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COMMITTEE ON JUDICIARY
January 19, 2005
LB 206, 93, 207, 168, 91, 105

The Committee on Judiciary met at 1:30 p.m. on Wednesday, January 19, 2005, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB 206, LB 93, LB 207, LB 168, LB 91, and LB 105. Senators present: Patrick Bourne, Chairperson; Dwite Pedersen, Vice Chairperson; Ray Aguilar; Ernie Chambers; Jeanne Combs; Mike Flood; Mike Foley; and Mike Friend. Senators absent: None.

SENATOR BOURNE: Welcome to the Judiciary Committee. This is the first day of hearings. We have six bills on the agenda today. I'll introduce the committee to you. I'm Pat Bourne. I'm from Omaha. On my left is Senator Flood from Norfolk; Senator Friend from the Omaha area; Senator Aguilar from Grand Island. And I was worried that I'd forget his name, I guess. Laurie Vollertsen, our committee clerk; Michaela Kubat, our legal counsel; Senator Foley from here in Lincoln. There's three senators that will be joining us later. They're introducing bills. As you can see, we are going to utilize the Kermit Brashear memorial lighting system as we have in the past (laughter). If you plan to testify on a bill, please sign in in advance at the table there. We will be using the on-deck table and so if you're going to testify on a bill, make your way forward to the on-deck area so we can expedite the proponents and the other testifiers. We've been joined by Senator Pedersen from... I don't know if he's from Omaha or Elkhorn (laughter). Maybe it's Elkhorn today (laughter). When you come forward to testify, please clearly state and then spell your name for the record. All of our hearings are transcribed so the transcribers will need to know how to spell your name. Again, as I mentioned, we're going to continue to use the timer system so most of you are used to that. Cell phones are not allowed in legislative hearing rooms so please, if you have a cell phone disable it so that it does not ring. Last rule is we will take testimony from those folks not present but we won't read that into the record. It will just be submitted as part of the record nor will we allow a testifier to read someone else's testimony. We've been joined by Senator Combs from Friend, Nebraska. And with that, let's open on LB 206. Senator Byars.

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SENATOR BYARS: Thank you, Senator Bourne and members of the Judiciary Committee. I am Senator Dennis Byars from the 30th Legislative District. That would be the "caring and sharing district." Thank you for hearing LB 206 this afternoon. In May of 2004, an unfortunate incident occurred as an individual with developmental disabilities and severe behavior and mental health issues seriously injured a young boy and this obviously alerted us that we were missing a vital service within the developmental disabilities community. Governor Johanns responded by calling together a group representing Health and Human Services, advocacy agencies, and members of the Legislature. And he asked this group to work cooperatively to develop a risk assessment, screening process that has been accomplished at this point and is being administered and implemented administratively. And Dick Nelson will follow me from the department to give you a description of what is happening there. A Developmental Disabilities Custody Act is before you today in the form of LB 206. Also, we have established a secure unit where the few individuals with developmental disabilities that have high-risk, dangerous behaviors could receive treatment and care. This has been established at the Hastings Regional Center, staff specifically trained to treat persons with developmental disabilities. We're calling this unit Bridges and it is meant to bridge that gap for individuals to be treated and their behaviors to be adjusted. Let me state very clearly that for the record, that myself and those that are involved in this process are talking about an extremely small number of individuals, probably fewer than ten and I think even less than that in a year's time. The vast majority of individuals with developmental disabilities are caring, wonderful people. We aren't and have not designed LB 206 to be used as an excuse to take people and put them back into the institution. That is obviously what we don't want to happen. But those with violent behavior deserve as all of us in society do and should be entitled to appropriate care and treatment. So we provide the state in LB 206 with a very narrow way to deal with individuals who have posed a threat of harm to someone. You'll see in Section 15 of the bill the threat of harm is defined as actually having harmed or attempted to harm someone or deliberately setting a fire. And currently all services at this point are voluntarily accepted by the

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individual or the parent of the guardian on the developmentally disabled person's behalf. This is as it should be and this bill does not propose to change that for the vast majority of DD clients. But in the instances when a person has posed the threat of harm, the county attorney or the Attorney General may file a petition in district court stating that that person has allegedly committed an act of harm or attempted harm and is in need of court-ordered custody and treatment. The bill lists the person's rights during this process. If a petition for court-ordered custody goes forth, the court must hear the petition within 90 days. If an NPC APC is granted for a person that has been evaluated to need treatment, the person has a right to an expedited hearing within ten days of being taken into custody to challenge that order. And the custody hearing itself shall be heard as soon as practicable but no later than 45 days when the person is taken into emergency custody. And placement of that person under court-ordered custody shall be in the least restrictive alternative and appropriate treatment program that's capable of providing and is willing to provide treatment in accordance with the plan. The court must hold annual review hearings of each order. The department must submit an updated plan for custody and treatment of the person and the court can continue, modify, or vacate the custody order. LB 206 is a good bill that protects the rights of the person with developmental disabilities who has shown a propensity toward violence but it also balances society's rights to protect the public and it's my understanding that this will be used in very rare circumstances. But at this point, we have a Mental Health Commitment Act but we do not have an act that does not apply to persons with developmental disabilities. I want to thank all of those individuals, advocates, clinical professionals, the individuals from Health and Human Services that worked so hard on this issue. And I think that we have crafted this bill so that the rights of a person with developmental disabilities are protected and the safety of other citizens is accommodated also. Dick Nelson will follow me, Chairman Bourne, to get into some of the details as far as Health and Human Services are concerned and I thank you for hearing this bill.

SENATOR BOURNE: Thank you, Senator Byars. We've been joined by Senator Chambers from Omaha. I neglected at the beginning to ask for a show of hands of those individuals

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that will be testifying in support. Can we get a show of hands? I see five individuals testifying in support. How many individuals will testify in opposition? I see one. Neutral testimony? I see two in neutral testimony. Questions from the committee for Senator Byars? Senator Chambers.

SENATOR CHAMBERS: Senator Byars, I'm going to keep mine to a minimum because you and I can talk at another time. On page 4 in Section 15, line 9, we have the words "having deliberately set a fire." Well, that doesn't mean anything to me as far as potential harm to somebody else. Suppose a person lit a fire in a fireplace, line 9. We need something more than that and there might be other little areas in a bill that looking at it with a microscope as I tend to do sometimes when a person's rights are involved, would need to be addressed. Now, when you talk about the various periods of time that a person can be held, we're not talking about a person who is accused of committing a crime but only one who might pose a harm to others. What is the maximum period of time that such a person can be held?

SENATOR BYARS: Forty-five days before action is taken.

SENATOR CHAMBERS: Well, let's say that you get through...and that's something we can talk about too but not right now. If the action is taken and the person is to be held, what is the maximum period of time that person can be held? And I will jump to my next question. Is it conceivable that person could be held for life?

SENATOR BYARS: It's conceivable but it is not the intention that that would be the situation. It is the intention that the individual in question would receive appropriate treatment to deal with the behaviors that have caused them to perform this act and that if at all possible and as quickly as possible, that person would be returned to the community in an appropriate setting so that they would be no harm to others.

SENATOR CHAMBERS: Am I to understand that every mental condition which would be addressed by this bill can be treated to the point where the person will not engage in these behaviors?

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SENATOR BYARS: No, you can't.

SENATOR CHAMBERS: So then somebody...if the treatment does not stop the person from being this danger or harm to others, he or she could conceivably be locked away for life.

SENATOR BYARS: Could be but the setting that that person would be placed in would be the least restrictive possible.

SENATOR CHAMBERS: You anticipate...

SENATOR BYARS: So we wouldn't put that person in a cell as we would assume that we would do a person like you and I that would (inaudible)...

SENATOR CHAMBERS: You anticipated my next question.

SENATOR BYARS: Um-hum. That's what we would do now.

SENATOR CHAMBERS: What place...what facilities are available? Oh, so then if a person is deemed to be a harm to others under the existing law, you can't lock that person away.

SENATOR BYARS: We do. We place them in a regional center; we can put them in jail. There is no kind of...for a developmentally disabled person there isn't any standard of treatment. There is no least restrictive setting.

SENATOR CHAMBERS: I thought I saw something in your statement of intent that this bill is necessary because this type of process is not available under the existing law.

SENATOR BYARS: That's right. So the way it's treated is that you take the individual with the disability and you lock them away without any kind of statutory language that would treat them differently than you and I. So instead of receiving appropriate treatment as we're asking for and being treated as a person with a disability, they are not afforded that right. That's why this is done.

SENATOR CHAMBERS: My final question of you, Senator Byars. What facilities or locations are available right now for people described in the bill to be placed when they haven't committed a crime?

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SENATOR BYARS: When they haven't committed the...?

SENATOR CHAMBERS: Have not, right. They're only deemed to be a harm...

SENATOR BYARS: We have community-based services. We have the Beatrice State Developmental Center where individuals can be placed. That would be a decision made by family. Community-based settings which would also be a decision made by individuals and their families.

SENATOR CHAMBERS: And if the family doesn't agree with the determination, who decides where that person will be placed?

SENATOR BYARS: Health and Human Services, the disability system.

SENATOR CHAMBERS: And if the family wants the person placed in one location, Health and Human Services has the final word and can overrule (inaudible)...?

SENATOR BYARS: That is correct.

SENATOR CHAMBERS: Oh, somebody is shaking their head so I'll wait until others come because I'm not...(laughter) these are not trick questions. I'm just looking for information so that's all that I'll ask at this point.

SENATOR BYARS: No, and I understand that. There are varying answers to that question and so it's not a black and white answer.

SENATOR CHAMBERS: Well, if it was a black answer this bill would be a lot more concerned about the rights of the people involved than since it's a white bill, we find to be the case. I'm very sensitive about people being deprived of their freedom especially when they have what society calls a disability in the first place. Who is going to determine the representation that this person will have?

SENATOR BYARS: The court will do that and there will be an annual review of each one of these cases so it's not a situation of taking a person black or white and locking them away and forgetting about them...

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SENATOR CHAMBERS: I know I'm...

SENATOR BYARS: Their situation is going to be reviewed on an annual basis by the court.

SENATOR CHAMBERS: I know I'm departing from what I said about that being my final question but we got into another area about representation. Will the representation be as competent as that provided to indigent defendants and children when they select guardians ad litem with no particular expertise? What would be the standards that this representation would have to meet or is that not in the bill?

SENATOR BYARS: That is not in the bill.

SENATOR CHAMBERS: Okay. Thank you. That is all that I have.

SENATOR BYARS: Thank you. Your questions are very appropriate and I think we share the same feeling. We do not want to see inappropriate incarceration or inappropriate retention when there are other alternatives available. And this is what we're attempting to do with this bill, Senator.

SENATOR CHAMBERS: And, Senator, while you're on the witness stand, let me just make this point clear. And you understand this already and others who have been to hearings. When questions are asked, they are not designed to suggest anything about the attitude or worth of the person testifying but just to elicit the information that we need because at the hearing we gather the information. So I wouldn't want anybody, if I happened to ask questions to take anything I ask personally or to be deemed disparaging or derogatory.

SENATOR BYARS: Appreciate that.

SENATOR BOURNE: Thank you. Further questions from the committee? Seeing none. Thank you, Senator Byars. Would the next proponent and, again, we want to make use of the on-deck circle or the (laugh)...I'm thinking baseball, the on-deck chair. If there's other proponents, please make your way forward to the front row, sign in and be prepared

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to testify. Welcome.

DICK NELSON: (Exhibit 1) Good afternoon, Senator Bourne and members of the Judiciary Committee. I am Dick Nelson, N-e-l-s-o-n, director of the Department of Health and Human Services finance and support. Would like to thank Senator Byars for introducing this bill on behalf of the Health and Human Services system. I am here to testify in support of LB 206. This legislation raises an important issue of public policy and public safety. It is one where the state must act decisively to protect the public safety but also with due regard for individual constitutional rights. Last year a tragic incident in Lincoln sparked a review of the state's processes when an individual with a developmental disability such as mental retardation is dangerous to others. This review identified a significant gap. The current law relies on either the criminal process or voluntary services when an individual with mental retardation commits an act of violence. However, a person with mental retardation will often be not competent to stand trial on criminal charges and cannot be made competent. Also an individual with mental retardation or their guardian may refuse the other alternative which is voluntary services or restrictions. The Mental Health Commitment Act provides for state custody and treatment for persons with mental illness but it does not include custody and treatment for persons with mental retardation or other developmental disabilities. The Health and Human Services system assembled a work group of developmental disability advocates, providers, psychologists, and agency staff to develop LB 206. It does create a civil process before the district court that protects the subject's civil rights and is focused on obtaining appropriate treatment. A subject would have a right to be represented by counsel to a full and fair hearing before the court to have the state prove its case by clear and convincing evidence and to annual hearings or annual reviews. A threat of harm to others requires proof that the subject committed an act or attempted to commit an act such as a serious assault, a sexual assault, an act of lewd and lascivious conduct toward a child or having deliberately set a fire. And we've noted, Senator Chambers, your question. That would clearly need to be clarified. Many of these acts would constitute a felony or a Class I misdemeanor if the accused were competent to stand trial. I'm not going to try to read all the rest of

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the testimony that's before you but I do want to make it clear that some individuals under court-ordered custody would remain in group home settings with restrictions. Others would require placement at Beatrice State Developmental Center or the new Bridges program at Hastings which serves individuals with developmental disabilities needing structure and a secure environment. Prison is not an option as the bill is strictly a civil process to provide treatment for individuals and protection of others. This act would give county attorneys or the Attorney General a new option, a civil process to protect society when criminal proceedings are not available. We would anticipate that less than a dozen cases across the state of Nebraska each year would involve this law. And I thank you and would be glad to answer your questions.

SENATOR BOURNE: Thank you, Mr. Nelson. Are there questions? Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Mr. Nelson, what is the difference between risk assessment and the risk screening compared to the court-ordered custody?

DICK NELSON: Risk screening, Senator, is something that has already been implemented by the Health and Human Services system. It is a process simply designed to identify people who may require further review. Risk screenings would take into consideration such things as prior convictions or encounters with the law, recent aggressive behaviors or attempts to harm somebody else. You know, those kinds of things, fairly obvious things that can be reviewed and it triggers somebody to say this person needs a more intensive review so that's a risk screening. It's basically triggered by circumstances. A risk assessment then is a process that has been devised by the Health and Human Services system working together with trained psychologists in the field to determine the likelihood that somebody is a danger to others and it's a combination not only of reviewing past activities and propensities but also looking at the current behavioral status of that individual, their response to treatment, those kinds of things. The purpose of the risk assessment then is to identify those areas that need to be addressed with further treatment, treatment plans that are not currently being addressed. It is a very similar process

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then that would be used by the Court-Ordered Custody Act except that that risk assessment now, instead of being used to work with the individual voluntarily to change their method of treatment or their location would now be in front of a court to be reviewed by a judge to assure that if these changes are made involuntarily, that there is ample evidence to support that decision and that the person is placed in the least restrictive environment where they can receive the treatment that they need.

SENATOR Dw. PEDERSEN: How often can that be done or is that just done on a one-time basis, the assessment and.

DICK NELSON: Administratively, within the system, they are done as often as necessary now, Senator. Under the Court-Ordered Custody act, of course, it would require a filing of a petition by the county attorney or the Attorney General.

SENATOR Dw. PEDERSEN: Thank you.

SENATOR BOURNE: Thank you. Further questions for Mr. Nelson? Senator Chambers.

SENATOR CHAMBERS: Mr. Nelson, what did you say about the impact of this bill on those with mental retardation?

DICK NELSON: The bill is designed for those with developmental disabilities, Senator, as defined within the act. The largest group of persons with developmental disabilities are those with mental retardation. But there are other chronic cognitive impairments that occur during the developmental period that could also fall within this bill.

SENATOR CHAMBERS: But I want to focus on those with mental retardation...

DICK NELSON: All right.

SENATOR CHAMBERS: Does this bill apply to them?

DICK NELSON: Yes, sir.

SENATOR CHAMBERS: What would appropriate treatment for

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somebody with mental retardation be?

DICK NELSON: This is an area that you and Senator Byars were starting to exchange some ideas on, Senator. Mental retardation itself is not treatable. The behaviors that accompany mental retardation are subject to some treatments.

SENATOR CHAMBERS: Now, may I stop you there?

DICK NELSON: All right.

SENATOR CHAMBERS: I'm going to proceed, not to cut you off.

DICK NELSON: No, that's fine.

SENATOR CHAMBERS: In the environment where this person will be placed, it would be possible to monitor and perhaps regulate that person's conduct in that setting.

DICK NELSON: That's correct.

SENATOR CHAMBERS: How do you know that once out of that setting, the behavior would remain the same as it was while in that setting?

DICK NELSON: It becomes a very difficult issue, Senator, and it is an area that we really leave to the experts, the psychiatrists, the psychologists with experience in developmental disabilities. We currently have a program at the Beatrice State Developmental Center called the Intensive Treatment Service. It's generally a fairly short stay, I'm going to say, I think, 30, 60 days, maybe a little bit longer than that. A person that's having difficulties with behaviors can go into that program and very often can have those behaviors modified to the point where they can return to the community. That judgment is made under the current system by these experts working with the family, the guardian, the individual because it is a voluntary placement.

SENATOR CHAMBERS: So there have been people with mental retardation currently with inappropriate behaviors who are put in this intensive treatment program from which they emerge after a relatively short period of time...

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DICK NELSON: That is correct.

SENATOR CHAMBERS: ...and their behavior remains modified.

DICK NELSON: It remains modified, yes, sir.

SENATOR CHAMBERS: Does that treatment include the administration of drugs? If you're not sure, I don't want to...I don't need to get that deeply into it now.

DICK NELSON: Yeah, and I was just going to say, I'm not sure we can get that answer for you, Senator. I don't know.

SENATOR CHAMBERS: Now, this mentions also that if a person did commit what would be a crime, if he or she were placed on trial but cannot stand trial because of not being mentally competent to do so because of mental retardation, would that person who had actually committed an act be treated the same as one who might potentially treat one...in other words is a distinction made between the one who has actually committed the act and the one who might commit it? Or would it be viewed as a situation where the one who hadn't committed it yet may have those propensities so they would both receive the same kind of...

DICK NELSON: They...

SENATOR CHAMBERS: ...behavior modification treatment?

DICK NELSON: It would be, obviously, Senator, a case-by-case distinction but it would be possible that both of them could receive the same treatment.

