorney General of Nebraska is in charge of the legal business of this state, and I think the Attorney General can say, in any given instance,

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I'm going to make the choice to bring a lawsuit or not to bring a lawsuit, and I think there are ample cases out there which illustrate that. For example, in the realm of settlement with state agencies, we have the authority to settle cases even though a state agency may say we don't want you to settle. Now I will tell you in the 30 years I've been with the office, that hasn't happened very often, because in most cases what we try to do--in fact, in practically all cases--is we consult with the agency and say, what do you want us to do. But ultimately it's our call, and I think that's true here as well. I think we do have the right to say, no, we're not going to bring this. And I don't think that's abdicating anything, frankly, because that's our constitutional duty. [LB442]

SENATOR COUNCIL: Well, according to the Nebraska Supreme Court, you are, because the Nebraska Supreme Court says that is a mandatory, not discretionary. [LB442]

DALE COMER: Right. And I think the case can be distinguished for the reasons I've given you. [LB442]

SENATOR ASHFORD: Yes. Senator Lathrop. [LB442]

SENATOR LATHROP: Just a couple questions, and maybe this is the distinction... [LB442]

SENATOR ASHFORD: This is a stimulating discussion, actually, so I... [LB442]

SENATOR LATHROP: Maybe this is the distinction is that the Attorney General can exercise discretion when one of these hits his desk, and if he says, if I can't win this I'm not going to file it. [LB442]

SENATOR ASHFORD: Right. [LB442]

SENATOR LATHROP: That would be the proper exercise of discretion. But if we mandate that the Attorney General do something and the circumstances fit perfectly, then he has to. And then it's a writ of mandamus, isn't it. He's not doing something that he's supposed to do. [LB442]

DALE COMER: Right. I think...I agree, Senator. I think the discretion...I think the Legislature can mandate that we look at the case and make a judgment about whether...I mean, part of it goes to our responsibility as attorneys. Do we have an adequate case here that we can go in and file? And so I think... [LB442]

SENATOR LATHROP: That is a lawyer's discretion. That's a given. I think the point is, is that if you never file one of these, then is that exercising discretion on a case-by-case basis or is that the refusal to do as you've been instructed to by the Legislature? And

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then if...then given that, isn't...don't we get to a place where if the Attorney General--and I don't even know the facts. I don't know if you've never filed one. But if you never--hypothetically, we'll say--if you never filed something that the Legislature said you must do, then we're not talking about exercising discretion on a case-by-case basis, but the refusal of the Attorney General to carry out the law as he's obligated to do. [LB442]

DALE COMER: I assume in that sort of a scenario that what you might see would be somebody, as you mentioned earlier, trying to bring a mandamus action, and then the issue before the court would be, are we required to file or are we required to look at the case and make a judgment? [LB442]

SENATOR LATHROP: No. We're past that, because I will grant you and every lawyer here will grant you that the Attorney General's Office has to have the discretion to decide on a case-by-case basis. But let's say they put--and I don't, truly don't know the facts, but I'm now engaged in this so I'm going to go with a hypothetical--if in five years you have 400 files from the NEOC, all of which demonstrate reasonable cause for a housing violation, and you file none of them, we're not making the judgment on a case-by-case basis. We've gotten to the place where you've made a judgment that, notwithstanding the directive of the Legislature, you're not going to file those kinds of cases. Right? And I think the point Senator Council was making is, under what authority can the AG just say I know I'm supposed to do something but I'm not going to do it. [LB442]

DALE COMER: Well, I suppose there would have to be some showing that that was the decision by the AG. The AG simply... [LB442]

SENATOR LATHROP: I want you to assume that that's the case. [LB442]

DALE COMER: Right, that the AG simply said I'm not.... [LB442]

SENATOR LATHROP: I am not going to file this particular kind of case, meritorious or otherwise. [LB442]

DALE COMER: But I think there is a distinction between just saying I'm not going to file the case and I'm not going to look at the case. I think what the statute mandates is that we review it. [LB442]

