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Judiciary Committee  
February 11, 2010

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[LB835 LB876 LB901 LB936 LB1094]

The Committee on Judiciary met at 1:30 p.m. on Thursday, February 11, 2010, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB936, LB876, LB835, LB1094, and LB901. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Mark Christensen; Colby Coash; Brenda Council; Scott Lautenbaugh; Amanda McGill; and Kent Rogert. Senators absent: None. [LB936]

SENATOR ASHFORD: All right. We're a little late. I apologize, especially to the Speaker. That's usually bad policy to keep the Speaker waiting, but. We have, as I mentioned, five bills today. The first bill is LB936 dealing with court-ordered conditions for juvenile court dispositions. And I would ask Speaker Flood if he would introduce LB936. [LB936]

SENATOR FLOOD: Thank you, Chairman Ashford. Good afternoon, members of the committee. My name is Mike Flood, F-l-o-o-d. I represent District 19. This bill provides the juvenile court with specific statutory authority to fashion a more meaningful probation order. More specifically, the bill would allow the juvenile court to place a juvenile on probation under the conditions necessary to ensure that the juvenile will lead a law-abiding life. It would allow the court to place a juvenile on probation under the conditions reasonably related to the juvenile's rehabilitation. The list of new conditions begins on page 6 of the bill and continues to page 7. An example of the new conditions in (A) on page 6 include, "To obtain employment, attend school, or pursue a prescribed secular course of study or vocational training." The amendments in LB936 were brought to my attention following a 2008 Nebraska Supreme Court case, In re Dustin 276 Neb. 635, 2008. In this case, the court found that the juvenile court lacked the statutory authority to order a juvenile to spend time in detention. If there is any disagreement with this bill, it seems to center on the authority of the court to place a juvenile in a detention facility, and this authority is in (B) on page 6. I appreciate the concerns with placing a juvenile in detention and I understand that detention is often not the best way to rehabilitate a juvenile offender. However, I also know that we have understanding judges and caring caseworkers in our juvenile system who truly want to help juveniles and have a juvenile's best interest in mind. I know that judges do not exercise their authority in these matters without due deliberation, and this bill would allow the court some needed authority in special situations. Another concern is the fact that this bill could have a fiscal impact. In the fiscal note, DHHS notes that there are approximately 90 youth who are duly adjudicated, duly supervised and are in the custody of the state. These youth may be ordered to serve detention and the court may order DHHS to pay for the detention costs. In these circumstances, there would be a cost to the department. I know that this committee is working very hard on looking at Juvenile Code revisions and doing the best job it can. I do not think that this bill is in conflict with the overall mission of this committee. I do not think this will lead to excessive detention.

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Here's what I like the most about this bill. You have a young person who's on probation and part of the probation is to behave at school and to control their behavior problems. When the juvenile willfully acts out in school, they get a five-day out of school suspension. So they're sitting at home, on the couch, causing trouble all day long or as soon as their loved one gets home. That's not for every young person but it does happen. This bill would allow the court to say you're going to serve that suspension in the juvenile detention center. You're going to understand what you did was wrong; there's a cost to that. And if you're going to act up in school and we're not going to be able to control this, you can sit that time out in detention. Now I don't know that it has to be overused. I don't think it will be overused. But the court should have the ability to do that and the court was doing that several years ago, and I think the administrators of the Norfolk Junior High would tell you it was very effective. So I'm asking you to place this authority in the statute and allow the juvenile court the discretion to use this as necessary. Thank you, Mr. Chairman. [LB936]

SENATOR ASHFORD: Thank you, Speaker Flood. Yes, Senator Council. [LB936]

SENATOR COUNCIL: Yes. Thank you, Mr. Chairman. Thank you, Speaker Flood. Appreciating the need to respond to the court decision, everything else in the bill on pages 6 and 7 are conditions that the court can currently impose on a juvenile that to my knowledge haven't been the subject of any court challenge. So if the issue is whether there's authority to place a youngster who is on probation in some kind of detention facility for some violation, could we, I guess, simply address this by, you know, line 5, that's where "Place the juvenile on probation subject to the supervision of a probation officer and under any conditions deemed by the juvenile court to insure that the juvenile will lead a law-abiding life or...", and I understand it, "...including, but not limited to..." attending or residing "in an institution or facility established..." because everything else they already can and many times already do impose as conditions. And my concern is I don't want to give the...to send the signal that, you know, judges can't go beyond these enumerated conditions. And if the intent here is to address the fact that the court ruled that the juvenile court had no jurisdictional authority to do that, just addressing that jurisdictional problem without giving the impression that judges haven't had the authority to do all of these other things, would that be problematic to...? [LB936]

SENATOR FLOOD: Not necessarily. I don't spend enough time in juvenile court to be very knowledgeable. I'd defer to maybe one of the county attorneys that are here to talk about that. But the main purpose of my bill is obviously to address... [LB936]

SENATOR COUNCIL: Just a...and I appreciate that. [LB936]

SENATOR FLOOD: And I do think that courts around the state are doing this. It's been a problem in our corner of the state and I certainly don't want to see it overused, but I think it should be available. [LB936]

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SENATOR ASHFORD: And any other...? Yes, Senator Lautenbaugh. [LB936]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman. Thank you for bringing this, Speaker Flood. Is it possible the reason for enumerating these things is that you don't want another court decision to say that something else can't be done? [LB936]

SENATOR FLOOD: That was, in part, the reason it's there. I think Senator Council brings up a good point. I think the state does have to give a little direction, but that's...I worked with our juvenile court judges on this, and others, and they saw some value in including this, but this is a lot more trimmed down than what the original draft of the bill looked like. I didn't want to recreate an adult probation system in the juvenile court because it is different, but I...you know, I think your legal counsel and your collective experience, I would certainly defer to that. [LB936]

SENATOR LAUTENBAUGH: And with a follow-up, I guess I look at page 6, line 12...11 and 12, "To obtain employment, attend school, or pursue a prescribed secular course of study..." What is the concern about secular? [LB936]

SENATOR FLOOD: "...or vocational training to obey the rules..." I think the interest there, obviously with the juvenile, is that they receive a public education or a parochial education that's certified under the state's...you know, the Department of Education. [LB936]

SENATOR ASHFORD: I think secular meaning state. We may have to clarify that, but it's secular... [LB936]

SENATOR FLOOD: I have no...I'm not trying to deny a young person any ability to involve themselves in CCD course or anything like that. I'll better clarify that. I want to visit with a few folks, but. [LB936]

SENATOR ASHFORD: We can clarify that. Any other? Yes, Senator Coash. [LB936]

SENATOR COASH: Thank you, Chairman. I think you said this pretty clearly in your opening, but I think it would be worth repeating. Your bill is authoritative and discretionary in nature, correct? It doesn't mandate. [LB936]

SENATOR FLOOD: Right. It doesn't mandate anything. [LB936]

SENATOR COASH: Okay. Because I did get some correspondence on this particular bill, folks concerned that this was directive in nature. And I think it's important we realize this is...it gives authority in this area. [LB936]

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SENATOR FLOOD: It's discretionary, and I don't...I think what you're wrestling with as a committee is how do we avoid excessive detention? That's certainly...this bill is not intended to mar that up. [LB936]

SENATOR ASHFORD: It's a little different issue. What we're working on in our juvenile bill is to situations where there's prolonged detention without even a...simply because of some violation of some court order not to appear or something that's not this. And, you know, it seemed to me that we can easily incorporate...that would be I think preferable to incorporate, you know, the substance of this bill into the juvenile justice bill, which we are in the last throes, hopefully, thanks to Stacey's hard work--which it really is hard work--over the last several months. But it seems to me consistent, not inconsistent, with the work we're doing, so. [LB936]

SENATOR FLOOD: If I may, one more story that I've heard. A young person is in juvenile court jurisdiction; the court has jurisdiction over him. And they are a constant runaway. [LB936]