SENATOR CHAMBERS: Okay.

DICK NELSON: The law does not require that another individual actually be harmed before action can be taken.

SENATOR CHAMBERS: That's all I have. Thank you.

SENATOR BOURNE: Thank you. Further questions? One quick question, Mr. Nelson. I'm trying to get my hands around how the law, the status of the law today versus what you want to do...you and Senator Byars. Both you and Senator Byars mentioned this individual or this situation in Lincoln.

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Now, the Mental Health Commitment Act would not have...we could not have relied on that act to stop that individual had we known about his propensity to do what he did?

DICK NELSON: Using your words, we could not have relied upon it. The Ment...

SENATOR BOURNE: So we couldn't have used the Mental Health Commitment Act to somehow protect society from this individual?

DICK NELSON: That depends upon whether that individual would be judged to have a mental illness. Mental retardation or other chronic cognitive impairments are not the same as mental illness. If the person is mentally ill as that's defined by the...it's now the Behavioral Health Commitment Act.

SENATOR BOURNE: I thought there was language in that act that talked about a threat to society or threat to others.

DICK NELSON: It...

SENATOR BOURNE: And that would encompass such a situation as retardation.

DICK NELSON: Senator, there is language in the Behavioral Health Commitment Act very similar to the language here. It's actually a little bit broader because it talks about danger of harm to self or others. The Developmental Disability Court-Ordered Custody Act is only danger to others.

SENATOR BOURNE: Okay, great. Further questions? Seeing none, thank you.

DICK NELSON: Thank you, Senator.

SENATOR BOURNE: Next proponent? If you just set them on the side, the page will get them when he returns. Thank you.

MARY GORDON: (Exhibit 2) Senator Bourne, Senators, my name is Mary Gordon and I'm director of the Developmental Disabilities Planning Council. I am testifying today on

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behalf of the planning council. Although the council is appointed by the governor and administered by Health and Human Services, it is a federally mandated independent council. Therefore, the position of the council is not necessarily that of the governor's administration. The council is comprised of individuals and families of persons with developmental disabilities, community providers, and agency representatives that advocate for system change and quality services. The planning council is in support of LB 206. It would create a new process for handling situations in which people with cognitive impairments...we've talked about mental retardation, traumatic brain injury that occurs before the age of 22 and autism are probably the most common ones we would think of. For handling, they pose a significant likelihood of substantial harm to others. As Senator Byars said, this is a very small percentage of people with developmental disabilities that are actually...would commit these kinds of activities. It does provide an appropriate placement. Right now, as you know, the only option really is the prison system or a mental health commitment neither of which is an appropriate placement for a person with developmental disabilities. What this bill will do will give custody to Health and Human Services and charges them with developing a plan to ensure community safety and appropriate treatment. And I know we've talked...you all have talked a little bit about this and about the difference between this and the screening and the assessment. And I just want to clarify, this bill really only applies to people who have actually done an act as defined. I mean, this is not a predictive. The assessment and the screening would be the tools used if someone is believed to may...that they may commit an act. This is too serious of a...this is really too serious of a response to someone that may do something. You actually have to have done something in order for this bill to take in effect. It does provide legal protections for people with developmental disabilities who are a threat of harm as described in the bill. People with cognitive impairments are often very vulnerable both in the penal and mental health systems. Their disability may require unique treatment and supervision not available as a current option. And placement under LB 206 could include anything from a community home to a more secure setting. It will be determined by a Health and Human Service team and approved by the courts. And this process will ensure appropriate

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services to the individual and safety to the community.
Thank you, Senators. Have any questions?

SENATOR BOURNE: Thank you. Could you again repeat your last name and spell it for us? I didn't catch it.

MARY GORDON: Oh, I'm sorry, Gordon, G-o-r-d-o-n.

SENATOR BOURNE: Thank you very much. Questions for Ms. Gordon? Senator Chambers.

SENATOR CHAMBERS: Ms. Gordon, did I understand you to say that the court and HHS will determine the placement of the individual?

MARY GORDON: How it is proposed in this bill, Senator, is that if the court, the judge will determine that this mandatory custody is charged, then the Department of Health and Human Services with the person's team and with specialists will come up with a plan in the least restrictive alternative. And whether it's a behavior modification plan, whatever an appropriate plan for that individual would be, it would come back to the court for the judge to approve that plan. And, obviously, if he doesn't then I'm sure it goes back again until they agree to the plan.

SENATOR CHAMBERS: So family members then have no role...when I say placement, I should have meant the specific site where the person will be located. Who...that determination is made by HHS?

MARY GORDON: Yes, and the courts for this bill. Now on the screening and the assessment that was talked about earlier, if the family is the guardian or the individual is their own guardian then they can choose not to go into...let's say the plan is developed under a screening that there is a safety issue and the individual needs to have these restrictions placed on them. They can't leave the home or whatever. That's voluntary and the guardian and the individual. Once, basically, a crime or once the activity...the act has happened and they go through this. Then the guardian would be...and the family member would be part of the team helping to develop the plan but they wouldn't have the final right. And that is what this bill is about because there are

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individuals whose family members are guardians, currently may refuse the treatment plan and this takes that away from them.

SENATOR CHAMBERS: I don't want to be argumentative but, again, on page 4 when we talk about Section 15, they mention threat of harm rather than the bill applying only to those who have actually done something. So you said, this is not a predictive approach. Is that talking about something different from what you discussed?

MARY GORDON: No, actually, Senator, as we developed this, the language was used for threat of harm and it was...the threat of harm is defined as this is the...you know, obviously, definition. That you...having inflicted or attempting to inflict serious bodily injury on another. It's not the chance that you might or that the threat is there that you're going to. So I would support that maybe threat of harm is maybe being read by many people to mean that it's predictive but it actually is being defined in the bill as we develop this to mean that you actually have inflicted or attempted to inflict serious bodily harm. You have committed an act that would constitute a sexual assault or...

SENATOR CHAMBERS: Okay. Now...

MARY GORDON: Um-hum.

SENATOR CHAMBERS: Not to cut you off,...

MARY GORDON: That's okay, Senator.

SENATOR CHAMBERS: ...but so you don't have to say more than is necessary to enlighten me and improve my education. Would we take the term "serious bodily injury" to mean the same thing that it would mean in other places where it may be defined in statute? And if so, it might be good to define for this bill's purposes what "serious bodily injury" means because the attempt is treated the same as having actually carried it out.

MARY GORDON: Right, Senator,...

SENATOR CHAMBERS: So, that might be an area for a little

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additional work...

MARY GORDON: I agree because during the discussions as we were doing this, we were very clear, for example, that an individual who maybe hits a staff person, that would not be considered seriously bodily harm. That...

SENATOR CHAMBERS: That's why we should define and then we'll be on safer ground.

MARY GORDON: Um-hum.

SENATOR CHAMBERS: That's all that I would have. Thank you.

SENATOR BOURNE: Thank you. Further questions for Ms. Gordon? Seeing none, thank you.

MARY GORDON: Thank you, Senator.

SENATOR BOURNE: The next proponent?

ALAN ZAVODNY: (Exhibit 3) Good afternoon, Senator Bourne, members of the Judiciary Committee. For the record, my name is Alan Zavodny, A-l-a-n, last name Z-a-v-o-d-n-y. It's embarrassing that I had to read that to make sure I didn't mess it up (laughter). Today I offer testimony on behalf of the Nebraska Association of Private Resources. I work for North Star Services serving 395 people with developmental disabilities in 22 counties in northeast Nebraska. It has been my privilege to work with and for people with developmental disabilities since June 15, 1981. The Nebraska Association of Private Resources represents agencies providing support for over 1,000 people receiving services in Nebraska. LB 206 appears to me to be a well-thought out proposal to a problem that certainly does exist. I'm unsure if it's the perfect solution but I'm encouraged by some of the components. I want to focus on a system that currently does not, in my humble opinion, work well for people with disabilities, providers, families, or law enforcement. There are a significant number of people with developmental disabilities that are considered dually diagnosed. Simply stated, this means they experience at least one developmental disability and have been diagnosed with a mental illness. When a person with a developmental disability or a person without a developmental disability

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engages in behavior that is dangerous to themselves or others it is not uncommon for a decision to be made to EPC or Emergency Protective Custody a person. Section 15, lines 3 through 9 of this bill address the definition of what constitutes threat of harm. It would be my interpretation that this act would not involve threat to self but it does address threats to others. Currently, the real avenue available is to initiate an EPC. This used to mean calling law enforcement that would, in turn, transport the individual in crisis to the nearest mental health secure facility. Today it is more common for providers to put the person in crisis in the backseat of a Ford Taurus with a staff member on each side of him or her and have another staff drive 75 miles an hour down the interstate to get to Bryan LGH West. That is providing we have already secured a psychiatrist to admit them. Upon arrival, we go through triage and then admitting. Then we have an interview with a mental health professional before the final decision to admit or not is made. Before you leave, you must assure them that you will come back for the person. Then usually about 48 hours later, you can expect a call to line up a time to come and get the person. You can also expect some type of medication adjustment. Life goes on. The percentage of a person needing more than one EPC appears to me to be high. I want to be clear that my asserting this is based more on anecdotal experience than actual statistical research. You face a difficult dilemma. The question we all face is how to balance the constitutionally guaranteed rights of due process with our responsibility to public safety. We need only to look at the stabbing incident of last spring to remind us that while the overwhelming majority of people with developmental disabilities pose no threat to society, we cannot ignore the few that require something more suited to their unique needs. I urge you to consider LB 206 with careful consideration to offered amendments, and that concludes my testimony. I'd be happy to answer any questions.

SENATOR BOURNE: Thank you. Questions for Mr. Zavodny?
Senator Flood.

SENATOR FLOOD: For the purpose of disclosure, I want, Mr. Chairman, the committee to know here that I do represent Mr. Zavodny as a private practice attorney in Norfolk. Just so that's out there.

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SENATOR BOURNE: Thank you. Senator Chambers.

SENATOR CHAMBERS: What have you done that requires your representation? I'm just kidding (laughter). That's just your baptism.

ALAN ZAVODNY: Maybe it's more of what I will do, I don't know (laughter).

SENATOR FLOOD: That's attorney-client privilege (laughter).

SENATOR CHAMBERS: Here's what I would ask. I had a question. You mentioned amendments. Maybe before I came here, somebody offered them. Has that been done already?

ALAN ZAVODNY: No, but I...in listening to what's happened already, I think you already offered a few good ones.

SENATOR CHAMBERS: Anticipatory consideration, I like that. Okay. (Laughter)

SENATOR BOURNE: Further questions for Mr. Zavodny? Seeing none, thank you very much.

ALAN ZAVODNY: Thank you.

SENATOR BOURNE: Will the next proponent please come forward? And, again, use the on-deck chairs there, if you would, please. Welcome.

DEBORAH WESTON: (Exhibit 4) Thank you. Good afternoon, Chairman Bourne and members of the Judiciary Committee, my name is Deborah Weston, D-e-b-o-r-a-h W-e-s-t-o-n. I'm the executive director of the Arc of Nebraska and I'm testifying on behalf of the Arc of Nebraska. The Arc of Nebraska is a state-affiliated chapter of the Arc of the United States, and we have 18 local chapters across the state with approximately 2,500 members. Thank you for the opportunity to speak with you today. The Arc of Nebraska is testifying in support of LB 206 with concerns. I will address the benefits and the areas of concern which constitute our qualified support today. We want to thank Senator Byars and Nebraska Health and Human Services system for including the Arc of Nebraska and others in the development of LB 206. We

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highly value the inclusive process which allowed full exchange and, at times, a high level of an interactive process. The Arc of Nebraska believes that LB 206 provides for a balancing of protection for people with developmental disabilities and people without developmental disabilities in their communities across the state. Dick Nelson, Mary Gordon have gone through the problems with the current options available, that being the use of the criminal justice system. Many people would be found not competent to stand trial or if it were used they would be subjected to possibly extreme vulnerability in correctional facilities. The Mental Health Commitment Act is also appropriate because those treatments and services are designed specifically for people with mental health needs. This is not always the case with people with developmental disabilities. LB 206 instead provides for appropriate treatment and services in the least restrictive environment for people with developmental disabilities who experience complex needs. LB 206 provides for appropriate interventions for individuals and the development of the skills, behaviors, and supports necessary for that person to live and function without a threat of harm to others. According to the Community Imperative which the Arc of the United States and the Arc of Nebraska supports in supporting documentation, it says, "When a person with a developmental disability is charged with or found guilty of committing criminal offenses, decisions about his or her future placement are under the jurisdiction of the courts and criminal justice system. Some states have developed services for this group of people, but the issue of whether or not they can be served in the community is for the courts to decide, ideally in collaboration with the developmental disability service system. Institutions should not be kept open for them because there are other alternatives the courts can use." LB 206 establishes this framework developed in cooperation and collaboration. LB 206 does address due process protection for the rights of people with developmental disabilities. We do have concerns regarding the use of the Rules of Evidence in Section 20 and the time frames for hearings on Emergency Protective Custody. In consideration of your time, the Arc of Nebraska concurs with the testimony that will be given by Nebraska Advocacy Services regarding these matters. The Arc of Nebraska believes that an annual review does not adequately protect the rights and needs of citizens with developmental disabilities. We recommend that

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quarterly reviews be conducted for each individual. More frequent reviews are a reasonable method to ensure that no person is held in a restrictive placement or environment without necessity. Finally, we recommend that a committee be created by the Nebraska Health and Human Services system to review the implementation and maintain oversight of ordered custody of people with developmental disability. This committee would continue the cooperation, collaboration, and accountability which has yielded very positive results.

SENATOR BOURNE: If you could wrap it up, Ms. Weston.

DEBORAH WESTON: Yes. We would recommend that it include the representatives that help create LB 206 so with changes incorporating our concerns the Arc of Nebraska would be able to support LB 206.

SENATOR BOURNE: Thank you. Questions for Ms. Weston? Seeing none, thank you very much. For those of you that did come in late, we are continuing the Judiciary Committee's tradition of the lighting system due to the number of bills that the Judiciary Committee has. So we're limiting testimony to three minutes so if you could please respect our procedures, we'd appreciate it. Thank you. Next testifier in support of this legislation?

MARK SMITH: Good afternoon. And I will be brief so maybe a cheer will go up now. I don't know. Good afternoon, my name is Mark Smith. I'm from Omaha. I'm here representing myself as a member of the working group that collaborated on the development of LB 206. To that discussion I brought nearly 30 years of experience working in the field of developmental disabilities in Nebraska and also my personal experience as the parent of a child with a disability and I'm also a licensed health practitioner. At times over the years in my work, I have had the occasion to deal with individuals with developmental disabilities who also had violent or destructive behavior across a broad spectrum of circumstances. One was always confronted with the fine distinction in those situations trying to balance the rights of those individuals with the rights of others, the right to live in their community, the right to meaningful work, the right to be free from harm. In participating in this working group, I think we are again confronted with this

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distinction. The question of how we can best protect everyone's rights, avoiding the possibility of automatically consigning certain individuals to circumstances where their individual rights might be ignored. In a way for me, it was a matter of contrasting how this bill might affect the life of my son who has a developmental disability and his sisters who do not. In the end, I think the process employed in the development of this bill tried to and was successful for the most part in accomplishing this. While I share the concerns that others have stated or will state regarding LB 206, in particular, Ms. Weston's comments from the Arc of Nebraska and then also what you'll be hearing from Nebraska Advocacy Services, decreasing some of the time lines for the inclusion of the Rules of Evidence and in some more of the review processes that look at the potential for an annual report to the Legislature and so on. With those stated, I personally support the passage of the bill. And that concludes my testimony.

SENATOR BOURNE: Thank you very much. Questions for Mr. Smith? Seeing none, thank you very much. Appreciate your testimony. Are there further testifiers in support? Is this the last testifier in support? We see a show of hands? Thank you.

MARY CAMPBELL: Mr. Chairman, members of the Judiciary Committee, my name is Mary Campbell, C-a-m-p-b-e-l-l, representing two developmental disability regions, numbers five and two. I'd like it acknowledged for the record that persons with developmental disabilities are perhaps far more likely to be victims rather than perpetrators of aggressive acts towards others. Having said that, we are here in support of the intentions of Senator Byars to craft reasonable protections in those instances where these individuals can be a danger to themselves or to others. And we certainly want there to be no less stringent due process accorded them that would be the case for all others in society. We concur with many of the questions and concerns raised by Senator Chambers and some of the other speakers and in the interests of time rather than repeat all those to you, please have for the record our notes that we echo those and would pledge to continue as always to work with Senator Byars and the advocacy groups in trying to get a good solution to what we think to be a problem that will arise in really very few instances.

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SENATOR BOURNE: Thank you. Questions for Ms. Campbell?
Seeing none, thank you.

MARY CAMPBELL: Thank you.

SENATOR BOURNE: First testifier in opposition?

JOHN LINDSAY: Chairman Bourne, members of the committee, my name is John Lindsay, appearing as a registered lobbyist on behalf of the Nebraska Association of Trial Attorneys. We have no position on the bulk of the bill but would call your attention to Section 33 of the bill which contains an immunity provision for any act taken in good faith under the bill. That provision is drafted...even for an immune provision I would think it would need some work. But NATA's position has traditionally been in opposition to immunity provisions for the reason that when we relieve people of accountability for their actions we breed carelessness. If we know up front that we're not going to be liable regardless of how we perform an action we're less likely to be careful in performing that action. The problem with this particular immunity provision is that it allows that immunity for any act taken in good faith. Good faith is a fairly broad standard. It goes to what a person's intent is doing in undertaking the action but not in how that action is undertaken. The examples that I believe would be relieved of liability in this case might include a police officer sent to pick up and hold in custody. A person under this act could pick up the wrong person but do so in good faith and there would be no liability. A developmentally disabled person could be injured in a car wreck while being transported to or from a court hearing and there would be no liability. In fact, someone transporting that person to or from a court hearing could injure an unrelated person and it could be argued that there would be no liability. A treatment program could overmedicate or give the wrong medication to a developmentally disabled person. And, again, if it's done in good faith there would be no liability. Again, as I mentioned, we have no position on the rest of the bill but we do believe that especially when we're doing something as important as looking at legislation that would provide a mechanism for depriving people of something as important as their individual liberty, that we ought not take the additional step and relieve people of

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liability for doing so in a careless fashion. We would urge that Section 33 be deleted and that at that point we would have no position on the bill. I'd be happy to answer any questions, Mr. Chairman.