SENATOR LATHROP: I'm asking you, for the purposes of my hypothetical, to assume that they are meritorious cases and they land on your desk. Is there any authority in a meritorious case or in a class of meritorious cases, for the Attorney General to say I'm not going to do it even if the Legislature tells me to? [LB442]

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DALE COMER: I suppose it gets down to...all right, if we're assuming that they're all meritorious cases... [LB442]

SENATOR LATHROP: Assume they're all meritorious, just for my hypothetical. [LB442]

DALE COMER: And in that context we're assuming that a district judge or the Supreme Court would look at all of those cases and say, these are all meritorious. [LB442]

SENATOR LATHROP: Yes. I want you to assume that. [LB442]

DALE COMER: Right. If that's the case, then yes, I think we'd have to file it, if... [LB442]

SENATOR LATHROP: And at that point... [LB442]

DALE COMER: But our defense would always...even if you came in and said there are 400 cases here that came in. It seems to me, in the context of mandamus, that our defense would be or could be some of these aren't meritorious or all of them aren't meritorious. [LB442]

SENATOR LATHROP: We're getting away from the hypothetical. [LB442]

DALE COMER: Yeah. [LB442]

SENATOR LATHROP: Okay. And I asked the question I wanted to ask. [LB442]

SENATOR ASHFORD: And I guess, constitutionally, Scott has a question...Senator Lautenbaugh has a question...the Legislature's authority is impeachment. I mean if a constitutional officer fails to do what they're supposed to do to the level where, you know...and you've been there when that happened, so. [LB442]

DALE COMER: I have. (Laugh) [LB442]

SENATOR ASHFORD: And...I mean, so you know what that is, so I mean we all know that, that the Legislature does have constitutional authority if something raises to that level. It's not that they don't have any constitutional authority. [LB442]

DALE COMER: No. I think you're absolutely right. In fact, I would add to that a bit, Senator, in response to something that Senator Council said, and that is, yes, if the AG totally abdicated and didn't do his or her job at all, then there's always the impeachment process. But even more so, the AG is an elected officer, and so I suspect that if the AG simply didn't do anything for some period of time, then he could be turned out by the voters or she. So the remedy in response to something that Senator Council said would either be, as you indicated, impeachment or electing somebody else. [LB442]

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SENATOR ASHFORD: Or electing someone else. Senator Lautenbaugh. [LB442]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman. Thank you for coming today, Mr. Comer. [LB442]

DALE COMER: Sure. [LB442]

SENATOR LAUTENBAUGH: I've been looking over, as we've been discussing this, I think it's the Minter decision that we've been talking about: Minter v. Jensen. As I read this decision, it turns on whether or not the 30-day filing period was mandatory on the Attorney General. Do you agree with that? [LB442]

DALE COMER: To be honest with you, it's been awhile since I've looked at that, so I don't know that, without going back and looking at it, that I could say, Senator. I'm sorry. [LB442]

SENATOR LAUTENBAUGH: Well, because I believe in this case the Attorney General did file the suit in question. It was just beyond the 30 days, and the whole argument was whether or not the 30 days controlled what the Attorney General did, and whether that requirement could be placed (inaudible). [LB442]

DALE COMER: And I have no reason to disagree with that. I think that's correct. [LB442]

SENATOR LAUTENBAUGH: But your argument is under a completely different section of the constitution, that this statute would not fly because of a different section of the constitution. [LB442]

DALE COMER: My recollection from that case is that it focuses on Article II, Section 1, which is separation of powers. The article that I presented to you today or the argument that I presented to you today, correct, is based on Article IV, Section 1, which is essentially the enumeration of the executive officers of the state shall be. And the notion there is all of those offices have inherent constitutional authority. [LB442]

SENATOR LAUTENBAUGH: And this case has nothing to do with that argument, in your recollection. [LB442]

DALE COMER: That's what I would maintain. [LB442]

SENATOR LAUTENBAUGH: And I don't see it in there either, I'll be honest with you. Is it your understanding...I think you previously indicated that the NEOC...your office, if you bring a case involving the NEOC, you have an ability to settle that case on behalf of the

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state, do you not? [LB442]