SENATOR ASHFORD: Well, that's a problem. [LB936]

SENATOR FLOOD: And the police continue to go to the house. And Mom and Dad are, or Mom or Dad or both, are upset and they can't seem to ever resolve it. And the runaway knows that whenever he or she is then found by law enforcement, nothing happens to them more often than not. It's hard to put a hold. Well, that behavior has to stop and there has to be some consequence to that behavior. And I think that a juvenile court judge may decide, you know, you need to spend a couple days here; let's get you set up; let's figure out what needs to happen. Because there's no consequence right now. [LB936]

SENATOR ASHFORD: I just wish in Douglas County we had the facilities you had in Madison County, because we...our concern with a county like ours that we don't have the kinds of facilities that would...or I would feel more comfortable doing this. [LB936]

SENATOR FLOOD: Our county sheriff, Vern Hjorth, that was one of his big initiatives. And I hate to say this but we're proud of the system we have up there. [LB936]

SENATOR ASHFORD: Don't...that's all right. You...(laugh). [LB936]

SENATOR FLOOD: I mean, I'm proud of it but I don't... [LB936]

SENATOR ASHFORD: I wish you could come down to... [LB936]

SENATOR FLOOD: We don't want to detain kids but we have the staff secure area for them. [LB936]

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SENATOR ASHFORD: We need staff secure facilities and the fact that we don't have it is...the words escape me. But there...because I don't want to get too aggressive with my wording. But I wish we had what you had. So thanks, Speaker Flood. [LB936]

SENATOR FLOOD: Thank you. And I'll waive my closing. [LB936]

SENATOR ASHFORD: Okay. How many people do we have talking about this bill? One or two? Okay. Let me introduce my...go ahead, if you would. Let's have the next proponent, first proponent. I want to introduce my colleagues from Lincoln. Senator Coash, some of you may not know Senator Coash, and Senator Christensen, Senator Lautenbaugh, Senator Rogert from Tekamah, Senator Council, and Christina Case is the committee clerk and Stacey Trout is legal counsel. They do all the work and I just sit here. Sometimes I do something. Okay, let's go with the proponents. Of course, Sarah and Jamie do a great job as well. They're here every day every time we have a meeting. Good afternoon. [LB936]

JO PETERSEN: Good afternoon, Senator Ashford and members of the committee. My name is Jo Petersen, P-e-t-e-r-s-e-n. I am a deputy Hamilton and Saunders County attorney, represent the Nebraska County Attorneys Association in support of this bill. I'll be very brief. We believe that the bill is necessary. It spells out and provides options which may or may not currently be available, but which need to be, to work and further juvenile rehabilitation efforts by the courts. I did speak with the Wayne County Attorney's Office, Madison County Attorney's Office, and Pierce County Attorney's Office who have the problem that exists with Dustin S. They were supportive. They want to make sure due process is in place but do see the need for the courts to have these things available. Want to address Senator Council's question to Senator Flood that as far as whether or not all of these need to be in there, I think Senator Lautenbaugh's position is well taken. Right now, no one has challenged those things. It's nice to have them in there to know...the courts are using them, routinely using them as you've indicated. It's nice...it would be nice to have them in the statutes so that there's no question. [LB936]

SENATOR ASHFORD: Right. I agree. Okay. Yes, Senator Council. [LB936]

SENATOR COUNCIL: And thank you, Ms. Petersen. My other concern around that, though, is what's not stated in here gives rise to the very kind of legal challenge that led to the Dustin decision. And that's my concern about when you enumerate you either... [LB936]

JO PETERSEN: I agree. [LB936]

SENATOR COUNCIL: ...don't enumerate enough or you enumerate too much, and

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that's...and that was my only question, because...and there may be some very creative, imaginative juvenile court judge that comes up with, you know, the ideal sanction for the behavior of a juvenile that's not enumerated. And that's the only concern I have about enumeration. [LB936]

JO PETERSEN: I would agree. It's a double-edged sword: Is it enough or not enough? But... [LB936]

SENATOR ASHFORD: But can't we...we could do some language that would not necessarily be enumerative but would... [LB936]

JO PETERSEN: Correct. [LB936]

SENATOR ASHFORD: Senator Council's point is well taken. Thank you. [LB936]

JO PETERSEN: Thank you. [LB936]

SENATOR ASHFORD: And we appreciate all the work of the county attorneys on our juvenile justice matter. [LB936]

JO PETERSEN: Well, I've been involved with that and we're hopeful. It needs work...I mean, it needs to be done, so we're getting there. [LB936]

SENATOR ASHFORD: Right. Thanks. Next proponent. Opponent. Oh. (Laugh) [LB936]

TODD RECKLING: (Exhibit 1) Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Todd Reckling, R-e-c-k-l-i-n-g, and I'm the director for the Division of Children and Family Services. I'm here today to testify in opposition to LB936. Although there are current statutes outlining the juvenile court's ability to order certain conditions of probation at disposition, this bill seems to expand the court's authority to order and define specific conditions such as detention. While this bill mainly impacts the Administrative Office of Probation, it also does have an impact on the Department of Health and Human Services. There are youth who have been committed to both DHHS and Probation for supervision. If the order of probation requires a period of detention for violation of a condition of probation, the issue may arise wherein DHHS, who has legal custody of the youth, may disagree with the probation officer regarding the imposition of a period of detention for the youth. We believe there should be some opportunity, such as at a court hearing, for DHHS to offer our recommendations, opinions, or raise concerns about a dual-supervised youth who will be required to serve detention time. Of specific concern is Section 2, on page 6, lines 15-17 of LB936 which amend 43-286 by adding language granting the court the authority to order detention as one example of a specific condition for probation. With the statutory addition of this specific probation condition in the Juvenile Code, there could potentially be an increase

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in the number of juveniles in detention and in the amount of time that a juvenile spends in a detention facility. The department believes that juvenile offenders should remain in their own home with support services whenever possible if there is not a safety concern, or as an alternative, to be placed in the least restrictive environment possible when home is not an option. Low-risk offenders that are placed in detention may actually learn more problematic behaviors from association with higher-risk peers. Youth placed in detention for long periods of time can also experience psychological and emotional trauma. There will also be a cost to DHHS and the counties if the use of detention increases. In tough economic times, adding additional costs to the state and counties is problematic. As always, the department is willing to work together with interested parties to provide better outcomes for juveniles. I appreciate this opportunity and would answer any questions. [LB936]

SENATOR ASHFORD: Any questions of Todd? Senator Council. [LB936]

SENATOR COUNCIL: Yes. Thank you, Mr. Reckling. And I see the concern you raise perhaps getting to one of the concerns that was presented during the work of the Juvenile Justice Task Force, and I think it's a problem because we don't have secure alternatives. And using the example that Senator Flood provided of the youngster who's on probation and continually runs away, the least restrictive alternative there may be something outside the home that is secure but is not detention. And the problem is that we don't have those types of facilities readily available, not only in Douglas County but across the state. And unfortunately, detention becomes the default. Has that been your...I mean, when you need to place a youngster in a secure environment, what options do we have? [LB936]

TODD RECKLING: I guess, Senator, from my perspective there is a time and a place for detention. I would not argue against that. I do, however, think that there are other juveniles that are going to get caught up in this law, that it's concerning. Some of the dual-supervised kids that I referenced in my testimony that are being both supervised by Probation and HHS, some of those kids are merely a status offender and/or abused and neglected child. And so I would argue that I don't believe in some of those individual cases that it's appropriate for an abused and neglected kid, or even a status offender that hasn't committed a law violation, to be detained in a detention center. There are alternatives that at least HHS has available, and granted, they're not statewide, but we do have things called emergency shelters in other areas that we can place a child temporarily that's less secure than a detention facility. I think there are other alternatives, as you have heard both Probation and I talk about in relation to LB800 that there are alternatives. Just because a child runs away doesn't necessarily mean they have to be detained somewhere. You have to look at the individual circumstances. We have other means that are available now to Probation and HHS, whether that's electronic monitoring, tracker services, or some type of temporary intervention. So my concern with this is that the use of detention could be imposed as more of a, like a