SENATOR BOURNE: Thank you. Questions for Mr. Lindsay?
Senator Chambers.

SENATOR CHAMBERS: Mr. Lindsay, if that section were deleted a person would then be held to a standard of due care or negligence. If they acted with due care there would be no liability...

JOHN LINDSAY: That is correct.

SENATOR CHAMBERS: ...even if an injury occurred to a person.

JOHN LINDSAY: That is correct.

SENATOR CHAMBERS: With this immunity provision, a person could actually be negligent and not be liable as long as it could be said that the action was taken in good faith.

JOHN LINDSAY: Yes, Senator, and I would argue that it could actually be even reckless and have the same immunity.

SENATOR CHAMBERS: Okay. That's all that I would have. Thank you.

SENATOR BOURNE: Thank you. Further questions for Mr. Lindsay? Seeing none, thank you. Are there any other testifiers in opposition to the bill? Seeing none, neutral testimony? I apologize for the lowness of the table.

KATHY HOELL: Oh, that's okay (inaudible) work.

SENATOR CHAMBERS: Well, if it was still too low I was going to have him crawl out there and put it on his back and kind of raise it (laughter). We have ways to deal with those situations, if necessary.

SENATOR BOURNE: Senator Chambers looks more like Hercules than I do so he would (laughter)...

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SENATOR CHAMBERS: And that's why he wouldn't have to do it. He could assign somebody else (laughter).

SENATOR BOURNE: Welcome to the committee.

KATHY HOELL: (Exhibit 5) Thank you, Senator Bourne, members of the committee. I'm Kathy Hoell, K-a-t-h-y H-o-e-l-l. I'm the executive director of the Nebraska Statewide Independent Living Council also known as NESILC. NESILC is an organization that exists because of a mandate under the Rehabilitation Act as amended in 1992 to advocate for independent living for people with disabilities. NESILC has chosen to testify in a neutral position but we do have grave concerns regarding the language in LB 206. There are some really good things about this bill. We're happy to see that the term developmental disability was tightly defined and that the state is utilizing the least restrictive environment for providing service which is outlined in the Supreme Court's decision in Olmstead v. L.C. However, we are concerned that in the fiscal note that is attached to this bill it appears that all individuals ordered into custody under this act will be placed in Hastings Regional Center. That is not the least restrictive environment that is outlined by the text of this bill. The bill does outline the rights of the individual. But in item number eight under Section 18, it states that transcripts will be made available for appeal. We feel that it's imperative that those transcripts be made available in an accessible format because it is possible to be developmentally disabled as outlined by this bill and have other impairments such as a visual impairment and so large print would be necessary. Nebraska Advocacy will be addressing some of our concerns about the time line and evidentiary responsibilities. So in closing, there is hopeful language in LB 206. But I'm hoping that it can be improved upon and we also feel that there needs to be an accountability standard established for this bill. If there are any questions, I'd be more than happy to answer them.

SENATOR BOURNE: Thank you for your testimony. Is it Mrs. Hoell?

KATHY HOELL: Hoell.

SENATOR BOURNE: Hoell. Okay, thank you. Questions from

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the committee? I just have a quick one so. I noticed that as well about the Hastings Regional Center.

KATHY HOELL: Um-hum.

SENATOR BOURNE: Do you have suggestions as to?

KATHY HOELL: Actually, I'm thinking the language in the bill is right on where it should be. It's the language in the fiscal note.

SENATOR BOURNE: Okay.

KATHY HOELL: And so I'm not sure if the language in the fiscal note is going...they're not allotting any money for other forms of treatment so I'm not sure where that stands.

SENATOR BOURNE: Okay. It's a good point. I think maybe Senator Byars will clear that up for us in his closing. Further questions from the committee?

SENATOR CHAMBERS: Just a comment to tailgate on what you and the chairman were speaking about. That's kind of what I was trying to get to earlier when I was asking, where is the site exactly that a person will be sent if the treatment is required? Because I didn't see Hastings or Beatrice mentioned in the bill itself but they had been referred to... KATHY HOELL: It's not...

SENATOR CHAMBERS: .. and one of the testifiers had talked about community and other types of situations so we want that established for sure...

KATHY HOELL: We want...

SENATOR CHAMBERS: ...as being what might happen.

KATHY HOELL: For independent living, that is imperative that it be established. We cannot support anything that is going to restrict people with disabilities unnecessarily.

SENATOR CHAMBERS: Okay.

SENATOR BOURNE: Further questions? Seeing none, thank you for your testimony. It's appreciated.

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KATHY HOELL: Thank you very much.

SENATOR BOURNE: Further neutral testimony?

ERIC EVANS: (Exhibit 6) Good afternoon, Chairman Bourne, members of the Judiciary Committee. My name is Eric Evans. That's E-r-i-c E-v-a-n-s and I am the deputy executive director at Nebraska Advocacy Services, the center for disability rights, law and advocacy. I am here today to testify in a neutral capacity in regard to LB 206. But let me begin by saying that we are strongly supportive of the intent in LB 206 to provide for court-ordered treatment instead of sending people with developmental disabilities, who are determined to pose a threat of harm to others into inappropriate settings such as jails, prisons and regional centers. We greatly appreciate the strong collaborative effort to address this complex public policy issue undertaken during the past year which involved both representatives from the Legislature, the Department of Health and Human Services, professionals in the field of developmental disabilities and advocates. Our neutral testimony is driven by the fact that we are the most likely entity to litigate what we see as substantive procedural and due process issues as well as equal protection issues with LB 206 as currently drafted. We have substantive concerns regarding the exclusion of the rules of evidence in Sections 20 and Section 26. And it is our position that there be no exception to the Nebraska Evidence Rules and that the rules be applicable to all proceedings under this act. And if you look at the Mental Health Commitment Act there is language in that act that specifically states that all hearings are...the Rules of Evidence are applicable hearings under that act. Also, we are concerned in Section 26 on page 10, line 6, that the evidentiary standard of preponderance of evidence is too weak and we would like to see that standard changed to clear and convincing standard of evidence. Secondly, we're deeply concerned that the Nebraska Rules of Civil Discovery do not appear to apply to all proceedings under this act. The rules of discovery are necessary if the proceedings under the act are to afford the plaintiffs the maximum benefits of the Rules of Evidence. Otherwise, it may be trial by ambush. We are concerned that the time frames for which an individual can be held in emergency protective custody as specified in

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Section 20 are unreasonable and unconstitutional. Particularly on page 7, line 4 is a requirement for a subject to be evaluated within seven days if they're in emergency protective custody, we feel that's significantly longer than necessary. Under the Mental Health Commitment Act, it's 36 hours. Our position is that 72 hours would be the maximum that we would see as being reasonable or otherwise it would be problematic. Also, on page 7, line 13 is a requirement for an expedited hearing. Again, that's a ten-day requirement. If we look at the Mental Health Commitment act, there's a disposition hearing that's required by the Mental Health Board within seven days from placement in the emergency protective custody. So we would feel more comfortable with a seven-day time frame for that expedited hearing. And also in terms of the 45 days during which a person can be held in protective custody without there being a trial on the merits of the petition, we find that to be particularly problematic. And we feel that 14 days after the expedited hearing date would be a more reasonable time frame. We also would agree with Mr. Lindsay's comments about striking the immunity language there. We're also in agreement with the comments made by Deb Weston from the Arc regarding the review proceeding, making that on a quarterly basis so there doesn't have to be a court review on a quarterly basis but there would be some kind of ongoing review on a quarterly basis by an external review team to see if it's still necessary for people to be... that their liberty be restricted and to ensure that they could be placed in a less restrictive environment. And, finally, I think the... we'd like to have some kind of a report to the Legislature regarding the status of those individuals who are in custody under this court-ordered treatment act as well as any problems regarding the implementation of this act. And one other comment, just if I may, Senator... SENATOR CHAMBERS: Mr. Evans,...

ERIC EVANS: Yes.

SENATOR CHAMBERS: I'm kind of a hatchet man and it hasn't been used yet but I have a bell that would scare everybody out here (laughter). When the red light comes on, if a person doesn't stop then I ring the bell. I haven't done it yet and I don't want to do it but if that happens, I've been authorized to do that (laughter). So, it would help me to not be a worse guy...

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ERIC EVANS: I'm done.

SENATOR CHAMBERS: ...than I'm viewed to be if when the red light comes on people would...

ERIC EVANS: I'm done.

SENATOR CHAMBERS: Okay (laughter).

SENATOR BOURNE: Thank you (laugh). Thank you, Mr. Evans. I will say, though, I am familiar with the Nebraska Advocacy Service and I think you guys are in the trenches, so to speak. And the reason I didn't ask you to stop your testimony is because I think given the nature of what you do, your suggestions were most helpful and so...but, thank you. Are there questions for Mr. Evans from the committee?

SENATOR CHAMBERS: I have one.

SENATOR BOURNE: Senator Chambers.

SENATOR CHAMBERS: Mr. Evans, I have been interested in the area you and Ms. Weston and probably from my questioning you could see that. Could we maybe get a formulation of some amendments or would that be too arduous for you?

ERIC EVANS: Yes. No, no, we can...

SENATOR CHAMBERS: That would help me a lot if you will.

ERIC EVANS: ...we would definitely be willing to work on putting through what we'd like...putting in what we'd like to see in replacement of what's already in there so...and, and...

SENATOR CHAMBERS: And when could I look for something like that or the committee?

ERIC EVANS: We could get that to you by tomorrow. Yeah.

SENATOR CHAMBERS: I like that.

SENATOR BOURNE: Excellent. Further questions? Again, I want to thank you, Mr. Evans, for saying. I mean, a lot of

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times these concepts are difficult to wrestle with and to come in with firm, concrete suggestions on how to make it better, it's appreciated. Thank you.

ERIC EVANS: You're welcome.

SENATOR BOURNE: Are there further testifiers in a neutral capacity? Seeing none, Senator Byars to close.

SENATOR BYARS: Thank you, Senator Bourne and members of the committee. We certainly concur. We think the suggestions that have been made are good, are healthy, good policy. We want to work with the committee and with those people that came in in a neutral position and Mr. Lindsay to make certain that we have good legislation. And our ultimate goal is to make sure that the rights of the people with disabilities are totally protected. We thank you very much.

SENATOR BOURNE: Thanks. Questions for Senator Byars?

SENATOR CHAMBERS: One question. It means then that your and my only battle will still be on seat belts?

SENATOR BYARS: We won't have a battle, sir. I'm sure you're in complete compliance with my thoughts this year.

SENATOR CHAMBERS: I'm sorry I asked (laugh).

SENATOR BYARS: I have no doubt about that (laughter). I am correct in making that assumption, am I not?

SENATOR CHAMBERS: We'll talk later (laughter).

SENATOR BOURNE: Thank you. That will close the testimony on LB 206. Senator Byars to open on LB 93.

LB 93

SENATOR BYARS: Thank you, Senator Bourne and members of the Judiciary Committee. I am Senator Dennis Byars, B-y-a-r-s from the 30th Legislative District here to introduce LB 93. LB 93, if you note in your fiscal note I think is as well described in brief as anything that I could describe. It provides an addition to any fine or penalty that's

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prescribed by law at this point, a surcharge of \$25 that shall be imposed on defendants convicted of any state or local criminal offense. In 2003, excluding juvenile and traffic offenses which would not be included, there were 133,328 criminal filings in the state of Nebraska; 124,819 from county courts and 8,509 from district courts. The court estimates that 90 percent of the filings result in a conviction and the estimated revenue from this bill would be \$2,999,875. And the bill provides how to use that money and provide for 30 percent of the funds raised up to \$225,000 to be credited to the Victims' Compensation Fund; 30 percent up to \$290,000 credited to the Victim Notification Program known as VINE and the remaining funds credited to the Victim and Witness Assistance Centers. LB 93 is clearly designed to provide funding for those several areas that I just discussed briefly but all of which addressed the needs of crime victims. And, as I said, they include the support and maintenance of Nebraska's computerized VINE. That's Victim and Identification Notification Everyday system, the expansion of the victim-witness unit statewide and support for the Nebraska Coalition for Victims of Crime and reinstatement of funding for Nebraska crime victims. There will be testifiers behind me that will go into the details about why these dollars are needed to be able to maintain a program that has been doing very positive things. Most all of this is done under the supervision of the Crime Commission. They award grant funds across the state and rather than bely the other bills that this committee finds important, it's an extremely important piece of legislation. It is clearly a spending bill, i.e. you can't walk away from it. It's going to assess additional costs, if you will, to people who go to court in the state but narrowly defined. And I would then ask that you hear the testimony of those who work in these programs and tell you how valuable they are and why it is that that funding needs to be increased.

SENATOR BOURNE: Thank you. Questions for Senator Byars?
Senator Chambers.

SENATOR CHAMBERS: Senator Byars, I've been here in the Legislature a long time. I'm familiar with this program and I know that the legislators, by and large, are not sympathetic and are not going to appropriate General Fund money. But the issue, if there is an issue relative to the worthy goals is not one that I'm considering in the

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questioning I have of you but the practicalities and realities. When a crime exists in this state, it exists only because the Legislature has defined certain conduct as criminal. So the Legislature determines what conduct is criminal. The Legislature in establishing its policies will look at the nature of that offense and determine an appropriate penalty. When a fine is set, the Legislature has said that it believes that an appropriate penalty in the form of a fine is whatever that amount is. What this bill is asking for really is a punishment beyond what the Legislature has determined is sufficient. Do you believe in punishing people beyond what the law, after it has been seriously considered, do you believe in punishing a person beyond that in order to raise money and the only purpose is to raise money?

SENATOR BYARS: I think that is a public policy decision, Senator, that is up to you and I and our 47 colleagues.

SENATOR CHAMBERS: Yes, so I'm asking you your view.

SENATOR BYARS: My view is I think it's appropriate.

SENATOR CHAMBERS: To punish beyond what the judgment is. Well, let me ask it a different way.

SENATOR BYARS: I think we're making a change in what we feel is appropriate.

SENATOR CHAMBERS: Let me ask it a different way. This money has nothing to do with the punishment imposed for the offense, does it? Because if it did, it's not a surcharge; it's a fine. It's beyond the punishment, isn't it?

SENATOR BYARS: Yes, it is.

SENATOR CHAMBERS: Where do all fines go?

SENATOR BYARS: They, as I understand it, they go to the school system, they're distributed among our schools in the state in the area where the fine is imposed.

SENATOR CHAMBERS: So if this money is going to go someplace else, it's obvious that it's not a fine. Is that true?

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SENATOR BYARS: That is correct.

SENATOR CHAMBERS: So it's not for the purpose of punishing the person in the strict sense of the word. Is that true?

SENATOR BYARS: Probably in the strict sense of the word, no.

SENATOR CHAMBERS: So we're heaping something on top of a person beyond what the Legislature has determined the punishment should be. Isn't that true?

SENATOR BYARS: That is correct.

SENATOR CHAMBERS: Do you see a difference between a surcharge as this is called to fund various operations that have nothing to do with the operation and maintenance of the judicial system and fees which are imposed to fund directly the operation of the court system? Do you see a difference between those two?

SENATOR BYARS: Yes.

SENATOR CHAMBERS: Do you think that cash register justice is appropriate for Nebraska because that's what this amounts to, isn't it?

SENATOR BYARS: Yes and yes.

SENATOR CHAMBERS: And you believe in cash register justice?

SENATOR BYARS: I think it can be not only appropriate but necessary.

SENATOR CHAMBERS: Are salaries for people going to come out of this money?

SENATOR BYARS: I presume there are but I would leave that to someone else to answer that question, Senator, because I'm not certain.

SENATOR CHAMBERS: Then I'm going to ask you from the standpoint of your being a policymaker, should we impose a penalty, a punishment beyond what the Legislature has set as the punishment in order to give salaries to people who have

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no employment within the judicial system?

SENATOR BYARS: I think these dollars were administered by the Crime Commission. I think this Legislature as a policy decision has made the appropriate decision that administration of these funds is necessary and that as good public policy, we need to do that.

SENATOR CHAMBERS: Does the Crime Commission get its money through surcharges or through Appropriations by the Legislature?

SENATOR BYARS: I think they get their money from Appropriations by the Legislature as well as some federal funding. I'm not sure whether any of the surcharges, if you will, or court costs go to the Crime Commission. I'm not familiar with that so I'm not sure.

SENATOR CHAMBERS: Does any of this money go to support any of the organizations that you mentioned in your opening?

SENATOR BYARS: Yes.

SENATOR CHAMBERS: Those are not state organizations, are they?

SENATOR BYARS: They...

SENATOR CHAMBERS: They're not state agencies or are they?

SENATOR BYARS: No. They're given grants by the Crime Commission so no, they are not state agencies, not to the best of my knowledge.

SENATOR CHAMBERS: Do people work for those agencies?

SENATOR BYARS: Yes.

SENATOR CHAMBERS: Are they given a salary?

SENATOR BYARS: I think there are some volunteers; there are some probably paid.

SENATOR CHAMBERS: Would the salary for some of those people come from this surcharge we're talking about here?

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SENATOR BYARS: I would make an assumption, yes.

SENATOR CHAMBERS: So then you do believe we ought to put a punishment on a person beyond the penalties set by law to provide a private person a salary.

SENATOR BYARS: That is our choice in public policy.

SENATOR CHAMBERS: And you agree with that as sound public policy.

SENATOR BYARS: I think that the programs are so absolutely valuable that, as you know, and you do also, we search for ways of funding these programs that are not necessarily traditional. If it means that the...and I guess we're talking about the ends justifying the means...

SENATOR CHAMBERS: No, you are. I'm not...

SENATOR BYARS: Yes, I am.

SENATOR CHAMBERS: Okay.

SENATOR BYARS: And I apply we to me, excuse me, Senator.

SENATOR CHAMBERS: Well, that's the royal we and you have been a noble person so I'll let you get away with it this afternoon.

SENATOR BYARS: Many thanks, Senator.

SENATOR CHAMBERS: You're welcome.

SENATOR BYARS: I feel that these areas badly need funding. I think victims are many times not just victims that have been assaulted in some way but those who have been threatened. This gives...

SENATOR CHAMBERS: Isn't that beside the point of the questions I asked you?