DALE COMER: Well, generally we have the ability to settle litigation. Once a case gets in litigation, we have the ability to settle it. I don't know, frankly, for the reasons I gave you earlier, what the impact of federal law or the particular statutes are. I don't know what they may say or how that factors into this. But generally, if it's in litigation, then it's our office's decision as to whether or not that litigation is settled. [LB442]

SENATOR LAUTENBAUGH: So if we are arguing that you're required to always bring suits with no discretion but you could settle them for a dollar, that really doesn't make a lot of sense, does it, that you always have to file but you can dispose of it the next day for a dollar. [LB442]

DALE COMER: Well, the last time I heard somebody ask that question was, I would object to it as a leading question in court, I think. (Laugh) [LB442]

SENATOR ASHFORD: We don't do... [LB442]

DALE COMER: I'll let you make that decision. (Laugh) [LB442]

SENATOR ASHFORD: I'll let the question go. You can ask it. [LB442]

SENATOR LAUTENBAUGH: Thank you, Your Honor. (Laugh) [LB442]

SENATOR ASHFORD: Thanks, Dale. Any other questions of Dale? Yes, Senator Council. [LB442]

DALE COMER: Okay. [LB442]

SENATOR COUNCIL: Mr. Comer. [LB442]

DALE COMER: Yes, ma'am. [LB442]

SENATOR COUNCIL: Is the Nebraska Fair Housing Act constitutional? [LB442]

DALE COMER: I honestly don't know. I have never analyzed the entire act in and of itself. My focus today is purely on that portion of the bill that we've been talking about, so. And to be honest with you, I'm not sure that I read the act in any great detail, so. [LB442]

SENATOR COUNCIL: Because, quite frankly, according to your argument as the law currently exists, it's unconstitutional, because the law as it currently exists doesn't give the Attorney General any discretion as to whether to pursue a case. The discretion is

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given to the NEOC, because the law as it's currently written says if the commission concludes at any time following a complaint that prompt judicial action is necessary, then upon receipt of such authorization from the commission, the Attorney General shall promptly commence and maintain such an action. So according to your argument, either the current Fair Housing Act is unconstitutional on its face or the Legislature exercised the authority that it had to specify action to be taken by the Attorney General under the power granted to the Attorney General's Office under the constitution. Because it can't be both ways because the law doesn't say that it's up to the discretion of the Attorney General whether to commence an action. The law today says it's up to the NEOC whether to commence an action; and taking your argument, then the law is unconstitutional and Nebraska has no Fair Housing Act, and we couldn't have one that's substantially equivalent to the feds because according to you the Attorney General doesn't have to do anything. [LB442]

DALE COMER: Well, I'm not sure what the question is, but I guess I would respectfully... [LB442]

SENATOR COUNCIL: Is it constitutional? That was the question. [LB442]

DALE COMER: Based on your...well, let me put it...let me answer that question this way: I would respectfully disagree with your analysis, and here's why. There is abundant case law in Nebraska that says that courts will construe statutes in a way to make them constitutional. And in this particular case, I assume from your comments, that you're focusing on the language that says the Attorney General shall file this lawsuit. And there is case law in Nebraska that says that "shall" is mandatory; may is permissive unless the context of this statute indicates otherwise or unless to construe it that way would result in an unconstitutional result. So I think what that statute says, given that case law, is when it says "shall," a court would construe that to mean "may." And so if you construe it that way, then it's in accordance with what I indicated earlier. [LB442]

SENATOR ASHFORD: Why don't we do this: Let's have one more question. Do you have another question, Senator Lautenbaugh? [LB442]

SENATOR LAUTENBAUGH Yes. [LB442]

SENATOR ASHFORD Let's have Senator Lautenbaugh ask one more question and then we'll go on to the next. [LB442]

SENATOR LAUTENBAUGH: And this might unanswerable, but isn't that the exact argument the Attorney General made when he blew the 30-day deadline in Minter; that the "shall" can't mean shall, so the 30 days isn't obligatory. [LB442]