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punishment and sentence. And that was the issue in the Supreme Court case was, there wasn't a question about the other services, but it was a question about whether or not the action of detention in and of itself is more punitive, which is counter to the Juvenile Code essence of rehabilitation. [LB936]

SENATOR ASHFORD: Senator Coash. [LB936]

SENATOR COASH: Thank you. Thanks, Todd. Something in your testimony kind of surprised me. You stated, "We believe there should be some opportunity, such as at a court hearing, for HHS to offer recommendations, opinions, raise concerns about dual-supervised youth." Your workers aren't able to participate in those court hearings now? [LB936]

TODD RECKLING: Here's my concern. There could potentially be a situation where this type of--and I'll narrow it just to detention--this ordering of detention could be imposed on a youth where I may not be at that court hearing. And so if that happens or even if that recommendation is made, we're just asking for the same opportunity to bring forward that information. [LB936]

SENATOR COASH: But you do...would your workers have the...I mean, they're not barred from going to those court hearings, are they? I mean, aren't they regularly at those court hearings for kids who are in those dual-supervised positions? [LB936]

TODD RECKLING: I don't know that that's always the case. I think, yes, the court hearings that we're involved with, yes, obviously our workers are there. But there may be other court situations through drug court or other opportunities where the probation officer is making recommendations or the court has already ordered detention used, where I would not necessarily have had an opportunity for input. [LB936]

SENATOR COASH: So they might make the order without a hearing. Is that possible? [LB936]

TODD RECKLING: Not without a hearing but maybe prior to my involvement. [LB936]

SENATOR COASH: Okay. Okay, I understand. I guess I was a little bit surprised about this bill. In my work with juveniles, I mean, I've seen judges order detention all the time, and Senator Flood referenced a court case where this authority seems to have been removed from the judicial branch. [LB936]

TODD RECKLING: And I don't want to...I'm not a lawyer so I can't speak eloquently to the case. Currently, if a juvenile is on probation and needs to be detained because of a probation violation, the probation officer has that authority, so they can use detention. [LB936]



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SENATOR COASH: Okay. [LB936]

TODD RECKLING: In this situation, the way I understand the way the bill was written, and the question in the court case was whether or not detention action looked more like a sentencing of particular days as part of the punishment, and it was in conflict with the Juvenile Code that says we're not here in Nebraska to punish youth; we're here to rehabilitate them. And that was the issue without legislative authority that the Supreme Court shied away from making a particular finding on that, just the detention matter. [LB936]

SENATOR COASH: Okay. I understand that more clearly now. But as you understand it right now, Probation has the authority. Can Probation order detention? [LB936]

TODD RECKLING: You know, I don't want to speak for Probation. They can detain a youth under their own current authority if they're violating probation. I don't know exactly how that all transpires. [LB936]

SENATOR COASH: Okay. So detention is already a tool available for... [LB936]

TODD RECKLING: For safety and security, like the example was that the youth's running away, violating the probation or violating our own...like if they're in our custody, as well, we can ask for that type of detainment or other. But this gets more into an issue of actually...let's say the kid is not going to school. They haven't gone to school for ten days. So somebody is going to order them to sit in detention as a punishment to fulfill that obligation versus a temporary placement because the kid is running away or we have to find other placement or wrap services around them. [LB936]

SENATOR COASH: Okay. Good. Thank you. [LB936]

SENATOR ASHFORD: You're preaching to the choir, Todd. I mean, certainly the whole tenor of LB800 is to steer away from detention as a punishment. And I don't think...and I agree with you, that you need to be a part of those proceedings where you have dual jurisdiction or dual participation. But I don't...there may be a gap that Senator Council is talking about that may need to be filled, at the same time consistent with what you need to do or have to do or should be doing to keep...to be consistent with juvenile court. [LB936]

TODD RECKLING: I just thought it was important for this committee to hear... [LB936]

SENATOR ASHFORD: I think it is and it's very helpful...throughout this whole process you've been very helpful. And the direction you're taking us in the juvenile area is definitely the right area...absolutely the right direction. I just wish the facilities...and I

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know we have shelters. But we need to catch up somehow, some way, with some of these alternatives. And we do have them in the private sector but, you know, again it's a question of finding space and capacity in our communities, but. I know we're working on it and we're making strides, and you're... [LB936]

TODD RECKLING: We look forward to being a part of that. [LB936]

SENATOR ASHFORD: ...and you're a big part of it. Yes, Senator Council. [LB936]

SENATOR COUNCIL: Yes, Senator Ashford. And I want to thank Senator Coash because his questions really drew out the issue that I have some concern about, and that is...and that's why I talked about alternatives, a child in a runaway situation and they're going to keep doing that and that's a violation of the probation. You know, placing them in some alternative placement out of home is an option. But what I was hearing being the crux of the reason for the introduction of this is to grant authority to use detention as a punishment, which does run counter to the whole philosophy of the separate juvenile justice system. So I appreciate your input. [LB936]

TODD RECKLING: Thank you. [LB936]

SENATOR ASHFORD: Thanks, Todd. Any other opponents? Neutral? Speaker Flood has waived closing. We'll now go to LB876. Let me ask again, how many testifiers...Senator Howard is here. Please...Gwen, welcome. [LB936 LB876]

SENATOR HOWARD: Thank you. [LB876]

SENATOR ASHFORD: How many testifiers do we have on LB876? Okay. Senator Howard, you may commence. [LB876]

SENATOR HOWARD: Thank you. Thank you, Senator Ashford and members of the committee. For the record, I am Senator Gwen Howard and I represent District 9. I appreciate the opportunity to present LB876 for your consideration. LB876 will remove the cap on economic damages while maintaining the current lid on noneconomic damages. If a person is awarded \$1.5 million in economic damages, that individual can recover no more than \$250,000 in noneconomic damages. But if the award is \$2 million, noneconomic damages are not recoverable. To clarify for nonattorneys such as myself, under 44-2835 economic damages are monetary losses such as medical expenses, funeral costs, and lost wages. Noneconomic damages are subjective losses such as pain and suffering. Right now, victims of the medical malpractice that are not injured by their doctor are then reinjured by the law. The law prevents individuals who suffer serious injury from being awarded even full payment for medical expenses. LB876 would mean that the cap on economic damage awards is what victims can prove that they deserve. As the law is now, we do these individuals even greater disservice by

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indulging in the common wisdom that injured patients are either greedy or duped into suing by evil attorneys. In actuality, 98,000 people die each year from medical malpractice, and yet, every year only 11,000 people file medical malpractice claims. I am sure that the opponents of LB876 will try to scare you, suggesting that premiums will go through the roof and that doctors will begin to flee Nebraska, especially in rural areas. This simply is not true. In the early years of the last decades when premiums were increasing significantly, researchers found that premium increases were, on the whole, no more significant than increases in other healthcare costs. It's often posited by those who wish to limit damage awards that doctors will rush into states that prevent large awards. However, a recent study found that after Texas passed a major overhaul of their tort system, the number of doctors per capita continued to decrease, especially in rural areas. Even some studies that look favorably on caps suggest that only doctors in high-risk specialties pay attention to changes in malpractice law. And if you look at some of those specialties in Nebraska, malpractice premiums do not seem to determine whether or not they choose to practice. The 2009 family physician survey reports found that 13 percent of obstetricians were considering leaving the practice. Although some doctors did indicate malpractice or other financial issues as a motivation, the majority of professionals seeking to leave the practice are doing so because of lifestyle concerns. The people who have the most financial interest in capping damages are not doctors or patients or attorneys, but insurance companies. The 2008 study from the American Association for Justice found that insurance companies take in three and a half times what they pay victims in states with caps on damages. In states with no caps, companies take in two times what they pay on policies. Economists at the National Bureau of Economic Research have come to the conclusion that the data suggests premiums seem to have little to do with insurance company payouts. And despite advocating otherwise, even tort reformers and insurance companies own up to this. Bob White, president of the First Professional Insurance Company, said of Florida malpractice cap proposals, no responsible insurer can cut its rates after a medical malpractice tort reform bill passes. Frankly, my fellow senators, I ask you to move this bill forward, not because of all this data, but because LB876 is the right thing to do. I can go on with statistics until we're all worn out, but there are two facts about this cap that are very clear. Because of the cap on economic damages, victims of medical malpractice are not receiving real compensation for their injuries. They are not receiving compensation for even the basic medical expenses that follow them throughout their lives. In these cases where catastrophic injuries result, the money just runs out. Health insurance runs out, your bank account runs out. And when savings and insurance and jury awards are gone, the only place these victims and their families can turn to is the state. And that is fact number two. The real cost of medical malpractice is not passed to negligent doctors or their insurance companies, but to Nebraska taxpayers. Economic damages are knowledgeable. We can predict what these expenses will be in the future and determine what an award should be today. They are knowable, determinable, and predictable. But the injury caused by capping economic damages is also predictable. We know today that if LB876 is not advanced, Nebraska taxpayers will bear the cost of