SENATOR BYARS: ...yes, yes, it is. It's my personal opinion.

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SENATOR CHAMBERS: Would you want to see this methodology used and applied across the board for worthwhile programs which will be presided over by people who need a salary and rather than the state appropriate sufficient money to operate these programs, we put surcharges on people to provide salaries for others?

SENATOR BYARS: I would much prefer that we were honest enough to use General Fund dollars to fund these programs but we sometimes choose not to and we find other vehicles, sir.

SENATOR CHAMBERS: Do you think when General Fund money is not appropriated for these programs, it's a question of dishonesty or a question of not agreeing with the program as one that ought to be funded from General Funds?

SENATOR BYARS: I'm not sure. It could be either...neither one. It could be a situation of not disagreeing with the program, disliking the program or it could be a situation where it was felt on a personal basis, a policymaker, that you didn't have the revenues available at that particular point in time so you make a choice as to where you spend the General Fund dollars.

SENATOR CHAMBERS: And as a practical, knowledgeable politician, you know that there is not sufficient support in the Legislature to provide money from General Funds for this program?

SENATOR BYARS: At this time, it would be my assumption that would be the case, yes, Senator.

SENATOR CHAMBERS: And not just at this time but at former times too, isn't that true?

SENATOR BYARS: That is correct.

SENATOR CHAMBERS: That's all I will ask you at this point but I wanted some things on the record. Thank you, Senator Byars.

SENATOR BYARS: Appreciate that.

SENATOR BOURNE: Further questions for Senator Byars?

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Senator Byars, just to further what Senator Chambers indicated, I think even though it's referred to as a surcharge, it's still a fine or a penalty. And I don't...as admirable as the entities receiving the money and as good a work as they do, how do you get beyond the constitutional issue, that whether, you know, whether you refer to it as a surcharge or it's still a penalty or a fine. And I'm struggling with how to get beyond the fact that the Constitution says it goes to the school fund.

SENATOR BYARS: I can't answer that question, Senator.

SENATOR BOURNE: Okay. Thank you very much. Further questions? Seeing none, thank you. Could I get a show of hands of those individuals in support of this bill? I see one, two. Individuals testifying in opposition? I see none. It's a good sign, Senator Byars.

SENATOR BYARS: I will waive closing, Senator.

SENATOR BOURNE: Thank you very much. Any neutral testifiers? I see one neutral testifier. Would the proponents step forward? Thank you. Welcome to the committee.

JOANNA SVOBODA: (Exhibit 7) Good afternoon, Senator Bourne and members of the Judiciary Committee. My name is JoAnna Svoboda, J-o-a-n-n-a S-v-o-b-o-d-a. I am here representing the Nebraska Coalition for Victims of Crime. I am currently the president and I have something to read. And I could answer some of your questions too. But the purpose of this bill is to provide consistent funding for the Crime Victims Reparation Act, the VINE Notification Program and for crime victims centers. It would initiate a \$25 surcharge that would be used to fund these programs in a consistent manner. In 1978 the Legislature created the Crime Victims Reparations Fund. The purpose of this fund was to compensate innocent victims for losses, for medical, funeral expenses, and lost wages which are not covered by either private insurance or other public assistance programs. Currently, the appropriations for this program is \$20,000 per year. In 1982, the Legislature passed the Crime Victims Bill of Rights which is LB 477 which created the Crime Victim and Witness Assistance Fund for the purpose of providing ways to improving the attitudes of victims and

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witnesses towards the criminal justice system and to provide for a faster and more complete recovery by victims from the effects of the crime through establishment of victim and witness assistance centers. The current appropriations for this program fund is about \$53,000 through the state. Both of these programs have been funded, cut, eliminated, and refunded and cut again. The VINE victim notification system is a relatively new program. Nebraska was the nation's sixth state to provide VINE statewide coverage. VINE is an automated notification system that provides crime victims and citizens with information about the custody status of offenders. People can also register to be notified of changes in an offender's custody status and provide information about upcoming parole hearings. The state currently uses \$50,000 from General Funds to provide match for a Crime Victim Act grant from the federal government. It costs about \$270,000 per year for the VINE program. Victim assistance programs depend upon federal VOCA, Victims of Crime Act funds for their existence. The crime victim reparation program also receives a 60 percent match from the federal government. Recently we have been advised that the federal VOCA funds are in danger of being rescinded in 2006. We have also learned that new federal legislation may prohibit notification systems from being funded by victims of crime act money. With millions of dollars of state and federal funds that enforce laws, prosecution, courts, corrections, and crime prevention, it only makes sense that the state looks at providing support and assistance for victims of crime. Our state has a constitutional amendment that affords victims certain rights. Last year the Legislature passed enabling legislation for the constitutional amendments. We believe that the surcharge would be well spent as a restorative justice effort. A statewide plan is being developed and it is our intent to have a victim assistance program in every judicial district and have a stable funding source for victim reparations and VINE. Thank you.

SENATOR BOURNE: If I could get you to give a final thought or just finish?

JOANNA SVOBODA: Right now victim assistance programs are not state programs but we do work for city and county government. So we really...we feel that we are a part of the criminal justice system at this point. We're just

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looking for some sort of stable funding for the programs.

SENATOR BOURNE: Understood. Thank you. Questions for Ms. Svoboda. Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Hi, JoAnna. A couple of questions. Do you get money from the local governments, county and city?

JOANNA SVOBODA: The local governments have to come up with 20 percent match. Usually that's in kind for our office space, telephone, various things like that.

SENATOR Dw. PEDERSEN: And that's a match of federal funds?

JOANNA SVOBODA: Yes, matched to federal funds.

SENATOR Dw. PEDERSEN: Okay. I just have one simple question here. Part five on Section 1, it says, money paid to the court by defendant shall be applied to the surcharge before being applied to any fine.

JOANNA SVOBODA: Yes.

SENATOR Dw. PEDERSEN: Are the schools in approval of that?

JOANNA SVOBODA: We have an Attorney General's opinion that stated this surcharge is separate from the school, the fines that go toward the schools. So that's what we're basing this on is the Attorney General's opinion.

SENATOR Dw. PEDERSEN: It's different. I mean, that's quite a statement itself to say the fine will go on hold, we come first. Thank you.

SENATOR BOURNE: Thank you. Further questions. Before we go on to Senator Friend, if there's any way you can forward that Attorney General opinion on to us,...

JOANNA SVOBODA: I have it in...

SENATOR BOURNE: It's in there? Okay, thank you. Senator Friend.

SENATOR FRIEND: Thank you, Senator Bourne. Ms. Svoboda, I

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wanted to follow up after Senator Byars' testimony about...you had mentioned in here, in regard to 1978 I think the Crime Victims Assistance Fund was created, 1978, is that correct?

JOANNA SVOBODA: The reparation fund, yes.

SENATOR FRIEND: This essentially funds something, it might not still be called that but the surcharge is...it's additional. I mean, there was a surcharge created that in 1978 is...am I correct in...?

JOANNA SVOBODA: No, no, it was funded through the general funds. These programs were funded through general funds. There was never a surcharge for that.

SENATOR FRIEND: To the best of your knowledge, has there ever been any...and I guess it goes along the line of questioning that we've been moving here. Has there been any constitutional challenge, legal challenge, to a surcharge of this nature to date?

JOANNA SVOBODA: To date, no,...

SENATOR FRIEND: In this state?

JOANNA SVOBODA: Not that I'm aware of, not that I'm aware of. We used...well, the Attorney General's opinion is in the handout I have. I can't answer that.

SENATOR FRIEND: Thanks.

JOANNA SVOBODA: Um-hum.

SENATOR BOURNE: Thank you. Further questions? Senator Chambers.

SENATOR CHAMBERS: Just for the record, this opinion is dated March 19, 1993, opinion number 93018 by then Attorney General Don Stenberg regarding the constitutionality of LB 619 which was the bill at that time. That's for the record. And this is not to interrogate you about the opinion but just to put a ping or two into it. There's a statement in here that says, it would be in the second paragraph, the last sentence. "It is our opinion that the

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surcharge would not operate as a fine or penalty for the purposes of the Nebraska constitutional art provision but would properly be characterized as liquidated damages collected for the benefit of those who have suffered uncompensated injury by the wrongful act of criminals." That's one of the most unlawyerlike statements I've ever heard. If liquidated damages are paid, they're paid by the person who perpetrated the wrong to the person who suffered the wrong. If I, Mr. A did not harm Ms. B they cannot make me pay liquidated damages to Ms. B who was harmed by Mr. C so this opinion, I think, is not a very strong basis for anybody to believe that a surcharge would be constitutional. But let me presume that it is. The point I was trying to make in the beginning is that the goals and purposes of the program are not coming under attack by me. What I am opposed to categorically is a surcharge as they call it and my questioning showed what my attitude was. If a program such as this is created by the Legislature but the Legislature does not believe in funding it, it's clear that a purpose other than to create a viable program existed. There was a senator here named Carol Pirsch who was always pushing for what she called victims' rights and all she wanted was to get something in the books. Whether it was funded or not was irrelevant. So what was done and I used to criticize it, you create a lot of false expectations on the part of the public who are unaware of the politicking and the insincerity going on. They see language in the law and think that the Legislature meant what it said and not that it was putting something on the books to accommodate a particular senator. And the reason I mentioned Senator Pirsch by name, people can go back to her and tell her I said this but we can look at the record. So by the Legislature handling this matter in the way it has and not just cutting it since it had no intent to fund it, it has created expectations that will never be realized. And it will be better if the whole thing went away instead of leading people on so that very sincere, very dedicated people such as yourself and others who work to try to help victims will feel there's a basis to come to the Legislature looking for something that's not there. I seem like the cruelest person here because I will be the one who is direct and will state honestly the way things are. If what I'm saying is not true, a senator ought to stand forth and say, the Legislature will fund this program. You will find senators who know what I'm saying is true but they won't say

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it because they know I will. I'll be the bad guy but my responsibility as a public official is to tell you the truth as I perceive it. Now if what I say seems true to me, is not true in the opinion of my colleagues they ought to declare it and say they're going to push the Legislature to fund this program. I have made it clear I'm opposed to this bill. I'm opposed to the surcharge. And I've stated my view that the Legislature as a whole is opposed to funding this program and I'm not saying that to stop other people from testifying because you want to get things on the record. I think it's futile. I think you're asking for a piece of bread of the Legislature and you've going to be given a stone but that's just my view. And I'm saying this so you will not get the opinion that I'm downplaying the seriousness or the worth of what you're trying to do. But it troubles me when I see people who are hurting or who are trying to help those who are hurting, coming before the Legislature and saying, these are my wounds. I'm bleeding, I need help, I can't get it. Will you help me? We should just tell you, if it's our intent not to help. There's no help here. There's no room in this inn. Now if there's a stable somewhere go there but you're not going to get it here. You can condemn me for a lot of things but not for being dishonest.

SENATOR BOURNE: Thank you. Further questions or statements for Ms. Svoboda? Seeing none, thank you very much. Next testifier in support. And, again, thank you. We'll please continue to use the on-deck chairs. Any further testifiers in support, please come forward. Thank you. Welcome to the committee.

JOANIE BRUGGER: Good afternoon, Senator Bourne and Judiciary Committee. My name is Joanie Brugger, J-o-a-n-i-e B-r-u-g-g-e-r. I'm also a member of the Nebraska Coalition for Victims of Crime. In the past year victimization in Madison County, Nebraska, as well as throughout the entire state has been on the rise. More specifically, Madison County recently completed the mitigation phase of a US Bank murderer by the name of Jose Sandoval. Jose Sandoval proved to be the ringleader of four defendants that entered a branch of a US Bank and brutally killed four employees and one customer on September 26, 2002. Services that were provided to the families' members included but were not limited to transportation, accompaniment to court, hearings,

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explanations of proceedings, emotional support, locating discounted hotel rooms, monetary donations to assist in defraying family members' costs, providing meals, corroborating with employers, and making referrals to persons today. The US Bank situation is just a needle in the haystack as far as victims in Nebraska are concerned. As funding is cut, death charges are on the rise, sexual assaults and domestic violence calls continue to pour in, robberies, burglaries, child abuse, and DWI cases are rampant. Victims have not always been an active part of the justice system and this must change. Including victims and victims' services into the criminal justice system is imperative to complete the ring of justice. Funding declines and a surcharge has become necessary to enable compensation for victims' programs to continue to supply services to victims of crime. I would urge you to support LB 93.

SENATOR BOURNE: Thank you. Questions for Ms. Brugger?
Senator Chambers.

SENATOR CHAMBERS: Again, for clarification, if an employee of the state or an agent of the state harmed a person, that person could seek compensation or damages from the state because it was a person employed by the state acting on behalf of the state who did the wrong. When random criminals freelancing out there do harm to others, on what basis should the state be held responsible to pay damages for the wrong done by those over whom they have no control?

JOANIE BRUGGER: Well, I guess one of the answers I would have is as Ms. Svoboda had stated, Nebraska has or had what's called the Nebraska Crime Victims Reparations Fund. And in that funding, a victim of crime could receive up to \$20,000 in compensation. Those fundings could be used for like medical expenses or burial expenses if a family member had been killed and I believe up to \$2,000 per family member if counseling services were in need of.

SENATOR CHAMBERS: And that was never adequately funded (inaudible)...

JOANIE BRUGGER: Well, what had happened was so each person would be allotted \$20,000 and as funding has been cut, last year Nebraska received a total of \$20,000 for the entire

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state of Nebraska which basically meant one to two people would have any type of relief.

SENATOR CHAMBERS: Or they might prorate it and give a little bit to everybody...

JOANIE BRUGGER: Correct.

SENATOR CHAMBERS: ...but here's the underlying question that I'm asking you and if you'd rather not answer it I'm not going to badger you. Other than the fact that unwisely the Legislature put in place the law that you mentioned and others have talked about and may mention again. On what can responsibility of the state be placed for compensating people harmed by criminals? What is the theory? Now I'm telling you it was strictly a political maneuver to get that kind of legislation on the books that never should have been there but let's forget that and start afresh. If you had to present the argument, on what would you base the liability of the state for the action of criminals? Because the state punishes them. The state has made their conduct a violation of the law.

JOANIE BRUGGER: One of the problems that I see happening in the criminal justice system as many times judges do order criminals to pay restitution. However, the district courts are notorious for not upholding those orders and restitution nine times out of ten is not made or restitution in felony charges are not ordered because that person is to go to prison and the judge finds that the offender is unable to pay any costs so, once again, you have a citizen that, you know, has suffered some sort of damages and has no other relief.

SENATOR CHAMBERS: But that wouldn't be the state's fault, would it?

JOANIE BRUGGER: It's not the state's fault but as the Legislature, do you feel that they look over the best needs of the state's citizens?

SENATOR CHAMBERS: I've given my view. I don't think the state should have gotten into this activity. You mentioned, I think, and I don't know if the other testifier did, increasing the number of certain crimes especially domestic

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violence and so forth. Well, the state would never have enough money even if it desired to pay the damages that all of these people suffer at the hands of criminals. If they put a limit, somebody might say that's arbitrary; \$20,000 is all this person needs but I'm going to have lifetime medical bills. I'm in pain all the time and mentioned the other things. And the state says, well, no, this is the cutoff. Then the criticism is that it's unfair so there has to be initially the establishment of a basis for making the state liable for the conduct of a criminal and personally, I don't think the state is unless it's a criminal in the state's custody and the state through carelessness is implicated in what that person does but there's a connection between the state, its responsibility, and this person being able to do wrong and the state didn't prevent it. But all these crimes being committed out here, even as we talk here, I'm not going to ask questions to you what your opinion is because I know you're for this program. But I'm trying to make clear how impractical it is to expect the state to compensate victims in the way that misleading legislation suggested. And some people ought to talk to Senator Pirsch. She's no longer in the Legislature. She's no longer on the county board. But just at what point does she think the state would fund these programs and where would the money come from?

JOANIE BRUGGER: Could I ask you a question, Senator?

SENATOR CHAMBERS: Oh, sure, I don't know if I'll answer it because we ask questions; we don't answer them.

JOANIE BRUGGER: Do you find it interesting to note that Nebraska is one of the few states in the union that has a lid on any type of reparations for victim services?

SENATOR CHAMBERS: Well, I'd have to answer that question with a question. How did these other states fund these programs and what is the amount of money that they put into these programs, if you know?

JOANIE BRUGGER: What I do know is that Florida is the one of the few states that has no lid on victim services and that their main source for generating funding for victim services are through a surcharge. And I believe they base that on statistics that Dade County is in Florida and that

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is one of the highest crime rates.

SENATOR CHAMBERS: Well, then I can tell you why Nebraska isn't in that line of work because I'm here and I'm going to make sure they don't get into that to the extent that I can.

SENATOR BOURNE: Thank you. Further questions for Ms. Brugger? Thank you very much for testifying today. We appreciate your input. Further testifiers in support? Welcome to the committee.

CAROL McBRIDE-PIRSCH: Thank you. It's kind of interesting being on this side of (laugh) the table. I'm Carol McBride-Pirsch and I live in Omaha, Nebraska. And for the last 26 years I have been interested in victims and the entire criminal justice system. And LB 93 speaks to the problem of all government's funding and this is not just for state, it is for counties and cities. It comes down to dollars and cents and education, of course, is our constitutional...was put in the constitutional for all fines, fees, and penalties but there is some aberrations to that. I believe judges' retirement is part of that and I have to remind you that the cost of crime and punishment and rehabilitation for criminals runs into the megamillions and we are talking about a few millions for those people who through no fault of their own have become victims. These are programs that do not apply to those who have access to insurance payments, to compensation by other people. This is a very narrow, narrow segment of victims. We have come to the place where the problem of government is that we help those who are least able to help themselves and that is what victims' programs are aimed at. We also do this in the area of welfare, people who can't get a job, people who for some reason at all won't get a job. The state is there to help those who have no other resources and so it is very appropriate that we go to those who have committed a crime whether it be a misdemeanor or a felony and we say that we contribute to those victims who do not have anywhere else to go. And we are supporting those people and also many volunteers, not all of these people get paid. We support the workers and volunteers who have supported those victims that have nowhere else to go and no other resources.

SENATOR BOURNE: Thank you very much. Appreciate that. If we could see if there's any questions from the committee?

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Any questions for Ms. Pirsch? Thank you for testifying. It's nice to see you again. Further testifiers in support? Testifiers in opposition? Neutral testimony?