DALE COMER: That may well be, but again I think the focus there was Article II,

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Section 1, not Article IV, Section 1. [LB442]

SENATOR ASHFORD: I think we're going to let Dale go. (Laughter) You know, the 30-day gives you a standing to talk about all this stuff because you've been there for 30 years, Dale. [LB442]

DALE COMER: For better or worse, I guess. (Laugh) Thanks, folks. [LB442]

SENATOR ASHFORD: Well, I'm sure it's for better. Thanks, Dale. Okay, David. How many other opponents do we have? David. [LB442]

DAVID COOKSON: (Exhibit 6) Chairman Ashford and members of the committee, my name is David Cookson, D-a-v-i-d C-o-o-k-s-o-n. I'm the Chief Deputy Attorney General. I also happen to be the one who had the good fortune to negotiate the memorandum of understanding with the NEOC and to review every single case that's been submitted to us by the NEOC since Attorney General Bruning took over in 2003. And while there's been a great deal of numbers that have been thrown out about how many cases were sent to us and how many cases were filed, in each of the cases the Attorney General's Office did a detailed review of the facts, evidence, and law presented to it. And during the course of that review, made a determination whether or not the case was sufficient for us to file in a court of law consistent with our obligations not only as attorneys but as attorneys for the state of Nebraska such that we don't subject the state to sanctions. And so that was done, and there were cases that we filed that they found reasonable cause. There were cases we didn't file, they found reasonable cause. Interestingly, a number of cases from...there were a number of cases involving a trailer park in Sioux City in which the NEOC found reasonable cause and claimed discrimination occurred in more than 20 instances. We reviewed the evidence, didn't believe it was sufficient to justify filing an action. Those cases went to administrative hearing, and the administrative hearing officer agreed with us and found no credible evidence of discrimination. Now the administrative hearing officer in that case found that there were at least 11 retaliation claims that were justified, and issued an order to that effect. We had declined to file the retaliation because the alleged acts of retaliation actually occurred before the claims were filed, which in our view would be, by definition, not retaliation. Nonetheless, we took the valid administrative order obtained from the NEOC hearing officer, domesticated it in Dakota County as a judgment, and have pursued collection actions in Douglas County against the proprietor of the trailer park, seeking to collect assets on behalf of the individuals who had a valid retaliation claim. So, in fact, things do happen. Quickly, the memorandum of understanding goes to a number of points, but the main point is it goes to how could we improve the working relationship between the AG's Office and the NEOC, which we worked very hard to do; yet we find out about this bill from the bar association through their legislative committee in December. We had signed this agreement in June and had no communication from the NEOC or from HUD that there were any issues. It was initially proposed to some groups

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that this was part of the compromise. It is not for the reasons that Mr. Comer stated. We believe the legislation is unconstitutional. Second, it's been proposed that HUD demanded that these changes be made. You have before you a letter from the regional director of HUD who was the person involved in signing off on the memorandum of understanding indicating HUD's approval of the resolution we came to, saying they have no current issues or concerns. Now we hear that HUD in D.C. has issues, yet we've seen nothing, heard nothing with regards to what these concerns might be. The fact is, we're committed to working to bring these cases that have merit. The only cases we will not bring are cases that we believe have absolutely no merit and are frivolous enough that it would subject the state to sanctions and our individual attorneys to sanctions. HUD agreed that that was sufficient by signing off on the memorandum of understanding. And again, what we would like to do is not focus on these contentious back-and-forth issues, but focus on let's make good cases. In fact, that's happened. The first case they sent under the memorandum, we said yes, there's sufficient grounds to proceed to find a determination of reasonable cause. However, if we're going to be successful in prosecuting this case, please do the following investigation. That's what we should be doing; this is not. And with that, I'll take any questions. [LB442]

SENATOR ASHFORD: Senator Lautenbaugh. [LB442]

SENATOR LAUTENBAUGH: Thank you, Senator Ashford, Mr. Chairman. Thank you for coming today, Mr. Cookson. I think you were here previously when I was discussing the Minter case. [LB442]

DAVID COOKSON: Correct. [LB442]