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medical mistakes far into the future. Thank you. [LB876]

SENATOR ASHFORD: Thank you, Senator Howard. Any questions of Senator Howard? [LB876]

SENATOR HOWARD: All right. Thank you. [LB876]

SENATOR ASHFORD: Thank you. Proponents of LB876. Those who are in favor of the bill. [LB876]

JOHN LINDSAY: (Exhibit 2) Thank you, Senator Ashford, members of the committee. For the record, my name is John Lindsay, L-i-n-d-s-a-y, appearing on behalf of the Nebraska Association of Trial Attorneys. Actually I was hoping I wouldn't be the first up because I think the stories that will follow me are much better than anything I would have to say. I think Senator Howard gave an excellent background. I would just note from my...just a little bit of personal background. I've been around the Capitol for around 23 years now, and the cap has been at issue just about every year since I've been here. The problem...and then Senator Howard's bill has a unique approach to it...the problem is, any time we're here we're always chasing inflation and the cap is always trying to catch up with inflation. This doesn't even get to the point that the NATA position is that we believe the cap is an unconstitutional restraint on people's access to the courts, but...and right of other reasons. But if we're going to have a cap, it ought to be something that can reflect what the economic realities are. The cap was raised in the '92 session, took effect I think in '93. Raised to \$1.25 million. The \$250,000 increase that Senator Ashford, I think you'll remember Senator Chizek pushed that through. And then it wasn't addressed again until 2003. I believe the 2002 session, ten years later, when Senator Brashear pushed it through from \$1.25 million to \$1.75 million. But that was within the context of a case involving the Gourley family who I think you'll hear from. The Gourley family's case was pending in the Supreme Court and there was pressure and concern that, in fact, the system was unconstitutional. And so I think in some little bit of reaction, that that last change in the cap took place. But we're always lagging inflation. If you look back at your own lives...medical inflation, by the way, since the last time the cap was increased, I believe is around 44 percent. If you look at it in your own lives, just think what medical inflation has done--just the medical portion of noneconomic damages. And the cap is already obsolete. There has to be some sort of a change that would allow families who fall under the purview of this cap, that they are not harmed as badly as some of the cases that you're going to hear about. I think there's another issue and that is who should...the damages don't go away just because there's a cap placed on them. The damages continue. The medical bills continue to mount. It's just a question of who pays for them. I would suggest to you that instead of that being spread among users through insurance, it will...has been shifted to the General Fund. I would have a handout that's just...I mentioned the increase in the Consumer Price Index. This is just...comes from the U.S. Department of Labor Web

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site, I believe, and it just shows you what the inflation has done just in the...since the cap was raised back in '93. So we're always, as I mentioned, always chasing that. My red light is on. I better shut up. [LB876]

SENATOR ASHFORD: Okay, thanks. And just to remind everyone, when we get to the yellow light there will be a minute remaining in your testimony, so that those who are not here on a regular basis realize we have this light system that John has just gone over. (Laughter) Any questions of John? Thank you, John. [LB876]

DAVID GEIER: (Exhibit 3) Chairman Ashford, members of the committee, my name is David Geier, G-e-i-e-r. My address is 1141 H Street here in Lincoln. I'm a lawyer. I'm here on behalf of myself, not any organization. I have given you a handout in which I detail my own research regarding the impact on malpractice insurance premiums of the most recent increase in a cap. I give you that because I want to make a point. One of the things you may hear in opposition to this idea that LB876 presents is that insurance premiums will go crazy, cost of litigation is going to go up, this is going to be opening the floodgates to all these claims. The National Association of Insurance Commissioners publishes statistics showing premiums earned and claims incurred by malpractice insurance carriers. I've given you a page out of their national report which shows the results in the state of Nebraska. If you look at the five years before the last increase and compare those to the five years after the last increase, you'll see, as I detailed in the paper that I've given you, that the insurance premiums did in fact go up when the cap was increased, but the amount of claims incurred did not. In fact, the amount of claims incurred by malpractice insurance companies actually went down in the state of Nebraska. So you had a 47 percent...a 40 percent increase in the liability exposure, 47 percent increase in premiums, and a reduction in claims incurred. Now the bill would put all of the burden of the removal of the cap on the Excess Liability Fund. The fund itself has not experienced a dramatic increase in the number of claims filed, number of claims paid, or dollar amounts paid since the last increase when the cap went from \$1.25 million to \$1.75 million. So that's substantial increase, as a 40 percent increase in the cap, did not produce a big change at the Excess Liability Fund. I think the statistics would show, at least they suggest that you could remove the cap, at least on the economic damages with little or no effect on the cost of compensating for these damages through the Excess Liability Fund. The people at the fund are trying to run it like an insurance company. They're paying attention to losses and trying to pay attention to issues like actuarial information, and I think that they could deal with it. Any questions? [LB876]

SENATOR ASHFORD: Any questions of...? The...Senator McGill has joined us. Welcome. The thought here is that the economic damages are more easily calculable. You can, by looking experience, economic damages are easier to provide for or to reserve for. [LB876]

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DAVID GEIER: Yes. And in court cases especially they're presented in...by economists and accountants. [LB876]

SENATOR ASHFORD: I mean, they're out there. The cases are out there. And the amounts, the damages that are awarded are evident. [LB876]

DAVID GEIER: Yeah. You can get ahold of them. [LB876]

SENATOR ASHFORD: Right. And is that...? There other underlying economic factors, but I suppose that would be the major one, is that insurance companies can look at economic damages. They can look at costs, medical costs, and have a better idea of how to reserve for them. Is that...? [LB876]

DAVID GEIER: I think that's true. But again, Senator, because the impact of this bill would fall on the Excess Liability Fund. Now the fund is not motivated in the same way that a private insurance company, a for-profit insurance company is motivated. [LB876]

SENATOR ASHFORD: Just explain that very briefly for me again. I know you mentioned that this fall when we met, but what...tell me why that's a different deal. [LB876]

DAVID GEIER: A Nebraska physician today has to purchase a \$500,000 liability policy from a private insurance company. [LB876]

SENATOR ASHFORD: Right. [LB876]

DAVID GEIER: And then the Excess Liability Fund, which is a trust fund that is operated by the Insurance Department, provides for the coverage of liability above that \$500,000. So there's \$1.25 million of coverage that is supplied through this trust fund that is run by the state Insurance Department. Now removing the cap on economic damages does not alter the fact that the private insurance industry is still only providing \$500,000 of coverage. So anything above the \$1.75 million. Now let's say you have a \$3 million claim. The extra amount is going to come out of the Excess Liability Fund because the private insurance company has already had to cover their first \$500,000. So now my point is that the Excess Liability Fund is not motivated in the same way that a for-profit insurance company is motivated. The Excess Liability Fund just has to break even. It doesn't pay... [LB876]