SIMERA REYNOLDS: My name is Simerá, S-i-m-e-r-a Reynolds, R-e-y-n-o-l-d-s and I'm the executive director for Mothers Against Drunk Driving and Chairman Bourne, members of the Judiciary Committee, thank you for allowing me to be here. I have some concerns about LB 93. I support the initial concept and I guess that MADD would look at it as a broad-based restitution concept. And the Crime Victim Compensation Fund...MADD has worked with several different entities that have been involved with drunk driving and we have not been very successful getting any funding out of the crime victim reparations funding. In fact, I appealed one case and we still lost it. A mother from Wisconsin who lost her only son in an alcohol-related fatality asked for some funding and we appealed it through the Crime Commission and we still were turned down. But despite the fact that we hardly ever have very many of our victims participate in that program, it doesn't diminish the importance of the program. It just goes to show that there is very little funding made available. My main concern for being here would be on page 3, line 7, and I would like to speak to the fact that it states, "No more than 10 percent shall be awarded to a public or private nonprofit agency to provide administrative services for crime victims in witness programs." I'm not quite sure why administrative services are in there, what that would mean statutorily because we provide all of our victims direct service at no cost. MADD raises money through different avenues, writes grants, direct marketing from MADD National to provide services to victims at no cost. And one thing that I would suggest that the committee might entertain the idea of establishing an independent advisory committee consisting of victim advocate organizations that would sit on the committee for, you know, I just arbitrarily picked a term of three years. This advisory committee could then ensure that there is equitable distribution of the funds should this ever go through which it doesn't look like it will get out of committee maybe. But if it should go through then MADD would just want to make sure that we had an equitable opportunity to put in and apply for some of that funding because oftentimes that funding has already been distributed here through the Crime Victim Compensation Fund, the VINE program, the Victim

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Witness Unit, 5 percent for administration, and then there's some odd amount that's floating out there in between 15 and 10 that I'm not quite sure where it goes. And so I just wanted to bring that to your attention. Of course, MADD totally supports supporting victims of crime and my red light is on.

SENATOR BOURNE: Thank you. Thanks for testifying. Questions for Ms. Reynolds? Seeing none, thank you. Further testimony in a neutral capacity? Seeing none, Senator Byars has waived closing. That will conclude the hearing on LB 93. Senator Stuthman to open on LB 207 and could I get a show of hands of those individuals testifying in support of LB 207? I see two. In opposition? I see none. Do you want to wait just a second, Senator, till the room clears?

SENATOR BOURNE: All right, Senator Stuthman, LB 207. Welcome.

LB 207

SENATOR STUTHMAN: Thank you, Senator Bourne and members of the Judiciary Committee. I'm Arnie Stuthman and I am going to introduce LB 207. This bill is intended to give jury commissioners another option in serving jury summons. Under existing law, a summons can only be served upon each juror by certified or registered mail or personal service. Sometimes potential jurors fail to pick up the registered or certified mail at their post office. The delivery of summons by first class would offer another option to reach the potential jurors. If a potential juror does not receive the summons he or she is not automatically held in contempt of court. Instead, the current practice is for the clerks of the district court to follow up by telephone or another letter. Contempt warrants are issued only as a last resort and generally are not often used. These are my opening statements. I have some expertise, clerks of the district court, to follow me but I will try to answer any questions if you have any.

SENATOR BOURNE: Great. Thank you. Questions for Senator Stuthman? Senator Chambers.

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SENATOR CHAMBERS: And Senator Stuthman, those who come after you can answer this question. There is no proof that the person received the summons and there is no proof that it was even mailed if it's by first class mail. Would you agree?

SENATOR STUTHMAN: This is true.

SENATOR CHAMBERS: Okay. That's all that I have.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you, Senator Stuthman.

SENATOR STUTHMAN: Thank you.

SENATOR BOURNE: First testifier in support.

ELLEN EBY: (Exhibit 8) Good afternoon, Senator Bourne, members of the Judiciary Committee. My name is Ellen Eby, E-b-y. I am clerk of the district court in Dawson County, Lexington, Nebraska, and representing the Clerks of the District Court Association and also the Nebraska County Officials Association and we are in support of LB 207. Our association is in the process of writing a procedures manual for the district courts and therefore we were reviewing statutes. After discussing 25-1629.04 we are requesting first class be inserted as one of the choices for summoning jurors. Most clerks/jury commissioners currently use first class mail since this statute states "may" serve by certified or registered mail. The reason is simple. It's a matter of cost. Sending a letter certified costs \$2.67 and registered mail is \$7.87 while first class mail is 37 cents. In Dawson County I usually send out 225 to 250 jury questionnaires in order that I have a pool of 75 to 90 jurors. The judge and I look at the jury trials scheduled for each quarter to determine how many jurors will be needed in the pool. Certified mail would cost Dawson County \$66.75 for certified mail, \$196.75 for registered mail compared to \$9.25 for first class mail each quarter as we mail out the jury summonses for a new panel. The current practice for jury commissioners in Douglas, Lancaster, and Sarpy Counties is service by first class mail. persons who fail to appear before the judges I serve in the 11th Judicial District are issued Orders to Show Cause. These are mailed by certified mail. Are there any

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questions?

SENATOR BOURNE: Thank you. Questions for Ms. Eby? Senator Chambers.

SENATOR CHAMBERS: Ms. Eby, I'm looking at the existing law and starting in line 7, the jury qualification questionnaire may be sent together with the summons and a single mailing to a prospective juror. That, I think the emphasis is on questionnaire. Then we get to the next sentence. The summons may be served upon each juror by certified or registered mail or by personal service by a jury commissioner. Is it possible the "may" is there because if you put "shall" it might not make it clear that you can choose whether to send it by certified or registered or personal service.

ELLEN EBY: I think that is correct. But we would like to have first class in there since it isn't mentioned currently.

SENATOR CHAMBERS: But I'm saying, they made those who are sending it by first class mail may not be complying with the laws as written now. There is room to interpret but I think what you have done is called my attention to something where we need to make it clear that when it comes to the summons it shall be sent, shall be served by either certified or registered mail or by personal service making it mandatory to use certified, registered, or personal which I think is the case now. I think they are required but, again, the argument can be made that since it's may. You stated in your testimony that if a person does not show up then a show cause order is sent by certified mail. And this show cause order is to require the person to explain why he or she didn't show up.

ELLEN EBY: That's correct.

SENATOR CHAMBERS: And if the person says, I didn't get the summons and if it was sent by first class mail, how is that handled? Is that person's word accepted?

ELLEN EBY: That is up to the presiding judge.

SENATOR CHAMBERS: So then the judge could reject that.

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ELLEN EBY: If he or she so chose.

SENATOR CHAMBERS: And what would the punishment be?

ELLEN EBY: I believe it would be a hundred dollar fine.

SENATOR CHAMBERS: So there is a hazard to the citizen based on the fact the clerks have decided to use first class mail. How about if we say, we strike the ability of a judge to send a show cause order and the only ones who show up are the ones who show up and anybody who doesn't show up is left alone? Or if they say they didn't get the summons that's sufficient and it's taken at face value?

ELLEN EBY: First of all, we have to have a certain amount of jurors for a jury pool...

SENATOR CHAMBERS: Agreed.

ELLEN EBY: ...so we can't just send out letters and then not allow...not have people be responsible for not showing.

SENATOR CHAMBERS: I agree.

ELLEN EBY: Okay. And then I think that in the court where I work, that if this person truly has a reason, saying I didn't get the letter or something, the judge will take that at face value.

SENATOR CHAMBERS: Why don't we say the judge shall so that there's no...see, you are here and you made it clear because of the financial consideration and you're speaking for the clerks. Nobody here is speaking for the citizen other than those who feel it's their duty to represent the interests of the citizens. At these hearings, if these questions are not raised they will never be looked at. The clerks want a set of circumstances where they can get off cheap; the county officials support this. They want to get off cheap but they're not willing to let a protection be built in for the citizen in a program that wants to travel on the cheap. If a bill like this goes through, I'm going to put a requirement that if a person says he or she didn't get the summons that statement is taken at face value. And there can be no requirement that any fee or fine or anything else

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be paid. The judge can ask the person why he or she didn't show up but if the person says, I didn't get the summons, that ends it. Would you be in favor of that?

ELLEN EBY: I can just speak on behalf of myself and our court and not for the association on that point. But that has happened in our court and, yes, the judge did take that as face value like I said. And the person was not found guilty, did not pay a fine, and in our court it's a show cause hearing that is actually in the case that the jury trial was being held and so it's not a separate new case where there is a felony or something on that person's record. So it doesn't go on the person's record. It's actually just a show cause hearing in that particular jury trial case.

SENATOR CHAMBERS: Well, what I'm looking at is a possibility of a punishment where the judge says, you're going to stand there and tell me you didn't get this. Are you saying that our clerk lied when she said she sent you the summons? Who am I supposed to believe, you or the clerk? Now I've read transcripts. I file complaints on judges for the way they've dealt with people so I'm not manufacturing what I'm saying here. I want to protect people from that even happening so here's the question I will ask again. If we insert first class, would you agree that any person who claims not to have received the summons shall not be penalized in any way for not having shown up?

ELLEN EBY: I don't think that I have the position that I can tell you that because I think that must come from the judges, not the clerks.

SENATOR CHAMBERS: Then the Legislature would have to use its judgment in terms of what...

ELLEN EBY: Okay (laugh).

SENATOR CHAMBERS: ...we will do. And I'm not going to ask these questions of everybody but just to put out there these notions and anybody who wants to testify to them can and I will not question them. But I want the record to show that those issues were raised.

ELLEN EBY: I understand.

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SENATOR CHAMBERS: Thank you, Ms. Eby.

SENATOR BOURNE: Thank you. Further questions for Ms. Eby? Ms. Eby, I have one quick one. So I assume that the counties of Douglas, Lancaster, and Sarpy are relying on the mail to be served language and doing it by first class mail.

ELLEN EBY: I assume, I just checked with the...

SENATOR BOURNE: You want clarity.

ELLEN EBY: ...jury commissioners and that's the way they did it in those counties.

SENATOR BOURNE: You just want...you're looking for clarity whether it's...

ELLEN EBY: Yes.

SENATOR BOURNE: ...you just want to be certain. Do we know, has anyone complained in those three counties that they're doing it first...?

ELLEN EBY: Not that I'm aware of. You know, there may be but I was not made aware of it.

SENATOR BOURNE: Okay. Great, thank you.

ELLEN EBY: Um-hum.

SENATOR BOURNE: Thank you. Next testifier in support?

JANICE WALKER: Senator Bourne and members of the committee, my name is Janice Walker. I'm with the Administrative Office of the Courts and I'm appearing today to also support LB 207. This legislation was put together by our clerks because they felt there was ambiguity in the statute as it exists now. And just as personal testimonial, I might tell you that I've recently received my first ever summons for jury service in Lancaster County and my summons and questionnaire came by first class mail. So there is a difference of opinion about whether it can be that way or not and we're seeking clarification for that.

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SENATOR BOURNE: Okay, thank you. Questions for Ms. Walker?
Senator Chambers.

SENATOR CHAMBERS: We could clarify by changing the may to
shall also, couldn't we?

JANICE WALKER: That would clarify it as well, yes, it
would.

SENATOR CHAMBERS: Okay, thank you.

JANICE WALKER: Um-hum.

SENATOR BOURNE: Thank you. Further questions? Seeing
none, thank you for your testimony. Further testifiers in
support? Testifiers in opposition? Seeing none, testifiers
in a neutral capacity?

BILL 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 State Bar Association. When our
legislation committee looked at this legislation we too were
concerned about how a court would show that a prospective
juror who did not respond to the summons actually received
notice that they had been summoned so we share your
concerns, Senator. We have talked with clerks and at least
anecdotally there are some people who will not respond to a
certified or a registered letter. If it's...they just
figure that nothing but bad news comes if it's certified or
registered (laughter) and I've had that experience
personally and in our goal to get people to serve on juries
I think we just need to decide how best to get people to
come and actually serve. In looking at this in preparation
for today, I think that we may have another inconsistency.
In 25-1606 and that's not in your green copy. I was looking
to see what the power of the court was to actually punish
someone who didn't answer the summons and it is contempt of
court. And the remedy, if you will, is fine or imprisonment
or both. But under 25-1606, as I read it, a clerk can give
notice or can send these summonses by registered, certified,
or first class mail so I think that we may have an
inconsistency now in the statutes and that should be
clarified. Be happy to answer questions that you may have.

SENATOR BOURNE: Thank you for bringing that to our

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attention. Questions for Mr. Mueller? Seeing none, thank you.

BILL MUELLER: Thank you.

SENATOR BOURNE: Other testimony in a neutral capacity? Seeing none, Senator Stuthman to close. Senator Stuthman waives closing. And perfect timing, Senator Landis, to open on...(laughter) oh, excuse me, that will conclude the hearing on LB 207 and Senator Landis is here to open on LB 168.

LB 168

SENATOR LANDIS: Thank you, Senator Bourne, members of the Judiciary Committee, David Landis, principal introducer of LB 168 representing the Garden District. A couple of years ago in a workshop designed to get to the problem of fatalities on the road and drunk driving and safety, recommendations were made for public policy improvements. One of those recommendations was to get at the issue of gaming the law enforcement and judicial process by making the prosecution show up with witnesses ready for a case, then having a last minute continuance and waiting for that time when all of the elements of the case to prove it are present and then going forward, not a common occurrence but an occurrence that occurs with some regularity. The reason that that works is because public employees do not receive a witness fee and there's no disincentive. There's no cost disincentive for that strategy. If, on the other hand, you had practically any other kind of case and you have the case and the other people, witnesses showed up and then you asked for a continuance and the witnesses had taken time off work or whatever and come there, they would get a witness fee and you'd pay for that witness fee. It would be a court cost. But there are no witness fees for public employees. Well, I can understand that because employees are on the public's time and they're doing the public's duty. Got it. However, that would be true if the public employees showed up one time to make the prosecutor's case. That is on us. That should quite rightly be on us, that's our responsibility. When the system's getting gamed (phonetic) and they come a second and a third time, hoping that they won't show up and, therefore, can get a dismissal because they can't prove

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their case it seems to me that the burden has somewhat shifted at that moment. This bill says that in an action in which an employee of the state of Nebraska or a political subdivision thereof is called as a witness with their official duties, the court may permissively award a witness fee to the employee's employer. It doesn't go to the actual employee, it goes to the employer, the political subdivision for the state and is paid by the defendant, equivalent to be what would be awarded to any other witness; it can't be higher. But to get this permissive possibility, two things jointly have to have happened. First, the defendant and only the defendant, not the prosecutor, the defendant has requested and received a continuance with less than 24 hours notice so it's a last-minute request for a continuance. And subsequently, the defendant is found guilty. Look, if you're found innocent, shouldn't have a court cost there, got it. But if three things are true...well, you know, two things are true. You've got a prosecution. The prosecution shows up with their publicly-paid witness and they go forward, no witness fee. But if they show up and the defendant at the last minute says, no, let's come back tomorrow. When they come back tomorrow it would be legitimate for the judge in the case of people who are guilty to say, you know what? You don't get rewarded for that gaming. You got to pay for the witness fee for making the...for the public's representative show up a second time. It's permissive by a judge. It requires that this only apply to the guilty and it applies only in the case of late notice for a continuance. That is a relatively limited application and I think it's appropriate. I ask for the passage of LB 168 and I'll answer any questions you might have.

SENATOR BOURNE: Thank you. Questions for Senator Landis? Senator Chambers.

SENATOR CHAMBERS: Senator Landis, I'm going to take the easy question first. Why not, if the prosecutor asks for a continuance at the last minute, does not the prosecutors...the state that the prosecutor's representing have to pay the employer his fee?

SENATOR LANDIS: They do. That's right. My recollection is this, that the prosecutor if he does a continuance in that situation and the defense has called witnesses,...

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SENATOR CHAMBERS: Um-hum.

SENATOR LANDIS: ...if the prosecutor has called witnesses that are not called, we pay witness fees.

SENATOR CHAMBERS: Now, and the state is the one prosecuting the individual so there's a heavier burden on the prosecutor than on the defense...

SENATOR LANDIS: And we are now bearing that burden, I think.

SENATOR CHAMBERS: ...as it should be.

SENATOR LANDIS: That's right. And we're bearing that burden.

SENATOR CHAMBERS: That's why I say I asked the easy question first.

SENATOR LANDIS: Gotcha.

SENATOR CHAMBERS: Now, who determines whether or not a continuance will be granted?

SENATOR LANDIS: The judge.

SENATOR CHAMBERS: So why then are you going to put it on the defendant if...because unless the defendant has stated a reason for getting a continuance that the judge finds valid it's not going to be granted.

SENATOR LANDIS: I can see that a judge might distinguish two different situations. One, there may be...I'll give you the benefit of the doubt on the continuance. But you're not going to be financially rewarded for doing so. He may have or she may have knowledge of who the lawyer is or the circumstances or past practices. What I'm going to say is, I will give the judge that discretion. My guess is we may not agree on the exercise of that discretion.

SENATOR CHAMBERS: So if a judge is willing to grant continuances just willy-nilly, the judge can be putting people that he or she intends to find guilty in a position

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of having to pay more than what the penalty is for having been found guilty.

SENATOR LANDIS: Hopefully, that judge has not determined guilt or innocence. That only works when after you, in fact, have the finding of fact and the determination of guilt, would you...and when there had been a very late continuance or multiple continuance grants granted, in the assessment of court costs would you go back and assess the costs then.

SENATOR CHAMBERS: Would the judge be required to notify the defendant that if you're granted this continuance and are found guilty you have to pay these witness fees?

SENATOR LANDIS: My guess is that you'd probably operate from the same standard that says, ignorance of the law particularly for a lawyer in the area would not be an excuse. We would expect them to understand that risk was a possibility. My guess is the defense bar is a small enough group of people that a judge who began acting that way would have that piece of news up and down the courthouse pretty quick.

SENATOR CHAMBERS: Lawyers are required to know the law and so are ordinary citizens but if a person is going to plead the person has to be informed by the court of the rights that are being waived even if the person pleading is a lawyer. You have to have those rights explained to you. So if there's going to be a penalty imposed for obtaining a continuance the court should be required to notify the person that you do this at your peril and would that be depriving the person of due process by putting a chilling effect on the request for a continuance?