SENATOR LAUTENBAUGH: Am I correct on this, that the Attorney General in that case did actually file? [LB442]

DAVID COOKSON: He attempted to file but he did not file within the 30-day deadline, and the court, as I...we agree with your interpretation of the case, that the court was addressing the 30-day notice. There is, however, with due respect to Senator Council, there is dicta in the case from which she could form the opinion that she formed. However, we believe it's dicta and not controlling on the office. And again, statutes are to be construed in a way to make them constitutional, so we construed the shall as if it has merit and is a case that we can file on behalf of the state, we will file. [LB442]

SENATOR LAUTENBAUGH: Is it your understanding that once the AG's Office files a case, it has the authority to settle a case? [LB442]

DAVID COOKSON: We do, and actually there's been some interesting discussions over the years, and variety of cases where we've decided to settle cases or not settle cases with or without the approval of the agency or the Governor's Office. [LB442]

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SENATOR LAUTENBAUGH: So if it is the case that you're required to file every case the NEOC tells you to file, you could do that and then just settle the really bad ones for a dollar the next day. Is that correct? [LB442]

DAVID COOKSON: We could but would not. [LB442]

SENATOR LAUTENBAUGH: Because that would be nonsensical, wouldn't it? [LB442]

DAVID COOKSON: That is inconsistent with our obligation to enforce the laws of the state to the fullest extent possible, and to do as much justice as possible. [LB442]

SENATOR LAUTENBAUGH: So it would argue it would be a nonsensical requirement to have you file every single case but then settle the ones in your discretion that aren't so great, if you will. [LB442]

DAVID COOKSON: It's possible, but again it comes back to, as lawyers we have an obligation not to file actions, as Senator Lathrop pointed out, that are not frivolous. It goes greater for us because we wield the power of the state. When we file an action, it's not on behalf of an individual. We're not an individual lawyer. We bring the arm and the power of the state to bear, and that's a greater obligation. And also we are viewed differently by the courts when we file actions, and as a state we don't just file for the NEOC. The NEOC is one of dozens of agencies and 90 boards and commissions that we represent. And sometimes governors want us to file things, agency directors want us to file things, legislators want us to file things, and we have to say no. That goes with the territory. [LB442]

SENATOR LAUTENBAUGH: That was a very comprehensive answer. Thank you. [LB442]

SENATOR ASHFORD: Senator Lathrop. [LB442]

SENATOR LATHROP: I just wanted to comment. My questions earlier today weren't intended to be representations of what I understood to be the fact. I was interested in the subject matter and was asking questions that were hypothetical. [LB442]

DAVID COOKSON: After having spent most of the past year, at least from January to June, working on resolving the NEOC issues as the new Chief Deputy Attorney General, I'd prefer not to focus on the numbers in the past. We worked out a good deal. We developed what I thought was a good working relationship. We have no problems with the staff handling the claims other than there are times that things don't get done that need to be done in order for us to be successful, and that's what...we want to be successful, and certainly we're committed to fighting discrimination. All you have to do is

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look at today's Supreme Court reports. We challenged the State Trooper Association because a member of their association couldn't be fired under their arbitration agreement because he was a member of the KKK. Despite great pressure from law enforcement, we fought to have that arbitration award overturned, and today the Supreme Court affirmed it, so we no longer have a trooper who is a member of the KKK. [LB442]

SENATOR ASHFORD: That's good. Let me just... [LB442]

SENATOR LATHROP: That was a long answer to my question. My...I didn't even have a question for you, Dave. (Laughter) It was just an observation, but I'm done. [LB442]

SENATOR ASHFORD: That's a good thing, though, David, and... [LB442]

DAVID COOKSON: You've got to take advantage of your time when you get it. [LB442]

SENATOR LATHROP: No more; it's 3:00. [LB442]

SENATOR ASHFORD: Senator Council. [LB442]

DAVID COOKSON: Yes. [LB442]