SENATOR ASHFORD: Therefore, there's enough in the fund, is what... [LB876]

DAVID GEIER: There's \$30 million unreserved in the fund today. It has been for some time. [LB876]

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SENATOR ASHFORD: Okay. So it's the profit motive or there's no...it's a different... [LB876]

DAVID GEIER: It doesn't pay income taxes. [LB876]

SENATOR ASHFORD: Right. [LB876]

DAVID GEIER: It doesn't pay executive bonuses. It doesn't pay dividends. [LB876]

SENATOR ASHFORD: I gotcha. [LB876]

DAVID GEIER: The fund then has the ability to run a much more cost-effective basis. And furthermore, if the fund runs out of money then it can just come back around and levy an assessment. [LB876]

SENATOR ASHFORD: And the assessment is some percentage of the... [LB876]

DAVID GEIER: Whatever the fund needs in order to remain solvent. But the fact is, again the fund, by statute, must be solvent at all times. Its solvency is not guaranteed by the taxpayers. Its solvency is guaranteed by the physicians and the hospitals. It has never been insolvent so far, and it's not likely to become insolvent. [LB876]

SENATOR ASHFORD: Okay. Thanks, David. Any other comments or questions? Thank you. Thanks for your...next testifier. Mrs. Gourley, are you next? [LB876]

LISA GOURLEY: (Exhibit 4) Hi. My name is Lisa Gourley and I just provided a folder here for everyone on just information supporting the removal of the economic damages cap. While I believe...do you want me to spell my name? [LB876]

SENATOR ASHFORD: No, I think we have it. [LB876]

LISA GOURLEY: Okay. While I believe LB876 is a big step in the right direction because it is addressing the problems our family has faced with regards to economic damages, I do have concerns that this bill does not allow for full recovery of noneconomic damages to the people who have been severely injured. One of the problems I see with the current malpractice cap is that it creates two classes of people. People who have catastrophic injuries over the cap are not made whole and people who have injuries less than the cap are. The law is not fair to all injured people. In 1993, my son, Colin Gourley, suffered severe brain damage at birth due to medical malpractice. After a three-week trial, the jury found the doctor and her group negligent of medical malpractice and determined compensation for Colin's losses. Colin's projected medical expenses for a lifetime were \$12.4 million. In 1999, the jury decided \$5 million would compensate him for economic losses which are past and future medical expenses and

lost wages. The jury also decided that \$625,000 would compensate him for his pain and suffering or noneconomic losses. Unfortunately, the cap at the time was \$1.25 million and the jury's hard work really meant nothing. The most compensation Colin was going to receive was the capped amount and it was only 10 percent of what he was actually going to need just for medical expenses. After reviewing the case, District Court Judge McGill ruled the cap was unconstitutional. This case was appealed to the Nebraska Supreme Court. In 2003, three and a half years later, the Nebraska Supreme Court reversed the lower court's decision, but it had concerns with the cap because it doesn't allow for full recovery of economic losses in cases with catastrophic injuries and felt the Nebraska Legislature should address the law. Nebraska is one of three states in the country that has a total cap on both economic and noneconomic damages. What are economic damages? Sixteen years ago I had no idea what economic damages were. Unfortunately today, I can tell you what economic damages are and what they have meant to my son. Colin's brain injury affects all areas of his life, including his ability to see, to walk, to communicate, and all of his cognitive abilities. He's had many, many surgeries over...like nine surgeries over the past 16 years, and one of the major feats for us is trying to, you know, keep him ambulatory and able to walk. At age 5, he had to have a surgery to address his dislocating hips. The doctors explained that with the brain injury, the brain is sending abnormal signals to the muscles, causing the muscles to be tight. And over a period of time, the bone growth is affected, causing the hips to dislocate. Colin had to have surgery to re-angle the bones into his hips and was in a body cast for six weeks. He had complications with the pain medications, and the pain he experienced with this procedure was horrible. He cried for almost three days straight following the surgery, and the hospital had moved us to a room at the end of the corridor so his crying would not bother the other children. I thought I could never survive watching him suffer through another orthopedic surgery like this. Unfortunately, three years later the brain damage had caused more problems for his bones in his legs. Colin's muscles were so tight he could no longer straighten his legs and would require a series of painful surgeries. The first major one was to shorten the femurs above the knees, move down his kneecaps, straighten his ankles, and fuse bones into his feet to correct his fallen arches. Thankfully, the surgeries were successful and have prevented Colin from being confined to a wheelchair. He continues with ongoing rehabilitation through physical therapy and occupational therapy twice a week to maintain and prevent further problems. Our family has done everything possible to give him the quality of life that was taken. [LB876]

SENATOR ASHFORD: Lisa, why don't we do this. We have your statement and we're not suggesting that it's not important that you read the whole thing, but we have it, and we also had your comments from this fall. So why don't you go ahead and just conclude for us. [LB876]

LISA GOURLEY: Okay. I ask that you change the current law to allow unlimited economic damages for the severely injured people. And as for noneconomic damages,



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no amount of money will be sufficient to give back what has been taken from Colin. But I believe the noneconomic damages would be best decided by 12 jurors hearing each individual case instead of the Nebraska Legislature setting a one-size-fits-all remedy. I think it would be safe, especially considering Nebraska jurors have only awarded amounts over the cap in four cases in the last 35 years since the cap was implemented. Nebraskans are true conservatives. And thank you for your time. [LB876]

SENATOR ASHFORD: Thank you, Lisa. Any questions of Lisa? [LB876]

SENATOR LATHROP: Can I just ask one, Senator? [LB876]

SENATOR ASHFORD: Yes. Senator Lathrop. [LB876]

SENATOR LATHROP: Who pays this? If you...the damages are capped. It's not enough money if you have a \$12 million life care plan. So who's paying the bills now? [LB876]

LISA GOURLEY: Right now, Medicaid is paying for all of his surgeries and rehabilitation, his care basically. [LB876]

SENATOR LATHROP: Okay. Thank you. [LB876]

SENATOR ASHFORD: Thank you, Lisa. Next proponent testifier. [LB876]

EVELYN McKNIGHT: (Exhibit 5) Good afternoon, Senator Ashford and members of the committee. I'm Evelyn McKnight and I'm a resident of Fremont. I'm a survivor of the 2002 Nebraska hepatitis C outbreak that took place in Fremont, Nebraska. Ninety-nine of us were infected with hepatitis C during chemotherapy treatments because the nurse reused syringes. This egregious malpractice resulted in 89 lawsuits and it was the largest healthcare transmission of hepatitis C in American history until Nevada just recently claimed that title. My husband and I used my settlement funds to establish Hepatitis Outbreak's National Organization for Reform, which is a patient safety organization. We advocate for patient safety through innovative technology, education, and reform in an effort to prevent these outbreaks from continuing to occur throughout the country. I have lived on a Nebraska farm most of my life. I'm an audiologist and my husband is a family physician who's practiced in Fremont for 29 years. Our three sons are pursuing medical training as physicians, as well. As a victim of malpractice, litigation was emotionally draining for us at a time when I was already burdened with recurring breast cancer and chronic hepatitis C. We have seen malpractice litigation both as a plaintiff and as a defendant. During the time of our litigation, I had to find time for taxing depositions, for meetings with my lawyer, and for mediation in between times of hospitalizations, doctors visits, and treatment for hepatitis C, which was very draining. I can't imagine going through those years with the added worry that I may not recover my actual economic damages. Our cohort of 89 lawsuits resulted in indemnity payments of