SENATOR LANDIS: Um-hum. I want to think the answer is no to that and I'm going to guess that, for example, I don't believe that the court is obligated to tell a defendant or a plaintiff what the court costs are. In other words, if it's a fee...you're characterizing it as a penalty. I think I'd characterize it as a fee...

SENATOR CHAMBERS: But isn't it a penalty?

SENATOR LANDIS: ...and when there's a different...in that

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situation, I think failure to notify of the fee does not constitute a due process problem. And by the way you've got me out in the deep end of the pool, an area that I'm not particularly familiar with, I'm hard-pressed to render judicial opinions on due process but if you force me to guess, my guess is it's not a due process problem in the failure to have an affirmative declaration of what administrative fees would be.

SENATOR CHAMBERS: Let's say it's generally known and I'll accept what you say for the purposes of proceeding although I disagree.

SENATOR LANDIS: Okay, right.

SENATOR CHAMBERS: If it is generally known that if you ask for a continuance and you're found guilty, you're going to have to pay all these witness fees in addition to everything else. That is something I think that goes to substantive due process because you're telling this person that in order for you to invoke a right that you have,...

SENATOR LANDIS: Um-hum.

SENATOR CHAMBERS: ...and which is within the discretion of the judge to grant or deny, well, I'll say a privilege that you have. If it's a right it must be granted. But if you are found guilty then you're going to have to pay this money. If you're not found guilty then you don't pay it. But you think this is good policy, Senator Landis?

SENATOR LANDIS: I do think that in repeated cases of continuances or common practices where what the defense is looking for is wearing out the prosecution from making their case, it's a legitimate thing to do...

SENATOR CHAMBERS: But there's nothing...

SENATOR LANDIS: ...I do.

SENATOR CHAMBERS: ...there's nothing in here about repeated activities...

SENATOR LANDIS: ...That's right. What happens here it says it's got to...and what it says is that it is where a

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continuance has been granted with less than 24-hour notice. I also, Senator Chambers, you wind up taking some...when you're unfamiliar with an area because you're not personally familiar with it like prosecuting DUIs.

SENATOR CHAMBERS: Um-hum.

SENATOR LANDIS: As I'm not familiar with, I've never done that. You have a tendency to give deference to people who have done that for whom you have some faith. Some people with whom I've had conferences or talk about it, they said this practice exists and there's no disincentive for it with the exception that on occasion judges may choose not to delay last-minute continuances.

SENATOR CHAMBERS: And that's how...isn't that the way that the court manages its business by determining not to grant a continuance if it's not warranted?

SENATOR LANDIS: It is one way.

SENATOR CHAMBERS: Okay. That's all that I have. Thank you.

SENATOR BOURNE: Thank you. Further questions for Senator Landis? Senator Landis, how much is the witness fee? I'm not familiar with.

SENATOR LANDIS: It can be \$8 in one situation and \$20 in another, I heard.

SENATOR BOURNE: That's set in statute...

SENATOR LANDIS: Yeah, and it is set by statutes. Small claims, the grand jury shall receive \$20. The witnesses before the small claims receive \$8 so there's...I think it depends on which court you're in front of. As far as the amount of money in the Lincoln area there were 1,500 DUIs last year. A police officer makes one court appearance, fine. That one I think is...we would expect that to be a public cost. Sometimes three times or more due to the nature of the pleas or continuances, that has cost \$166; \$1,000 in overtime expenses. If the department because of this practice were to save roughly 20 percent of those costs because they were reimbursed in those kinds of cases, you'd

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be talking about 33,000 bucks. You'd talk about another cop on the street. Now, that not be a (inaudible) or whatever but it depends on how common the practice is. And I am passing along secondhand information not firsthand information when I say the practice does exist. It is not the common practice. It's not in every case. But it is in a significant minority of cases. That's what I've heard.

SENATOR BOURNE: The next question might be something for the officer perhaps but are there other cases other than DUI that this might apply? Are there other situations where the state would offer a witness?

SENATOR LANDIS: Yes, I'm going to say yes there is. Let me see what the green copy of the bill is. This is a change to the standard witness fee area so it is not tied to DUIs. It is the place where it has been most recognized which when we got people together say, well, you know, where are the problems in the DUI administration? One of them was defense lawyers who get multiple continuances particularly and wait for the day when the prosecutors' police representative isn't there and can't bring the testimony forward and then moves to dismiss because they can't prove the case. That's the problem.

SENATOR BOURNE: Thank you. Senator Chambers.

SENATOR LANDIS: Yep.

SENATOR CHAMBERS: Senator Landis,...

SENATOR LANDIS: Yeah.

SENATOR CHAMBERS: ...Senator Landis.

SENATOR LANDIS: (laugh) You'd think I'd learn by age, wouldn't you?

SENATOR CHAMBERS: If it's a tactic,...

SENATOR LANDIS: Yeah.

SENATOR CHAMBERS: ...then it's one that would be between the judge and the defense lawyer. The lawyer requests it; the judge grants it. If it's the lawyer who does this in a

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way that the court feels is abusive the court can sanction the lawyer. If a judge is granting continuances when he or she shouldn't then a complaint can be filed against the judge. But we're putting the person who's in the middle and saying, because these two guys are...they want to play ping pong, you're going to be the ball. The judge knocks you over the net. The lawyer knocks you back over the net and then you pay for the derelictions of the judge and the lawyer.

SENATOR LANDIS: Every other losing party in the state pays witness fees. The only people who do not pay witness fees are where the witness is a public employee.

SENATOR CHAMBERS: And these are criminal cases.

SENATOR LANDIS: In the DUI, yes, it is. That's right.

SENATOR CHAMBERS: But when I've gone, even when I've lost a traffic ticket...of course, I usually win them on appeal (laughter) but let's say that I lost one. I wouldn't pay the fee for the cop having come to testify against me.

SENATOR LANDIS: No, you wouldn't.

SENATOR CHAMBERS: So these are criminal cases and I'm not...the defendant is not paying witness fees to those who are testifying to get him or her convicted.

SENATOR LANDIS: That's right and they don't when the (inaudible). On the other hand, if we're supposed to have that issue and at the last minute the defendant says, oh, you know what? Everybody go home and let's come back another day.

SENATOR CHAMBERS: Then the judge shouldn't grant it but if the judge grants it then it's on the judge and not the other side.

SENATOR LANDIS: My guess is that if I was lucky enough to get this bill to the floor, we would hear that argument...

SENATOR CHAMBERS: Who asked you to bring this? Lancaster County?

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SENATOR LANDIS: ...on (inaudible)tions. I think Lancaster County would support it. No, it grew out of the conversations sponsored by Mothers Against Mad (sic) Driving in which there was a statewide convention.

SENATOR CHAMBERS: Mothers Against Mad Drivers (laughter).

SENATOR LANDIS: Well, that's (laugh)...

SENATOR CHAMBERS: (inaudible). You said...(laughter)

SENATOR LANDIS: Our names are on that list, I'm sure. Mothers Against Drunk Driving, well said (laughter).

SENATOR CHAMBERS: Okay, thank you. That's all I have (laughter).

SENATOR BOURNE: All right, thank you, Senator Landis. Thank you. (laughter) First...

SENATOR LANDIS: Mad Mothers Against Drunk Driving (laughter)...

SENATOR BOURNE: First testifier in support.

MILISSA JOHNSON-WILES: Good afternoon, Chairman Bourne and members of the Judiciary Committee. My name is Milissa Johnson-Wiles. It's Johnson-W-i-l-e-s. First name is M-i-l-i-s-s-a. I'm the Assistant Attorney General appearing on behalf of Attorney General Jon Bruning today. We are here to testify in support of LB 168. This bill is a result, as Senator Landis indicated to you, is a result of the Impaired Driving Task Force that was created by Mothers Against Drunk Drivers and Mr. Bruning in the summer of 2003. And I believe that Senator Flood also served on that task force. The purpose of this task force was to reduce drunk driving fatalities. In Nebraska, the number of drunk driving fatalities and injuries had somewhat flat-lined over the last ten years. They had not significantly reduced so they got a bunch of experts together to see what could be done. LB 168 is the result of some brainstorming in that task force. And it was an idea of how we can make the court system more efficient. As Senator Landis indicated to you, the task force showed that it was a very real problem, that there were certain defense attorneys and I guess tactics

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used by the defense bar to continue cases, DUI cases often, many times in order to catch that one hit where the officer doesn't show up and then asks for a dismissal. Or that the state has to dismiss because they can't prove up their case. This was a really...it was a real problem and the police forces were completely frustrated by this strategy because they do pay overtime for the officers to attend court hearings. Oftentimes the officers that would be coming to these hearings worked on their night shift. They would be coming to court hearings during times when they would normally be sleeping. They would make the effort to come to a hearing at 11 o'clock in the morning or two in the afternoon and then, lo and behold, the cases would be continued. So this happened time and again in certain circumstances, and we believe that LB 168 will make defense attorneys think twice before using this strategy because the defendant will ultimately have to pay a witness fee if they ask for a last-minute continuance. And, remember, this is only within 24 hours of the court date when the officers don't have a chance to be told that the hearing has been continued so that they don't make these arrangements and they don't get paid overtime. We also...LB 168 would compensate the taxpayers in some small part for the overtime that employers pay to law enforcement to attend multiple court hearings. And, for that reason, our office supports LB 168.

SENATOR BOURNE: Thank you. Questions for Ms. Johnson-Wiles? Senator Friend.

SENATOR FRIEND: Thank you, Senator Bourne. Ms. Johnson-Wiles, maybe I'm putting you on the spot here. Can you give me an example of the practical example of the behavior? It could be a hypothetical. Don't, you know, obviously, name any names, of a judge being put in a predicament, in a situation like this. I mean, I find myself...no more than two hours ago arguing with Senator Chambers and finding no middle ground. The problem is as he has spoken here, I am a little curious. I mean, if a judge is in a position to make a decision on this game playing or gamesmanship that's going on. Give me an example of something that would force a judge's hand. I mean, in a situation where they would say hey, yeah, sure, continuance. I mean, knowing full well that there are possibly two law enforcement officers out there on overtime, understanding

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the situation. You see what I'm getting at? I mean, what kind of gamesmanship is going on and consider me naive about this whole situation?

MILISSA JOHNSON-WILES: Well, I think I understand and what my answer would be is that, I guess, we think that this would help force defense attorneys to give a good reason for these continuances and also, do you understand that?

SENATOR FRIEND: Yeah.

MILISSA JOHNSON-WILES: So they're not just going in and saying, well, we're going to ask for a continuance.

SENATOR FRIEND: So, right now judges...I mean, correct me if I'm wrong. Judges are put in a situation where a defense attorney can pretty...I mean, what are they? Rubberstamping these things, I guess? And this would force...

MILISSA JOHNSON-WILES: I do think that happens and I can tell you that I think the result of the task force was that it doesn't happen all the time but it is a problem when it does happen. So this would be...this just...it's limited to the circumstances where they come in after their first freebie if you want to call it that, a continuance. They ask for a continuance without giving notice. Now if they come in and say look, my mother died yesterday and I need a continuance, the court still has the discretion not to assess this witness fee in the event that the defendant is ultimately found guilty. And the reason would be because he thinks the reason for the continuance was a good one.

SENATOR FRIEND: So playing to a judge's emotional, you know, well-being while that particular judge is sitting on the stand and to try to make those decisions, it's given the judge a little bit of cover because he says, yeah, that's fine but you're the one that's on the hook for this 20 bucks or whatever.

MILISSA JOHNSON-WILES: Well, that's right and it's also reminding the defendant and his attorney that they can't just be asking for them for no reason so.

SENATOR FRIEND: I think that helps.

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SENATOR BOURNE: Thank you. Further questions? Senator Flood.

SENATOR FLOOD: Ms. Johnson-Wiles, you referenced my participation on the Impaired Driving Task Force. Simera Reynolds might recall my fierce objection to the suggestion that we pursue witness fees from defendants as the defense counsel representative on that task force. What I find interesting about this bill is that the very thing it attempts to stop is gaming as referenced by Senator Landis with regard to the defense counsel filing of a motion once they see, you know, that the state has produced all the witnesses suggested in the pretrial list of witnesses. In the event they're successful and those witnesses aren't in court, certainly a defense lawyer would not request a motion to continue so that they could receive the not guilty verdict for lack of evidence. This doesn't address that. In other words, isn't it the case that if you, as a defense lawyer, don't ask for a continuance when the state produces its witnesses that will still continue and the defendant will not be forced to pay any witness fees? Do you understand my question?

MILISSA JOHNSON-WILES: Can you...I'm sorry, I think so. Can you say it again?

SENATOR FLOOD: If, let's say for a second that the Madison County Attorney goes to court without his witnesses and I bring my client as a defense lawyer to court that day, citing the fact that the officer that made the stop and the only true state witness as to my client's intoxication the night of the arrest is not there, certainly I wouldn't request a continuance...

MILISSA JOHNSON-WILES: That's correct.

SENATOR FLOOD: ...and my client would be found not guilty most likely so this doesn't really address gaming or stop gaming.

MILISSA JOHNSON-WILES: It...LB 168 wouldn't apply to your situation, would it?...

SENATOR FLOOD: Certainly, certainly.

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MILISSA JOHNSON-WILES: ...You wouldn't, your defendant would not be paying any costs.

SENATOR FLOOD: True.

MILISSA JOHNSON-WILES: So this designed for the situation where you had your first day and the officer showed up and you asked for a continuance and, or the officer showed up...I think Senator Landis contemplated that there would be one free freebie but let's step aside that. We're talking about multiple continuances. It would be the next time the officers are showing up to court and the defense asks for a continuance within that 24 hours and basically kind of wears out the process. And it's tough on the judicial resources as well for, I mean, for the overtime to be paid for these officers to come to the hearing. And I think that's what it was really intended to address.

SENATOR FLOOD: But it wouldn't stop this practice from happening for successful defendants.

MILISSA JOHNSON-WILES: It would not stop the practice from happening. I think it tries to kill two birds with one stone but certainly it would not...it's not a fix-all.

SENATOR FLOOD: What about defendants that request continuances and/or apply for administrative license revocation hearings? Wouldn't that contribute to the overtime charges paid by law enforcement agencies across the state? So maybe that \$166,000 that was mentioned by Senator Landis, I believe, wouldn't be altogether too accurate because that's a different proceeding in an administrative court.

MILISSA JOHNSON-WILES: Yes. And to be honest, I'm not sure if LB 168 is intended to apply to administrative hearings or not. It was my impression that it would apply to criminal...

SENATOR FLOOD: Court proceedings.

MILISSA JOHNSON-WILES: ...yeah, court proceedings so.

SENATOR FLOOD: Thank you.

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MILISSA JOHNSON-WILES: Okay. Any other questions?

SENATOR BOURNE: Thank you. Further questions? Senator Chambers.

SENATOR CHAMBERS: First of all, let the Attorney General know he got off easy by sending you here (laughter). But I'm going to ask the question very succinctly but I have to make a comment with reference to something you had said. That the judge may determine even if a person is found guilty after having asked for a continuance within 24 hours of the trial, that the reason for seeking the continuance was a good one. Therefore, the witness fee won't be assessed. You said something to that effect?

MILISSA JOHNSON-WILES: Yes, I did.

SENATOR CHAMBERS: Well, if the reason is not good, why would the judge grant a continuance in the first place?

MILISSA JOHNSON-WILES: Well, it's hard for me to say. We're not...there are many circumstances where the defense asks for a continuance and the judge just decides to grant it with no good cause shown.

SENATOR CHAMBERS: Who controls whether a continuance is given?

MILISSA JOHNSON-WILES: Well, the judge controls it but...

SENATOR CHAMBERS: Only the judge. So why are you jumping to the defense...I meant to the defendant? Because you can't do anything to the judge, right?

MILISSA JOHNSON-WILES: Well, that may be but the judge isn't the only problem. He may be contributing to the problem but this is intended to address the problem of well, two things like I said before. But one, asking for last-minute continuances with no...really, with the purpose of delaying the process and...

SENATOR CHAMBERS: But asking for the continuance is not a problem at all. The judge just says no. There are people who ask for evidentiary hearings and the judge says, you don't have enough basis for it, no.

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MILISSA JOHNSON-WILES: Well, perhaps LB 168 would make them think twice before asking for the continuance in the first place...

SENATOR CHAMBERS: Well, why should...

MILISSA JOHNSON-WILES: ...if they know that they're going to have to pay for it.

SENATOR CHAMBERS: ...Why should you put the burden on those who ask when the only one who creates a problem is the one who grants? If the judge...you're...

MILISSA JOHNSON-WILES: I'm not sure if I agree that the only...

SENATOR CHAMBERS: ...you're not making a cost of witness fees on the defense for asking for the continuance. You're not charging the witness fees because they ask. You're charging because a judge granted it. The judge granted it. But that's all I will say. I wanted that clearly in the record despite the fact that you do not want to acknowledge it. The judge is the problem. And if this officer is going to speak, I'm going to hold his feet to the fire till he answers (laughter).

MILISSA JOHNSON-WILES: (Laugh) Okay, any other questions?

SENATOR BOURNE: Thank you. I do want to indicate that there's nothing in the green copy of the bill that gives one free pass to one free, so just...

MILISSA JOHNSON-WILES: Okay. That may be something that needs to be addressed then.

SENATOR BOURNE: Thank you for your testimony. Thanks for coming today. Further testimony in support?

SIMERA REYNOLDS: Okay. My name is Simera Reynolds and I'm the executive director for Mothers Against Drunk Driving. We're against the act and not the people. It's not against drunk drivers; it's against drunk driving and it's not mad driving either or whatever Senator Landis referred to us as. Chairman Bourne, members of the Judiciary Committee, I'd

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like to thank Senator Landis for being brave enough to bring this forward to you especially with Senator Chambers here and to hold our feet to the fire. MADD supports LB 168 as an organization, our members, and as a participant of the Impaired Driving Task Force. MADD advocates the charging of witness fees for defendants who do not provide a 24-hour notice when asking for a continuance of their case that is scheduled for a court hearing. This legislation would clearly provide a disincentive to those who try to seek ways to avoid prosecution. MADD understands that there is a cost associated with protecting the public. However, this expense is often compounded and financed by the taxpayer when defendants come to trial and repeatedly ask for a continuance without notice to law enforcement prosecution or the victims involved. MADD and our volunteers know firsthand that victims all too often go to court only to find out that a continuance has been requested. They've already traveled; they've already asked for the day off and they get there and then a continuance is requested. The legislation would provide victims an advance notice because they could call up the prosecutor, you know, assuming they abide by the 24-hour notice, they could call up the prosecutor. Additionally, the Impaired Driving Task Force called together by Attorney General Jon Bruning was made up of over 40 members including agency directors, law enforcement, county attorneys, retailers, highway safety advocates. There was an overwhelming majority of those participating that supported the use of witness fees to reduce the costs of continuances without a notice. Now you were in that overwhelming majority, Senator Flood, sorry.