SENATOR COUNCIL: Thank you, Mr. Cookson, and I appreciate...I know you've been in communication with my staff throughout this process since the bill was introduced, and I appreciate your responsiveness. But with regard to the memorandum of understanding, there clearly is a hole that is not covered in the memorandum of understanding, and that's the situation where the NEOC makes a reasonable cause determination that the AG's Office doesn't agree with. [LB442]

DAVID COOKSON: That's correct. [LB442]

SENATOR COUNCIL: And there's no...the only provision here is that the AG's position and NEOC's position is forwarded to HUD. [LB442]

DAVID COOKSON: Well, actually it includes another one. If the NEOC doesn't do the legal analysis that we've asked them to do, then we would then not file. But the reason to do that is to bring the case to a level that we, in good faith as attorneys for the state, can file. And if we can't file it as attorneys of the state, there shouldn't be any other lawyer filing it on behalf of the state, because the reason we make that determination is not because we don't want to file that particular case or we don't like the NEOC; it's we don't want to subject the state to sanctions. That's our obligation: to protect and defend the state of Nebraska in actions that are filed against it, and to not file actions that are frivolous on behalf of the state. [LB442]

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SENATOR COUNCIL: Okay, but help me understand. If the NEOC makes a reasonable cause determination under its procedures, which are procedures that are presumably in accordance with the U.S. Department of Housing and Urban Development and the federal EEOC standards in terms of housing discrimination if they were to pursue the case, if they make a reasonable cause determination and the AG pursues that case and discrimination is not found, what sanctions are you subject to? [LB442]

DAVID COOKSON: I'm not sure I quite followed you. [LB442]

SENATOR COUNCIL: Because you talked about filing a case... [LB442]

DAVID COOKSON: We're talking about filing frivolous actions in which there's no credible evidence to support the claim that we brought, and I'll use the trailer park example again. They found reasonable cause in those cases. They went to...and we declined to file. They went to an administrative hearing and their hearing officer, using fairly strong language, said there is absolutely no credible evidence of discrimination. So that's...those are the ones we're talking about. What we want to try to avoid is to get in those situations. That's why the MOU is crafted as a let's talk before they go to a hearing stage; let's figure out what needs to be done. If there's a jurisdictional problem, which by the way in the HUD investigatory report they note we didn't file a case; it was not jurisdictional. And they agreed with us. We want to find out is there a jurisdictional problem and do we have sufficient evidence to go forward. I think we want to achieve the same results you do, and I think what we're doing is we're talking about what I hope becomes a nonexistent situation in which we are not of accord as to what's going on. I understand the baggage that has gone on with the NEOC for some time. Before the current executive director came, they had internal problems. The current executive director has come and has got the agency functioning efficiently and operating well. We're trying to get past this and to get to a point where we're doing exactly what you and the other proponents want us to do, which is to have good cases and to stop acts of discrimination in this state. [LB442]

SENATOR COUNCIL: What if the national headquarters of the U.S. Department of Housing and Urban Development comes and says, despite what the regional director says, this memorandum of understanding doesn't satisfy our need for Nebraska's law to be substantially equivalent, what would be the AG's position? [LB442]

DAVID COOKSON: If that's the case, and although I would be very disappointed that the folks in Kansas City didn't negotiate with us in good faith, we'd sit down with the folks from HUD. And if it's an issue, we as AGs actually have a fairly...we have a better relationship with the new administration than we had with the previous administration in Washington. We're going to meet with the new Attorney General, Mr. Holder; I'm going to meet with him on Monday as part of a national group of AGs and chief deputies.

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We're committed to making this work, so if the national HUD comes to us and says we have issues...but we want to hear it from them directly. Because once we heard what the issues were with Kansas City, this got resolved pretty quickly. So if the national folks have an issue, we'll sit down and talk to them because we're committed to making this work. [LB442]

SENATOR COUNCIL: But even the regional people...and I had heard what you said, that they signed off on the June 2008... [LB442]

DAVID COOKSON: Right. [LB442]

SENATOR COUNCIL: ...but then they turned around and they do this periodic assessment... [LB442]

DAVID COOKSON: You have to understand that the period covered was from March '07 to March '08... [LB442]

SENATOR COUNCIL: Right. [LB442]