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\$16 million. The Nebraska Excess Liability Fund was solely responsible for 86 of those 89 suits. During the litigation, there was much worry that our group of lawsuits would bankrupt the system. It did not. I think we can take comfort in that and believe that if 86 lawsuits did not bankrupt the system, then the occasional perhaps four that have approached that cap in the past 35 years will not either. The argument has been raised that Medicaid will take care of those who are egregiously damaged in catastrophic situations. And that may be so if it was left up to the good people of Nebraska. But through our national efforts we have seen that Nebraskans are not solely responsible for Medicaid reimbursements. The federal government has a large say in this situation and we cannot guarantee that the federal government will take care of the good people of Nebraska who have been damaged by catastrophic medical error. And if this were the case that Medicaid would take care of it, can we say that that is fair? Should the taxpayers be responsible for that? Both my husband and I carry malpractice insurance. It is a cost of doing business. We rely on it to aid us at a time when patient outcomes are not as we hoped and we rely on it to help our patients, as well. In conclusion, I urge you to advance LB876. It is the right thing for the people of Nebraska. [LB876]

SENATOR ASHFORD: Any questions of Evelyn? Thank you for your work. I didn't realize you were...had done that. That's a really amazing contribution to all of us. Thank you. Next...let's see, I guess next proponent. Do we have any opponents? [LB876]

DAVID BUNTAIN: Senator Ashford, members of the Judiciary Committee, my name is David Buntain. It's B-u-n-t-a-i-n. I am legal counsel and registered lobbyist for the Nebraska Medical Association and we are here today in opposition to LB876. There will be several people that are speaking to various aspects of this, but I want to give the committee some background on this. The issue of medical liability reform and medical liability insurance has been an issue in Nebraska and throughout the country since the early 1970s. The Hospital-Medical Liability Act, which is the subject of LB876, was enacted in 1976 in response to concerns about the cost and availability of medical liability insurance, and it was intended to provide protection for Nebraska citizens by assuring that there is availability of medical liability insurance for persons who have legitimate claims against providers. And the providers that are covered by the Hospital-Medical Liability Act are physicians, certified registered nurse anesthetists, and the hospitals. If you look at the Hospital-Medical Liability Act, at that time the Legislature, your predecessors, found that it was in the public interest that competent medical and hospital services be available to the public and the state of Nebraska at reasonable costs and that prompt and efficient methods be provided for eliminating the expenses, as well as the useless expenditure of time of physicians in courts in nonmeritorious malpractice claims and for efficiently resolving meritorious claims. The intent of this law is, "to serve the public interest by providing an alternative method for determining malpractice claims in order to improve the availability of medical care, to improve its quality, and reduce its costs." We would submit to you that the Hospital-Medical Liability Act over the last 35 years has accomplished that purpose, and

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throughout that period of time the Medical Association and the others that are interested in this have been good stewards of the fund so that today we have an Excess Liability Fund that is viable, that is solvent, that was there in order to respond to the kind of mass tort situation that Mrs. McKnight just testified to. I want to address one point that Mr. Geier made as far as the premiums. I think you need to look very closely at the premium information. I haven't seen what he handed out to you, but you have to keep in mind that at the last time the cap was raised from \$1.25 million to \$1.75 million, we recommended and the Legislature adopted a change which raised the amount of underlying insurance that providers are required to carry from \$200,000 per occurrence to \$500,000 per occurrence, which would have the effect of shifting some of the cost to the underlying coverage. And so I think that may account, in part, for the premium increases that Mr. Geier was talking about. Because we're on a claims-made basis, it will take a period of time for the claims to come through the system. [LB876]

SENATOR ASHFORD: Any questions of Dave? [LB876]

SENATOR LATHROP: Maybe just to point out this, that the Medical Liability Act doesn't do anything about discouraging or keeping frivolous claims out, right? All it does is it actually works the other way around and caps legitimate claims and small, relatively small and frivolous claims. There's no filter here, assuming there ever is a frivolous malpractice claim filed. [LB876]

DAVID BUNTAIN: Yes and no. When the law was originally passed, it included a number of other features, including medical review panels... [LB876]

SENATOR LATHROP: Nobody does those, though, right? [LB876]

DAVID BUNTAIN: Well, those...we came in...after about ten years of experience, in 1984 the Medical Association came in as a part of raising the cap and agreed at that time with the trial bar that those were not working. And that part was eliminated, that is correct. [LB876]

SENATOR LATHROP: Just so that we're clear because there's some people here that haven't been through this discussion before, it doesn't cap. Caps on damages don't stop a small claim or a relatively small claim from happening. Those people get 100 percent. What we do with the cap is we say people with big, legitimate claims, like the Gourleys for example, we're going to cap their damages at a fixed amount and then turn the balance of the care over to Medicaid. [LB876]

DAVID BUNTAIN: It is correct that it does impose a cap on certain claims, and that was part of the trade-off that the Legislature elected to make. [LB876]

SENATOR LATHROP: It caps the big claims and those people end up going to

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Medicaid. [LB876]

DAVID BUNTAIN: The effect of removing the cap that's being proposed in LB876 would be to, in effect, eliminate...it would, in effect, eliminate the cap and it would, over time, we submit, eliminate the need for the Excess Liability Fund. I mean, it would basically undo the act if you take the cap off of economic damages. [LB876]

SENATOR LATHROP: Thanks, Dave. [LB876]

SENATOR ASHFORD: And David, my recollection was...I can't recall, but didn't the medical society agree with at least the '92 change in the cap? [LB876]

DAVID BUNTAIN: Yes, we actually...we were proponents of raising the cap in 1984... [LB876]

SENATOR ASHFORD: Both times. [LB876]

DAVID BUNTAIN: ...in 1984 and in 1992 and in 1994...I mean--I'm sorry--2004. [LB876]

SENATOR ASHFORD: And also 2004. [LB876]

DAVID BUNTAIN: Correct. [LB876]

SENATOR ASHFORD: And the...we do have one of the...only three states have this cap. [LB876]

DAVID BUNTAIN: That is correct. [LB876]

SENATOR ASHFORD: And...but medical costs have also increased dramatically over that, the time this cap has been in effect, and certainly over the last ten years, because we see it in our own costs of Medicaid and healthcare costs to the state. John was talking about...you know, John Lindsay, about 44 percent since the cap last was raised. And I don't know if it's 44 percent but it's been a lot. And so to me it would seem it's a fair conclusion that medical inflation and the cap have very little relationship, one to the other. [LB876]

DAVID BUNTAIN: Well, it's always been our position that inflation should be considered in looking at the cap. [LB876]

SENATOR ASHFORD: Yeah. I mean, inflation is out in front of this cap. [LB876]

DAVID BUNTAIN: Correct. [LB876]

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SENATOR ASHFORD: I mean other drivers drive... [LB876]

DAVID BUNTAIN: Drive medical costs. That's correct. [LB876]

SENATOR ASHFORD: ...those costs. That would be...I mean without...I mean that would seem to me, with your support of raising the cap in the past, that you recognize that. [LB876]

DAVID BUNTAIN: Yes. And we would continue to be open to discussing raising the cap in a responsible way. [LB876]

SENATOR ASHFORD: Right. And that's been your position. [LB876]

DAVID BUNTAIN: Correct. [LB876]

SENATOR ASHFORD: That's all. Any other questions? Seeing none. [LB876]

DAVID BUNTAIN: Thank you. [LB876]

SENATOR ASHFORD: Any other opponents? [LB876]

BEN HULS: Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Ben Huls; that's H-u-l-s. I'm a certified registered nurse anesthetist, a CRNA here in the state of Nebraska out in Kearney. And the niche of our practice includes perioperative anesthesia care from the time the patient is ready to go to surgery, waiting to go to surgery, seeing that patient, making sure they're prepared to go to surgery, and continuing on and delivering anesthesia through the operation, and then taking care of them, as well, in the postoperative care unit, and sometimes longer if need be. I said I do practice in Kearney but I also practice out in the state and helping colleagues when they need to go on vacation out in rural Nebraska, and that is why I am here today. Anesthesia CRNAs are the sole providers in a great majority of rural hospitals here in Nebraska and this is why the Legislature originally chose to include us in the Hospital-Medical Liability Act when it came out. I believe that the Hospital-Medical Liability Act has, in fact, done its job in decreasing our professional liability premiums and we are very appreciative of that fact. And we all know that we're all trying to decrease the costs of healthcare, as has been advocated or brought up earlier. We all know this is also of national concern. To be short, we are asking the committee to indefinitely propose (sic--postpone) LB876 and I am now available for questions if you need be. [LB876]