SENATOR FLOOD: I recall being the only one against it.

SIMERA REYNOLDS: (laugh) (inaudible) As the legislation was crafted to use the language, may versus shall allows for judicial discretion and that can be noted on lines 27, page 2. On behalf of our members and MADD I would respectfully ask that you support and pass this measure to the floor for a full and healthy debate.

SENATOR BOURNE: Thank you. Questions for Ms. Reynolds? Seeing none, thank you. Next testifier in support.

DEREK HORALEK: Committee members, I'd like to thank you for this opportunity to speak to you today on Senator Landis'

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bill regarding witness fees. I'm Derek Horalek, H-o-r-a-l-e-k. I'm currently employed with the Lancaster County Sheriff's Office and have been in law enforcement since November of 1992. This period of time has given me the opportunity to work various shifts to include day shift, afternoon shift, and the overnight shift. Working shift hours has given me the experience to see how court affects me and other law enforcement officers both on a personal and professional level. On a personal level court can be scheduled for various times which affect people differently. For example, court can be scheduled for your day off, your time that you're not currently scheduled to be at work, your off time, and during the middle of your weekend. These court appearances require that you reschedule any appointments or events that you have for that particular time period. It also provides a strain on day-care provision where you're required to make alternate arrangements for any day-care provisions that you might have. These alternate arrangements have to be made which require additional time out of your schedule to make these arrangements plus also a financial burden for any additional day-care expenses that you would have. On a professional level, for example, you're scheduled to work the overnight shift and you're scheduled to be in court at 2 o'clock in the afternoon. This requires that you get up in the middle of what we would consider our night to go to court. As a result, this causes a lack of sleep which, in turn, requires an officer to go to work and work when he's tired and he may not be as effective as he would be if he had the proper sleep. This lack of sleep also reverts back to the personal level where lack of sleep also causes a body to be more acceptable to illnesses or other health issues. I look back on my schedule and during a one-year period of time I had 46 court appearances. Eleven of those court appearances were repeat appearances which does not seem like a lot but calculates to 23.9 percent of my court appearances for that particular period of time, was a result of continuances. I feel this bill would help cut down the repeat and unnecessary court appearances and, again, thank you for the time for allowing me to speak today. Do you have any questions? Senator Chambers. (laughter)

SENATOR BOURNE: Okay. Thank you very much, Officer. Can I...is it Horalek?

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DEREK HORALEK: It's Horalek, yes.

SENATOR BOURNE: Horalek? Thank you. Questions for the officer? Senator Chambers.

SENATOR CHAMBERS: Sheriff, Abraham Lincoln once said, the promise having been made must be kept. I had promised to ask you a question or two and it will not be an interrogation. Do you think that judges know who is going to testify in these cases for the state?

DEREK HORALEK: Do the judges know?

SENATOR CHAMBERS: Yes.

DEREK HORALEK: Basically, they would be, I'd assume, provided a list from the attorneys at the time of trial.

SENATOR CHAMBERS: And do you think they would know that an officer whether a sheriff or city police officer or a state trooper is going to testify?

DEREK HORALEK: At...when I give them the list of who's going to testify, they would know, yes.

SENATOR CHAMBERS: So the things that you informed us of, judges probably are aware of those things as they pertain to the life of a law enforcement officer, don't you think?

DEREK HORALEK: They would know of those things but at what particular work schedule they are assigned to, the judge would not know nor would any of the attorneys.

SENATOR CHAMBERS: Now do you think a continuance should be granted or denied based on the work schedule of a police officer?

DEREK HORALEK: No, as a law enforcement officer that's part of our job is to appear in court and, I mean, obviously, the proceeding is something as a result of what action we took on a violation.

SENATOR CHAMBERS: And whether an officer works the night shift and would have to come in the daytime should not have any bearing on whether a continuance is granted or denied,

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should it?

DEREK HORALEK: I'm not sure what you're asking, Senator.

SENATOR CHAMBERS: If a defense lawyer asks a judge for a continuance, should the judge make his decision based on the fact that the officer who's going to testify works the night shift and the judge would say, well, because this officer works the night shift I'm going to deny you a continuance. Do you think that's a valid reason to deny a continuance?

DEREK HORALEK: No, I don't.

SENATOR CHAMBERS: Is a judge required to grant a continuance when it's requested?

DEREK HORALEK: That's something that's up to the judge. I mean, I'm not particularly up on what a judge is required to do as far as continuances but I'm assuming he has the right to say or deny the continuance.

SENATOR CHAMBERS: Yes, the judge does have the discretion to grant it or deny it. So when a continuance is granted, who is the only person in the courtroom with the authority to grant the continuance?

DEREK HORALEK: The judge.

SENATOR CHAMBERS: So why are you all going after the defendant for requesting it?

DEREK HORALEK: For...I mean if they have legitimate reasons. I mean, a continuance can be requested prior to...I mean, we're talking about a 24-hour period where...

SENATOR CHAMBERS: Doesn't matter that the period of time. The judge is the one who's going to listen to the reason given for requesting a continuance. Would you agree?

DEREK HORALEK: Yes, the judge grants the continuance.

SENATOR CHAMBERS: If the judge thinks the reason is no good, do you think the judge would still grant the continuance?

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DEREK HORALEK: No, I don't think so.

SENATOR CHAMBERS: So why don't you make the judge the focal point instead of the defendant?

DEREK HORALEK: I don't have an answer for you, Senator.

SENATOR CHAMBERS: Do you belong to a bargaining unit because I want to create an analogy if I can?

DEREK HORALEK: Yes, I...yes, we do or the sheriff's office does.

SENATOR CHAMBERS: would you want the law to say that if you ask for an increase in wages and you do not gain that increase, then you'll suffer a 5 percent decrease in what you're being paid now? In other words, do you want to have to run the risk of losing wages simply because you ask for an increase?

DEREK HORALEK: With a bargaining unit sometimes you give up stuff to get ground so...

SENATOR CHAMBERS: But would you want the law to say that if you ask for an increase in wages then the city or state, whichever one you're bargaining with, is free to dock your wages because you could not persuade the city to increase your wages? Would you want the law to say that?

DEREK HORALEK: No.

SENATOR CHAMBERS: Then why are you going to say that if a defendant requests a continuance and the judge grants it and the defendant is then found guilty, the defendant has to pay court costs...I mean pay witness fees? What sense does that make? Well, let me ask it a different way because this is what I said I'd hold your feet to the fire on. You do agree that the only way a continuance can be granted is if the judge grants it.

DEREK HORALEK: That's correct.

SENATOR CHAMBERS: If the same defense lawyer asks the same judge for ten continuances and the judge grants it ten times, why do you blame the defendant for what the judge

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did?

DEREK HORALEK: I don't know.

SENATOR CHAMBERS: That's all that I would ask. Thank you.

SENATOR BOURNE: Thank you. Further questions? Senator Friend.

SENATOR FRIEND: Thank you, Senator Bourne. Thank you, Deputy. I just wanted to ask, I mean you've been in the...you said that there were instances where something like that has happened and you ended up having to come back for a repeat appearance. Can you give me a, you know, a practical situation. I mean, everybody probably in this room has been duped, you know, on some occasion for something. I mean, judges can be duped. I mean, I think we know that. I'm looking, and there's clearly a problem here because we're here talking about this. There's some gamesmanship going on or there's a perceived point of gamesmanship that somebody is saying exists. Can you give me maybe a particular where you're sitting in a courtroom and you said, that judge just got duped. You walked out and you're coming back the next day. I mean, do you know what I'm saying?

DEREK HORALEK: Well, on that lines, there's been times when you said, basically that in the courthouse, the officers all standing outside because the courtroom is full of defendants. So you're standing out there talking amongst yourselves and you have attorneys come up and say, oh, you're here. We won't have a trial since you're here, just, I mean comments like that. I mean, refer to ALRs, I know this doesn't apply to ALRs. This is for criminal stuff but like the ALRs, I've had attorneys come up to the ALRs and said, oh, since you're here we're not going to have a hearing. It just, I think that's coming with the game really that you're talking about.

SENATOR FRIEND: Well, and, of course, this is information in most instances that a judge is not privy to, correct? I mean, you're talking about a few people out in the lobby saying, hey, guess what? We're going to game...well, they're not going to say this but we're going to game this situation. Something the judge finds out what, too late or

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he never does find out. He or she never does find out.
Okay, thank you, Deputy, appreciate the time.

DEREK HORALEK: Correct.

SENATOR BOURNE: Further questions? Senator Flood.

SENATOR FLOOD: Real briefly, I would agree with you that the ALR procedure and process is extremely flawed. In the case, and I sympathize with your testimony about having to find day-care and all of that but have you discussed your frustrations with the attorney...as an agent for the state, have you discussed your frustrations with your representative in court, the county attorney or his designate?

DEREK HORALEK: I personally have not so I can't give you an answer on that. I mean, I know our concerns have been addressed to our administration and I would assume and hoped that that (inaudible) concerns would be passed on to the attorneys like the county attorney's office and hopefully brought down so.

SENATOR FLOOD: It would seem that the appropriate county attorney or city attorney if we were in Omaha or another municipality has that kind of enforcement that should be held responsible by your law enforcement agency. Wouldn't that be appropriate do you think to make sure that the county attorneys were held to that standard, the standard of not agreeing to continuances if they were unreasonable?

DEREK HORALEK: Yeah, I think that would be nice.

SENATOR FLOOD: Or at least making an effort to oppose those continuances.

DEREK HORALEK: Yes.

SENATOR FLOOD: Do you often see a county attorney in Lancaster County vigorously oppose a continuance from defense counsel?

DEREK HORALEK: As again, most of my time is spent outside the courtroom...

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SENATOR FLOOD: Sure.

DEREK HORALEK: ...but to answer that, no, I have not seen a lot of that basically opposing to the continuance.

SENATOR FLOOD: Is that frustrating?

DEREK HORALEK: I mean, when you work, like I said, like I testified earlier, when you're working seconds and third shift and it's in the middle of your day or the middle of your sleep time, yeah, it is frustrating when you get to court and of those 46 times I could probably count on three fingers the number of times I've actually testified so it does get discouraging.

SENATOR FLOOD: I imagine so. Thank you.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you. Appreciate your testimony. Further testimony in support? Testimony in opposition? Testimony neutral. Senator Landis has waived closing. That will conclude the hearing on LB 168. Senator Aguilar to open on LB 91. Would the testifiers for the next bill please use the on-deck chairs? Senator Aguilar.

LB 91

SENATOR AGUILAR: Thank you, Senator Bourne. Good afternoon, members of the Judiciary Committee. I'm here to introduce LB 91, a bill requested by a business in my district called Credit Management. Credit Management is a collection agency with multiple offices around the state. The purpose of our introduction is simply to update the statute that has long been ignored. The bill addresses two areas of updates. First, the current claim limit is at \$2,000 and has not been adjusted to reflect court jurisdictional limits since 1967. The current court jurisdictional was raised to \$45,000 in 2001. It is our intention to bring these two limits together. I understand that Senator Bourne has another bill that addresses the jurisdictional limit of the court that we may wish to consider in relation to LB 91. Second, the attorney fee has not been adjusted since 1955 when the minimum fee was \$10 plus 10 percent of the claim amount was considered

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reasonable. LB 91 requests the \$10 minimum be raised to \$100. Bill Wroblewski, legal counsel for Credit Management will testify after me and will be able to answer specific questions and give everyday examples of how these fees are applied. With that, Senator Bourne and members of the committee, I respectfully ask you to join me in support of LB 91. Thank you. I'll take any questions.

SENATOR BOURNE: Thank you, Senator Aguilar. Questions for Senator Aguilar? Seeing none, thank you. Again, if people would use the on-deck chairs. First testifier in support of this measure, step forward. Welcome.

BILL WROBLEWSKI: Thank you, Chairman Bourne, members of the committee. My name is William Wroblewski. The last name is spelled W-r-o-b-l-e-w-s-k-i. I'm an attorney in Grand Island and I'm here on behalf of my client, Credit Management Services to testify in favor of LB 91. LB 91 is an amendment to statute section 25-1801. This is a statute that allows a plaintiff to recover costs and attorney's fees on claims of \$2,000 or less in county court and as Senator Aguilar indicated, the statute has not been amended since 1967. LB 91 proposes two changes to the statute. First it increases the minimum reasonable attorney's fee from \$10 to \$100. Second, it increases the size in allowable claim under the statute from \$2,000 to the current jurisdictional limit, \$45,000. With respect to the attorney's fee when this statute was first enacted it provided only that a plaintiff could recover a "reasonable attorney fee" but did not define what that meant. And this statute has been around since 1919 is when it was first enacted. At that time, it was for claims of \$300 or less. It's since gone up to \$2,000 along with a jurisdictional limit of the court. In 1955, the statute was amended and included a formula for calculating the reasonable attorney's fee which included a minimum amount of \$10 and the purpose of this was to allow plaintiffs to recover their attorney's fees in cases where they had to hire an attorney and file a lawsuit to collect a delinquent bill. And it should be pointed out that this only applies to claims that are more than 90 days old so they're all old claims. In order to accomplish the purpose of reimbursing a plaintiff for this expense, I think the fee ought to be raised. I don't think that \$10 is a reasonable amount to pay an attorney to file a lawsuit to collect a past due bill. With respect to the \$2,000 statutory limit,

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this was originally, as I said, a \$300 limit. When the court jurisdictional limit was \$300 as the jurisdictional limit raised to \$500 and \$1,000 and then \$2,000 the statute was adjusted. However, since 1967 when the statutory limit and the jurisdictional limit were both \$2,000 there's been no change in it. I just think that it's time to adjust this upward to reflect reasonable amounts both in the attorney fee and the limit for claims.

SENATOR BOURNE: Thank you. Questions for Mr. Wroblewski?
Senator Chambers.

SENATOR CHAMBERS: You represent a collection agency?

BILL WROBLEWSKI: Yes, I do.

SENATOR CHAMBERS: And you try to collect on old accounts?

BILL WROBLEWSKI: Yes.

SENATOR CHAMBERS: Are you also a loan company?

BILL WROBLEWSKI: No.

SENATOR CHAMBERS: So how does it come that you have the account to collect?

BILL WROBLEWSKI: Generally, they're assigned to the collection agency from the underlying creditor.

SENATOR CHAMBERS: Do they tell you they'll give you a certain amount to collect this or they turn it over to you? They discount it and it becomes yours?

BILL WROBLEWSKI: They generally...the collection agency gets a percentage.

SENATOR CHAMBERS: They don't say we're going to sell you this account for...if it's for a hundred dollars that's owed, you give us \$40 and you go get the \$60 and it's yours.

BILL WROBLEWSKI: No.

SENATOR CHAMBERS: They want you to collect the full hundred and then they give you a percentage of that.

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BILL WROBLEWSKI: Actually, I think the way it works is that the collection agency gives them a percentage of what they collect but that's basically it, yes.

SENATOR CHAMBERS: I'm trying to understand. Somebody owes me a hundred dollars and they won't pay me so then I come to you as a collection agency to get my money. You pay me a percentage, is that what you're telling me?

BILL WROBLEWSKI: Yes.

SENATOR CHAMBERS: What do you pay me?

BILL WROBLEWSKI: I collect the hundred dollars assuming that I can and give you whatever percentage we agree upon.

SENATOR CHAMBERS: But it's really me foregoing some of what is owed me in order for you to have your fee?

BILL WROBLEWSKI: Yes.

SENATOR CHAMBERS: There's nothing in here as the law is written now that says your fee cannot be more than \$10, is there?

BILL WROBLEWSKI: No, there isn't but as a practical matter the formula that's in the statute is the amount that is generally awarded.

SENATOR CHAMBERS: That's what courts grant, award?

BILL WROBLEWSKI: Yes.

SENATOR CHAMBERS: Could it be that they look at the nature of these collection agencies and their tactics? I've had to intervene on behalf of people who got calls on their job and at night and were actually cursed at because I would happen to be able to hear what the person was saying. Then when I took the phone and said, you can believe this or not but I'm Senator Chambers. I hear every word that you're saying and you're violating the law. Click. Now you can say that I'm making it up for this occasion but there are others that know of such things and there are laws at the federal level to prevent collection agencies for doing certain things.

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Are you telling me that if we don't amend this bill to allow the increases that you're talking about, your company will go out of business?

BILL WROBLEWSKI: No, they won't.

SENATOR CHAMBERS: Curses (laughter).

BILL WROBLEWSKI: We'll be here either way.

SENATOR CHAMBERS: That's all that I will ask you. Thank you.

BILL WROBLEWSKI: Okay. Thank you.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you. Next testifier in support?

ROBERT HALLSTROM: Chairman Bourne, members of the committee, my name is Robert J. Hallstrom. I appear before you today on behalf of the National Federation of Independent Business and it's some 6,500 small business owners in Nebraska. Unlike the credit collection agency, small businesses oftentimes bring lawsuit on their own, hire an attorney to collect on a stale claim. And we believe that Senator Aguilar's proposal to bring the jurisdictional limits back into line with the court jurisdictional limits as had been the case until, as I understand it, the early sixties and to increase the attorney fees and a percentage of that jurisdictional amount are the appropriate thing to do and we would urge the committee to support the bill.

SENATOR BOURNE: Thank you. Questions for Mr. Hallstrom? Senator Chambers.

SENATOR CHAMBERS: You know there would be some over here on the right (laughter). Mr. Hallstrom, you're today representing the Small Business Association?

ROBERT HALLSTROM: Yes, Senator.

SENATOR CHAMBERS: How does a person wind up in the debt of a businessperson?

ROBERT HALLSTROM: They purchase services or products from

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that company.

SENATOR CHAMBERS: If a businessperson had more accounts that were not paid than are paid, that businessperson couldn't stay in business, is that true?