DAVID COOKSON: ...which was before we entered into the memorandum of understanding. There are also a number of factors of which they have issues with the NEOC that don't have anything to do with the Attorney General's Office. [LB442]

SENATOR COUNCIL: Exactly. But the date of assessment...I mean... [LB442]

DAVID COOKSON: Understand, they did it August, but we'd not...the memorandum of understanding was about two months old and we had not received any case under the new memorandum of understanding. They were looking back. And I sympathize with the NEOC getting mixed signals from the feds, because the feds are looking back at something and giving it to them in January, and it really is...I can see where it can be confusing. But the fact remains, since we've had the MOU in place, it's working. We want to continue to see it work. And if the national...if HUD in D.C. has a problem, we'll sit down and talk to them. [LB442]

SENATOR COUNCIL: Thank you. [LB442]

SENATOR ASHFORD: Thank you, Senator Council. Yes, Senator Coash. [LB442]

SENATOR COASH: Thank you, Chairman. Thank you, Mr. Cookson. I'm going to ask you this question. It might have been more appropriate for some of the other folks but it just came to me, so I'm just trying to understand the process here. If I'm the person who feels they've been discriminated against and I file a claim with the NEOC; they think the claim has merit, they kick it up to the AG's Office. And the AG's Office says, no, I'm

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sorry; that's not...that doesn't seem to have merit to us. Does that preclude me from hiring Senator Lathrop as my own attorney and moving forward on my own? [LB442]

DAVID COOKSON: No, it doesn't. And in fact... [LB442]

SENATOR ASHFORD: Unless we were write it that way: to preclude you from hiring Senator Lathrop. (Laugh) [LB442]

SENATOR LATHROP: It would be malpractice. [LB442]

DAVID COOKSON: In fact, I think it was Mr. Butz brought up the aging housing cases, and the vast majority of aging housing cases they hire their own lawyers, primarily I think because they can recover attorneys' fees, and it's a fairly lucrative practice when you have the determination of the NEOC or the EEOC. [LB442]

SENATOR COASH: So I still...I can still do that. [LB442]

DAVID COOKSON: Right. And one thing we tried to do with the memorandum of understanding is not get in a position where the NEOC has gone through its entire process and then come to us. They come to us before they go to hearings, so if we see problems, we can identify them and try to work with them to get the evidence necessary to make the case that we can file. [LB442]

SENATOR COUNCIL: But that's under the MOU. [LB442]

DAVID COOKSON: Right. That's... [LB442]

SENATOR ASHFORD: Okay. So I just have one follow on question. You mentioned or maybe Dale did...or you did, I think--the bar association. What is that all about? Was the bar association...I just heard bits and pieces over the year about the bar being involved and... [LB442]

DAVID COOKSON: Apparently someone submitted this idea to the bar association, and it came up...I'm on the legislative committee and it came up at the legislative committee's agenda in December, and that was the first we had heard anything about it. [LB442]

SENATOR ASHFORD: Well, I don't see Bill here so they must not be... [LB442]

DAVID COOKSON: No, the bar didn't take a position. [LB442]

SENATOR ASHFORD: Doesn't take a position on this. Okay. Well, maybe he is here. I don't know. [LB442]

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SENATOR LATHROP: There were two people that didn't like it, Scott. [LB442]

SENATOR ASHFORD: I guess that's all. Thanks, David. [LB442]

DAVID COOKSON: Right. Thank you, Senator. Thank you, members. [LB442]

SENATOR ASHFORD: Any other opponents? Neutral? Okay, Senator Council. [LB442]

SENATOR COUNCIL: (Exhibit 7) I'd waive closing with the understanding that the testimony of D.C. Woody Bradford is received into the record. I think you should have a copy over there. Everyone has been distributed a copy. [LB442]

SENATOR ASHFORD: We're finished. Thank you. [LB442]

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Disposition of Bills:

LB374 - Placed on General File with amendments.
LB375 - Placed on General File with amendments.
LB351 - Held in committee.
LB442 - Held in committee.

Chairperson

Committee Clerk