SENATOR ASHFORD: Thanks for your testimony. The only question I would ask, and I think Dave covered it, that the medical society and healthcare professionals generally have not resisted increases in the cap from time to time. [LB876]

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BEN HULS: Thank you. [LB876]

SENATOR ASHFORD: Next opponent: Dr. Whitted. [LB876]

PETER WHITTED: (Exhibit 6) Chairman Ashford, members of the committee, I want to thank you for the opportunity to speak on a subject of extraordinary importance to Nebraska physicians, the medical liability issue and LB876. I am Peter Whitted, W-h-i-t-t-e-d, a practicing ophthalmologist from Omaha, Nebraska. I'm also an attorney and a board member of the Nebraska Medical Association, Colorado Physicians Insurance Company or COPIC. I recently completed a two-year term as chief of staff of the Nebraska Medical Center. I have had the opportunity to address this committee on this topic a number of times over the years, and last time in 2004 when we saw to it that an appropriate increase in the cap was necessary. I've been interested in this topic which was the subject of my senior paper in law school during the last...first medical malpractice crisis 35 years ago, so I've been at it a long time. Nothing I have to say is particularly new but I will outline a few important points. LB876 effectively eliminates the cap on medical malpractice awards in Nebraska. The cap in and of itself, with the Excess Liability Fund, is responsible for the stable medical liability environment in Nebraska. It is a living cap, as you've heard, in that it is periodically reviewed and amended upwards to reflect medical cost inflation and the changing medical environment. There will always be anecdotal cases, and you've heard two today, in which the cap will seem inadequate. These are very few and far between. This is a small price that Nebraskans pay to ensure that there is wide access to a broad range of medical services in a very rural state. It is painfully obvious that without a cap, malpractice premiums will rise significantly and endanger the availability of services such as obstetrics. Dr. Howard mentioned that earlier as one of the threats that I would bring that up. You simply, as a family practitioner in a small community, don't perform enough deliveries to justify the additional expense, especially as reimbursement for medical services, as has been in the national headline, in general, erodes. I don't dispute the fact that the medical liability system in America is broken, because it is. It doesn't compensate the patient in an efficient and timely fashion, nor does it improve patient safety and medical quality. Medical malpractice and perhaps much more appropriate term that I used 35 years ago, medical maloccurrences, is very complex. We aren't talking about a simple organism here. We can create a better system, whether with programs like COPIC's 3Rs or its neonatal encephalopathy--that's birth injury initiative, or health courts. But until we create that new system, reasonable caps on damages are the most potent means of stabilizing malpractice premiums and ensuring access to quality medical care. Thank you, and I'm open to questions. [LB876]

SENATOR ASHFORD: Thank you, Pete. Any questions of Pete? In 30 seconds, how do we control the increase in healthcare costs in our country? [LB876]

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PETER WHITTED: Personal responsibility and rationing. Not everybody can have everything and everybody has to be responsible for their own health. Those are two things that haven't been discussed in the national... [LB876]

SENATOR ASHFORD: Okay. That's within 30 seconds. (Laugh) Thank you. Senator Council. [LB876]

SENATOR COUNCIL: Yes. I'm just looking at the Medical Association fact sheet that you distributed and, I mean, I'm curious. The Excess Liability Fund is voluntary, not mandatory, in terms of participation? [LB876]

PETER WHITTED: No. It's voluntary for a patient to participate in that. So if you're a patient and you say I don't want to be a part of the Excess Liability Fund, then you're not under the cap. So you as a patient can opt out. The problem is, is somebody going to take care of you if there's no cap on damages? That's the problem. [LB876]

SENATOR COUNCIL: Okay, because I'm reading this. It says, "If physicians do not participate in the Excess Liability Fund..." [LB876]

PETER WHITTED: Well, a physician doesn't have to participate either. Then he's not under the cap either. So if I as a physician don't want to pay...here's basically how it works. I pay a premium. Let's say my premium is \$10,000 for my medical malpractice coverage. For the underlying layer, which is \$500,000, a million dollars, I have to pay some percentage of that to fund the Excess Liability Fund. This year it's 35 percent. So I pay another \$3,500 to the fund. It's been as high as 50 percent. The fund is capped at 50 percent. So my malpractice premium is \$13,500. Well, if I decide that I don't want to be a part of that, then I'm going to have to buy some other level of insurance. Probably a 2...\$4 million policy, which is going to be more expensive than that. [LB876]

SENATOR COUNCIL: Okay. Thank you. [LB876]

SENATOR ASHFORD: Thanks, Pete. [LB876]

PETE WHITTED: Thanks very much. [LB876]

SENATOR ASHFORD: Next opponent. [LB876]

KORBY GILBERTSON: Good afternoon, Chairman Ashford and members of the committee. For the record, my name is Korby Gilbertson; it's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n. I'm appearing today as a registered lobbyist on behalf of the Nebraska Medical Center and Boys Town National Research Hospital in opposition to LB876. Let me first start by saying that the Nebraska Medical Center has estimates that the increase just for premiums if this bill was enacted would be between 300 and 500

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percent increases. Those estimates are based on the differential they see currently for the coverage for physicians and their business units in Nebraska as compared to the cost of coverage in Iowa where there is not a cap. Also both NMC and Boys Town Hospital are very concerned about the potential impact this type of legislation could have on the recruitment and retention of highly specialized physicians. We should not jeopardize the groundbreaking work that these institutions do in the areas of transplants, orthopedics, cardiology, genetics, hearing, language, and vision, and obviously this is not an exhaustive list. Furthermore, there is much concern about access to care for low-income patients. Many of you know that Boys Town National Research Hospital does a lot of work with lower income patients and it's likely that the number of cases that they would be willing to take on would be fewer if the cap was not in place. For these reasons, we would respectfully ask that the committee indefinitely postpone LB876. I'd be happy to take any questions. [LB876]

SENATOR ASHFORD: Any questions? Thank you. [LB876]

BRUCE RIEKER: (Exhibit 7) Chairman Ashford and members of the committee, my name is Bruce Rieker. It's R-i-e-k-e-r. I'm vice president of advocacy for the Nebraska Hospital Association on behalf of the 85 member hospitals we represent. We're opposed to LB876. We appreciate the intent of the proposal and we also recognize the delicate balance between compensating the individuals for their injury or death that resulted from the care they received and acceptable levels of financial responsibility for those who caused that harm. If enacted, the amount of the economic damages recoverable from the healthcare providers and the Excess Liability Fund in a settlement or judgment would be unlimited under LB876, resulting in higher costs for the delivery of healthcare, as you've already heard from other testifiers. We contend that the significance of this issue has probably been greatly underestimated in debates, especially at the federal reform, but we're not here to discuss that right now. Escalating costs for professional liability insurance increase the cost of delivering healthcare. Skyrocketing costs for professional liability insurance also threaten access to care. Initial estimates, as you heard from Korby Gilbertson before me, estimate that the increased liability insurance costs would be in the hundreds of percent increases. Nebraska has long been recognized as a leader in professional liability reform. The Nebraska Hospital Association contends that the applicable state statutes provide the appropriate balance between compensating those injured and holding those who caused the injury accountable in a manner that helps to control costs. Therefore, we oppose amending LB876 as proposed. Thank you. [LB876]

SENATOR ASHFORD: Any questions of Bruce? Bruce, how do you explain the increase in costs, hospital costs to patients over the last ten years? It doesn't have anything to do with this cap, obviously, because we have a cap. [LB876]

BRUCE RIEKER: The increased costs... [LB876]