ROBERT HALLSTROM: That would be correct, Senator, and I think in light of the bill having the 90-day staleness concept to it is why the bill is somewhat important to small businesses in terms of the ability to get that attorney's fee, reasonable attorney's fees within those parameters taken care of is because there are carrying charges that apply to those businesses and having to stay in business and perhaps even borrow money to stay in business when people aren't paying their bills in a timely fashion on the other end.

SENATOR CHAMBERS: Bad debts can occur because businesspeople are willing to gamble on occasion, isn't that true?

ROBERT HALLSTROM: That could be, Senator, yes.

SENATOR CHAMBERS: And they're hoping or betting that most of the people they extend credit to are going to pay what they owe and the interest or whatever fees might be tacked on.

ROBERT HALLSTROM: I believe that would be a usual presumption and hope and expectation and should be the expectation that people will pay for their debts.

SENATOR CHAMBERS: And certain losses are calculated in as likely to occur. Isn't that true not that they want them to but...

ROBERT HALLSTROM: I would assume indirectly although they don't want to sustain those losses naturally.

SENATOR CHAMBERS: Exactly. But they know that as a cost of doing business there are going to be some bad debts.

ROBERT HALLSTROM: Yes.

SENATOR CHAMBERS: And if they got people who pay well,

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sometimes they might get a little more than what they should in certain neighborhoods so that those who don't pay are made up for by overcharging some of those who do. Again, I live in an area where this happens. And different amounts are charged for the same product to different individuals. You probably didn't know that happened and where you live they don't do such things. You're probably shocked so I'm going to give you a minute to recover your composure before I proceed.

ROBERT HALLSTROM: (laugh) Thank you, Senator.

SENATOR CHAMBERS: Now if this bill is not passed in the way that it's drafted here, what will happen to the majority of the people that you represent?

ROBERT HALLSTROM: Well, I think they'll continue to pay their own attorney fees and not have a reasonable reimbursement level established in the statute.

SENATOR CHAMBERS: Do you consider the people that you represent to have ordinary intelligence at least?

ROBERT HALLSTROM: Yes, yes. Generally, yes.

SENATOR CHAMBERS: Would they pay more to hire an attorney than the amount they're likely to recover?

ROBERT HALLSTROM: Sometimes you end up doing that, not knowing it's going to happen in the first place, Senator, but I think that...

SENATOR CHAMBERS: Well, if the debt is \$50 will they sue somebody to get \$50, hire a lawyer to do that?

ROBERT HALLSTROM: Generally not. You may see more of those claims go into small claims court but I think the one aspect of the bill which is significant in that regard given the fact that you do have small claims jurisdictional limits to address those issues where you don't want to spend the money to go after it is that this raises up to the \$45,000 jurisdictional limit and obviously as you move higher up that scale, you are going to have cases where the debts are high enough that it clearly does make it worth your while to retain the services of a qualified attorney to help pursue

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recovery of that debt.

SENATOR CHAMBERS: But you could have debts that big anyway that are not being collected, is that true? Even now.

ROBERT HALLSTROM: Well, there could be some that you may not recover on. But generally, if you take them to court, presuming obviously that you've got an actionable claim or cause for the services rendered you generally will recover.

SENATOR CHAMBERS: Well, right now if somebody owed you \$50,000 and wouldn't pay you, what would you do?

ROBERT HALLSTROM: I would generally hire an attorney if I wasn't one myself and pursue the recovery.

SENATOR CHAMBERS: And if you recovered, could you ask for attorney fees?

ROBERT HALLSTROM: You cannot ask for attorney fees, Senator, my understanding unless the statute specifically authorizes it under Nebraska law.

SENATOR CHAMBERS: And in most cases people do not recover attorney fees you're telling me when they sue on a bad debt and recover?

ROBERT HALLSTROM: In many cases, yes.

SENATOR CHAMBERS: Well, how do they recover in any of them?

ROBERT HALLSTROM: Because the statute authorizes it. There's insurance statutes, for example, that authorize the recovery of attorney fees for certain actions. This is a statute that is similar to that for certain specified claims within certain jurisdictional amounts that those have been designated as public policy as warranting the recovery of attorney fees.

SENATOR CHAMBERS: And if the amount is above that jurisdictional amount then this statute doesn't help you.

ROBERT HALLSTROM: That is correct.

SENATOR CHAMBERS: And who decided on the \$45,000 amount?

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ROBERT HALLSTROM: My understanding is that that conforms to the jurisdictional amount for the county court.

SENATOR CHAMBERS: Well, suppose it was raised to \$90,000. Would you like that better?

ROBERT HALLSTROM: Well, I assume I might like it better but it will not have the symmetry of what it is at least again until the early sixties been tied to that increasing level of the jurisdictional limit.

SENATOR CHAMBERS: Suppose the jurisdictional limit of the court were raised. Would you be in favor of raising the jurisdictional limit of the court?

ROBERT HALLSTROM: If the jurisdictional limit of the court were raised,...

SENATOR CHAMBERS: Um-hum.

ROBERT HALLSTROM: ...would I favor that?

SENATOR CHAMBERS: Would you favor then increasing this amount to correspond to whatever that jurisdictional limit is raised to?

ROBERT HALLSTROM: Generally speaking, that would be what I would favor.

SENATOR CHAMBERS: So if we raised the jurisdictional limit to \$500,000 you would want this statute to say \$500,000 also.

ROBERT HALLSTROM: That is what, within certain parameters has been done in the past, yes.

SENATOR CHAMBERS: And that's what you would prefer, your group probably.

ROBERT HALLSTROM: Yes.

SENATOR CHAMBERS: How many of them have bad debts up to \$500,000?

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ROBERT HALLSTROM: I would assume very few of them.

SENATOR CHAMBERS: So why would it be of interest to those you represent to do that?

ROBERT HALLSTROM: Well, you picked the figure, Senator. I'm using the concept of (laughter) keeping it with the jurisdictional limits.

SENATOR BOURNE: Further questions? Seeing none, thank you.

ROBERT HALLSTROM: Thank you, Senator.

SENATOR BOURNE: Next testifier in support?

BILL MUELLER: Mr. Chairman, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today as a registered lobbyist for the Nebraska Collectors association, the statewide association of collection agencies in Nebraska in support of LB 91. In response to a question that Senator Chambers had, yes, the \$45,000 as you know is the county court jurisdictional amount. That was an amount that Senator Aguilar chose; we did not. We do believe that the statute should be amended. As Senator Aguilar testified, the jurisdictional amount is \$2,000 was established in 1967 and the attorney fee formula was established in 1953. And we do believe that it should be updated, whether it should go to the county court jurisdictional limit is obviously up to the committee and the Legislature but we do believe that this statute should be adjusted upward. I'd be happy to answer questions the committee may have.

SENATOR BOURNE: Thank you. Questions for Mr. Mueller? Any questions on the left? Oh, Senator Chambers.

SENATOR CHAMBERS: I want these new people to see what they got into when they got on the Judiciary Committee.

SENATOR BOURNE: (laugh) I remember why I got off two years ago (laughter).

SENATOR CHAMBERS: You're right (laughter). Now it's coming back to you. And there's a ghost in the house, Senator Brashear, wherever he may be (laughter).

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SENATOR BOURNE: (laugh) RIP.

SENATOR CHAMBERS: Mr. Mueller, why should we even put a formula, why not even if you're going to raise the amount to coincide with the jurisdictional amount of the court, do you put any amount as a minimum? Why don't you just leave it to the court to determine what the reasonable lawyer fee is? I'm asking you for your opinion, if you have an opinion.

BILL MUELLER: And I was not here in 1967. I don't believe that you were.

SENATOR CHAMBERS: I wasn't.

BILL MUELLER: And so I don't know the genesis of this formula. I don't know of another example where we have this kind of formula in statute. I can tell you my experience is from what I experienced years ago when I was a real lawyer and what other lawyers tell me, this is the formula that courts impose. Would we have opposition to a reasonable attorney fee? We've not talked about that. I don't know that we would oppose that.

SENATOR CHAMBERS: I was just curious, okay.

BILL MUELLER: Yeah, I don't know. I don't know why there's the formula. It's unusual, I think.

SENATOR CHAMBERS: That's all that I have.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you.

BILL MUELLER: Thank you.

SENATOR EOURNE: Further testifiers in support? Testifiers in opposition? Any neutral testimony?

RICHARD HEDRICK: I'm against (inaudible).

SENATOR BOURNE: Oh, I'm sorry. Well, Mr. Hedrick, if you want to come forward in a...

RICHARD HEDRICK: No, (inaudible) just let Ernie take care

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of it (laughter).

SENATOR BOURNE: Okay (laugh). Testifiers in a neutral capacity.

SENATOR FRIEND: We can't do that.

SENATOR BOURNE: Testifiers in a neutral capacity? Seeing none, Senator Aguilar to close. Senator Aguilar waives closing. That will close the hearing on LB 91. Now we'll open on LB 105.

LB 105

SENATOR CHAMBERS: Members of the Judiciary Committee, I'm Ernie Chambers. I represent the 11th Legislative District. I am the sole introducer and soulful introducer of LB 105. And I'm going to demonstrate to you all how much better my bills are than those you hear because they're not going to take much time and they're crystal clear. This bill is brought on behalf of the Nebraska Supreme Court. They created the Nebraska Minority and Justice Task Force in 1999 in conjunction with the State Bar Association to look into the disparities that exist in the judicial and legal systems relative to minorities and to some extent, females. In order to account for those disparities, the court wants to be able to look at actual, factual material and information. Last year or the year before we passed a bill that gave them access to information and presentence reports so that they could get the actual hard data. What this bill would do now since they're looking at the issue of juries, how they're selected, who is on them, and all of the issues that might account for the underrepresentation of certain groups on juries. This bill is going to create an exception to the law which would say that certain information is not to be made available to anybody except those who work with the system and if they reveal this information it's a Class IV felony. This is the language because I want it into the record that the bill will ask you to amend into the law. Notwithstanding subsection 1 of this section which requires the confidentiality, the Supreme Court or an agent of the Supreme Court acting under the direction and supervision of the Chief Justice shall have access to juror qualification forms for research purposes. The Supreme Court and its

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agent shall treat such information as confidential and nothing identifying any individual shall be released. This is information for research purposes only. That is all that the bill does and if you have any questions I will answer them or maybe not (laughter).

SENATOR BOURNE: Questions for Senator Chambers? Senator Chambers, so the Supreme Court or its agent would not be subject to the Class IV felony if they disseminated the information (See also Exhibit 9)

SENATOR CHAMBERS: You're right. It would not apply to them but because of the fact that we're dealing with the court, I do have a level of respect for the court and its integrity and I don't believe we need to threaten them with a criminal sanction to make them honor what they've agreed that they're going to do.

SENATOR BOURNE: And you're not concerned with the language in the bill that says an agent of the Supreme Court? They could literally hire a third party?

SENATOR CHAMBERS: The court could do that but if the court were to bite me on this, they would wind up with no teeth or jaw muscles for biting or chewing thereafter. So I'm willing to give them one bite.

SENATOR BOURNE: (laugh) Term limits are coming, Senator Chambers.

SENATOR CHAMBERS: Then it will be up to others to hold the fort (laughter) but by then they may have gotten all the information that they really need.

SENATOR BOURNE: Thank you. Further questions? Senator Aguilar.

SENATOR AGUILAR: Just a comment. I was able to attend one of the task force hearings in Grand Island on this for this task force and participated and very pleased with what they brought forward. And I just wanted to thank Senator Chambers for bringing this forward today.

SENATOR CHAMBERS: And I want to make it clear that had Senator Aguilar not been there they might not have conducted

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their business as circumspectly as they did. So I want to thank you for attending that meeting.

SENATOR BOURNE: (laugh) Thank you, Senator Chambers. Testifiers in support?

RIKO BISHOP: Chairman Bourne, members of the Judiciary Committee, I'm Riko Bishop. It's R-i-k-o, Bishop, B-i-s-h-o-p. I'm an attorney in private practice here in Lincoln and I am a member of the Minority and Justice Implementation Committee which was born from the Minority and Justice Task Force which Senator Chambers referenced that was conceived back in 1999. It became the Implementation Committee in 2003. I've served on that committee since 1999 and have served as one of its subcommittee chairs on a subcommittee; it's called Access to Justice wherein we put our primary focus on the jury system and made it our primary goal to determine whether or not the racial and ethnic makeup of the juries across Nebraska were representative of their communities. And as a result of our investigation we determined that there appeared to be evidence that they were not and that steps needed to be taken to remedy that and one such step was to have legislation passed in the last couple of years that requires refreshing of the jury pool information on an annual basis. And there's some anecdotal evidence that that may be causing some change now but we can't know whether we're seeing changes from that legislation unless we can have access to the jury data. And, specifically, the race and ethnic data of the jurors who are called to participate in that process. Currently, the jury commissioners of the various counties which aside from Lancaster and Douglas are the district court clerks, make their own questionnaires or forms that get sent out to the jurors. And they can opt to request race and ethnic data or not. So what we're proposing is a uniform questionnaire that would be sanctioned by the Supreme Court of the state and required by all counties to use with a detachable page that would request race and ethnic data that could be separated from the primary form that attorneys may have access to. So that those forms can be maintained confidentially and as Senator Chambers indicated, be accessible only by the Supreme Court or its appointed agent for research purposes only. I think that the only way to ensure that we are going to have diverse representation on our juries is to be able to access that

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data. And so I encourage you to support this legislation.
Thank you.

SENATOR BOURNE: Thank you. Questions for Ms. Bishop?
Senator Aguilar.

SENATOR AGUILAR: Again I don't have a question except a
comment again that as well intended I think we're going
here, there's still a little bit of a problem in the fact
that if my last name is Rodriguez it's not going to be very
hard for somebody to determine what my racial background is.

RIKO BISHOP: Sure, or even when you appear. I mean, the
same for myself, if I appear someone's going to at least try
to identify what my racial or ethnic makeup might be. But I
don't know. And that's our hope, Senator, is that if we
find through our collection of data that we do have a good
intake of a diverse population in the initial pooling but by
the time we impanel jurors our data shows us we have an all
white jury time after time again despite having a pretty
good population coming in. We have a problem somewhere in
between and that will help us try to pinpoint where that
problem is occurring. And if it's because people are
looking at names or faces and disqualifying jurors somehow
then we want to address that.

SENATOR AGUILAR: Thank you.

SENATOR BOURNE: Thank you. Further questions for
Ms. Bishop? Seeing none, thank you.

RIKO BISHOP: Okay. Thank you very much.

SENATOR BOURNE: Next testifier in support?

ROBERT STEINKE: Senator Bourne and other members of the
committee, thank you. My name is Robert Steinke and I'm a
district court judge for the 5th Judicial District in
Columbus, Nebraska. I'm also a member of the Nebraska
Supreme Court Minority and Justice Implementation Committee.
I, too, am here this afternoon to testify in support of
LB 105. Our Constitution guarantees us all the right to
trial by jury which, of course, is a fundamental right in
our system of justice. I think it's very important for
those of us who deal with the legal system on a daily basis

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and those who have a special interest in our system of justice do all that we can to promote and protect and to encourage the constitutional right that we have to trial by jury and as to trial by a jury of our peers. If juries are to properly and fairly represent truly a cross-section of our respective communities it necessarily follows then that juries and jury pools must fairly and properly and accurately reflect the racial and ethnic makeup of our respective communities throughout all of our counties throughout the state of Nebraska. I'm here in support of LB 105. I think that this particular piece of legislation would promote and protect our right, our constitutional right to trial by jury and that it would certainly assist in providing a uniform method to investigate and to examine the representative composition of our juries throughout the state on a county by county basis and that it would, as others have mentioned today, allow the Supreme Court the authority to adopt and implement a uniform juror questionnaire which would, in part, contain data which would reflect or deal with racial ethnicity. In addition, LB 105 for research purposes only as has been mentioned by Senator Chambers would allow the Supreme Court or its agent access to the jury qualification forms and this, in turn, would provide us research data necessary to determine whether or not our juries and our jury pools truly are reflective and representative of the composition of our counties and communities. I would support LB 105 and would encourage its passage. Thank you.

SENATOR BOURNE: Thank you. Could I ask you to spell your last name for the record, please?

ROBERT STEINKE: I'm sorry, Steinke, S-t-e-i-n-k-e.

SENATOR BOURNE: Thank you. Questions for Mr. Steinke? Seeing none, thank you. Appreciate your testimony.

ROBERT STEINKE: Thank you.

SENATOR BOURNE: Further testifiers in support?

ELLEN EBY: Hello again (laugh), Senator Bourne and members of the Judiciary Committee. My name is Ellen Eby, E-b-y. I am clerk of the district court in Dawson County, Lexington, Nebraska. I am representing the Clerks of the District

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Court Association and also the Nebraska Association of County Officials. We support LB 105 and that's the main thrust of my testimony. Overall, the response of the clerks of the district court has been very positive. We understand additional changes may be made and would be happy to continue working with the Minority and Justice Task Force, Supreme Court, and court administrators office. I think a uniform questionnaire is a step in the right direction but I also think it must be user friendly. We are asking people to take time out of their busy schedules to fill out another form and we know how important it is but to some of those people it might not be quite as important in their thinking. Therefore, we need to keep it simple and concise as possible and still be able to get the information needed for the courts and for statistical purposes. If there are any questions I'd be happy to answer them.

SENATOR BOURNE: Thank you. Questions for Ms. Eby? Seeing none, thank you.

ELLEN EBY: Thank you.

SENATOR BOURNE: Next testifier in support?

JANE SCHOENIKE: Senator Bourne, members of the committee, my name is Jane Schoenike, S-c-h-o-e-n-i-k-e. I'm the executive director of the Nebraska State Bar Association and I appear today on behalf of the association in support of LB 105. The Nebraska State Bar Association is a partner along with the Nebraska Supreme Court in the Minority and Justice Implementation Committee. This legislation will help to ensure that our juries reflect the demographics of our state. The uniform questionnaire and the research exemption are necessary to assist in this effort. We urge your support of LB 105 and thank you for the opportunity to appear.

SENATOR BOURNE: Thank you. Questions for Ms. Schoenike? Seeing none, thank you. Are there further testifiers in support? Are there testifiers in opposition? Any neutral testimony? See none. Senator Chambers to close. Senator Chambers waives closing. That will conclude the hearing on LB 105 and the hearings for today. Thank you.