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SENATOR ASHFORD: To patients that are...patients are...it's \$10,000 to have a...we're finding out and learning about these women who are having babies and they're paid for it with Medicaid, that the cost for a hospital birth is around \$10,000, and it's doubled in the last 3-5 years or whatever it is. What...why is that happening? [LB876]

BRUCE RIEKER: I would say that a lot of it is based upon federal requirements, especially in the area of technology. As we move towards meaningful use and the utilization of electronic health records, which we all contend are needed, into a much more effective delivery... [LB876]

SENATOR ASHFORD: That's causing the cost to double in having a baby? [LB876]

BRUCE RIEKER: Well, that's one portion of it. The cost of the equipment that we need to have. The defensive medicine. Defensive medicine is estimated to cost this nation between \$50 billion and \$100 billion per year. [LB876]

SENATOR ASHFORD: But what's the defensive mechanism when you have a cap of a million... [LB876]

BRUCE RIEKER: What's the... [LB876]

SENATOR ASHFORD: Where is the defensive...what kind...why are you practice...why is that such a significant factor in a state like Nebraska that has... [LB876]

BRUCE RIEKER: I don't know the direct correlation but I would say that the practice of defensive medicine is probably lessened by the reform...or by the Medical Malpractice Act that we have in place here. [LB876]

SENATOR ASHFORD: Okay. I'm not arguing. It's just...I think all citizens in our state are in a quandary as to why the hospital...and I talked to many physicians and their costs are not going up. (Laugh) They're charging about the same as they've been charging for years, and hospitals are going...it's beyond me. I know you've got to...probably have a reason for it, but...and we love our hospitals but at some point we're not going to be able to afford to go to them. I mean, so they'll be... [LB876]

BRUCE RIEKER: It's primarily the cost of the equipment that we have to put in there. [LB876]

SENATOR ASHFORD: The equipment? [LB876]

BRUCE RIEKER: What's that? [LB876]

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SENATOR ASHFORD: The equipment? [LB876]

BRUCE RIEKER: The equipment. [LB876]

SENATOR ASHFORD: Okay. But that's why the doctors don't make any more money than they have? I mean, I guess, to me...you know, I talk to physicians. I talk to physicians all the time and they're my friends. We all have friends who are physicians and they do a great job. They don't make much...they don't make more money today than they made five years ago. In fact, in some cases they're making less money. And the reason for that is because...one of the reasons is that the hospital charges are so significant that they can't charge any more. I don't know. I mean I'm not...this is not about that issue but I just think that at some point the citizens of our state and this country are just going to say, no more. That the salaries that are paid by hospitals, that the...and the administration and all these things are out of whack with what's going on with the physicians and the nurses who are out there on the...they're taking...they're the ones that are taking the real risk. I mean, they're the ones that are putting their reputations on the line. It's not...you never hear about...you never hear much about, well, that hospital was negligent. You hear about some doctor, an accusation or allegation that some physician was at fault. I just...I just think...you know, I've been listening to this for 25 years, and I really think the hospitals, and in this state...and I know they do good things. They take a lot of patients that aren't covered and they do that in rural Nebraska and that's a drain on resources. But I don't understand and it's not the purpose of today's hearing, I don't understand why physicians and other healthcare professionals are not getting the increases. They're not able to pay their loans. It's...and the hospitals are continually taking more and more money. It's a problem and that's all. [LB876]

BRUCE RIEKER: Well, in many instances the hospital pays the loan for them to get them here. [LB876]

SENATOR ASHFORD: Well, no. (Laugh) I'm not going to buy that. Go ahead... [LB876]

BRUCE RIEKER: I will. [LB876]

SENATOR ASHFORD: No, that's fine. I think you've got a problem, Bruce. [LB876]

BRUCE RIEKER: I understand. [LB876]

SENATOR ASHFORD: I think your clients have a problem and I think we've got to get control of this because otherwise, you know, people in this country are not going to be able to do it anymore. They're just...it's...we're done, so go ahead. Colby. [LB876]

SENATOR COASH: Thank you, Chairman. Bruce, I don't know if you're the right person

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to ask this question, but I thought of it while you're here so I'll ask you. We seem to be very interested in this body in where Nebraska is compared to our neighboring states when it comes to everything, so can you tell me where we are with, you know, just three or four surrounding states as it relates to caps on liability? [LB876]

BRUCE RIEKER: I cannot. I don't have an analysis as to what the surrounding states have in place. I will find that out for you and I'll provide it to the committee. There are only three states that have caps such as ours, but none of them are the neighboring states. [LB876]

SENATOR COASH: All right. Thanks. [LB876]

SENATOR ASHFORD: Thanks, Bruce. [LB876]

SENATOR LATHROP: So the answer would be the neighboring states don't have caps. [LB876]

BRUCE RIEKER: They don't have caps to the same degree we do, yes. [LB876]

SENATOR ASHFORD: Thanks, Bruce. [LB876]

BRUCE RIEKER: You bet. [LB876]

SENATOR ASHFORD: Thank you. (Laugh) You've got to represent your client, I understand that. All right. Any other opponents of the bill? Neutral? Senator Howard. And you have the next bill, so you can conclude and then go right into the next one. [LB876]

SENATOR HOWARD: All right. Well, I found that very interesting myself. Someone wise once told me that under current Nebraska law it would be better if your doctor hit you with a car than injured you during treatment. That statement is perhaps a little blunt, but nonetheless true. LB876 is a commonsense approach to dealing with those who are responsible for medical malpractice. Under LB876, the cap on economic damages would be lifted so that victims of medical malpractice can meet the costs associated with their injury. Noneconomic damages will be capped in proportion to the total award at the \$1.75 million limit currently in place. And my LA just pointed out to me, in the information that you were given by Lisa Gourley, there's just an interesting fact I'll point out. Medical malpractice payments account for between .18 percent--that's .18 percent--and .58 percent of all healthcare costs in 2006, the most recent year for which all of the necessary data to make these comparisons are available. You've heard the stories of two individuals whose lives and whose families were forever changed by medical malpractice. Victims of malpractice are not asking for juries to help them win the lottery. They don't want to build mansions. They want to be able to afford necessary

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surgeries. They want the walker that will make moving around the world less arduous. And parents want to know that someone qualified will care for an injured child when they cannot. Right now, the only reassurance that these families have is that Medicaid will be there. The Nebraska taxpayers will be there. And we will, but of course, like everything else, there are finite resources. Isn't it time that the costs of these injuries are paid by those who inflict them, and isn't it time that we care about these patients and not insurance company profits? It is for these reasons that I ask you to advance LB876. Thank you. [LB876]

SENATOR ASHFORD: Thank you, Senator Howard. I see no questions. LB835. [LB876 LB835]

SENATOR HOWARD: This is a bill that actually is kind of a spin-off of the hearing that we had this summer, and thank you for that hearing. I appreciate the interim opportunity. Thank you, Senator Ashford and members of the committee. For the record, I am Senator Gwen Howard and I represent District 9. I appreciate the opportunity to present LB835 for your consideration. Currently, healthcare providers involved in malpractice claims are required to report certain information to the Department of Insurance when a claim is settled or a final judgment rendered. And we heard some about that, that funding source, earlier, so maybe this will all kind of tie together. The Department of Insurance reports this information to the Department of Health and Human Services. Under LB835, the Department of Health and Human Services would be required to collect this data and provide it to the Clerk of the Legislature and the Chairs of Judiciary and Health and Human Services Committees. Additionally, LB835 includes the name and address of the healthcare provider who rendered the service and the information that providers are required to submit and that the Department of Insurance is required to submit to Health and Human Services. LB835 is a first step in addressing the dearth of information about medical malpractice in Nebraska. During the interim hearing on LB226, it was clear that this committee has never really been provided with sufficient information to evaluate whether the medical malpractice cap is good law. And perhaps more importantly, it became clear the citizens do not have accessible information about malpractice claims against their doctors and hospitals--information that they need to make good choices about healthcare. The purpose of LB835 is to provide this information to the Legislature and to the public without having a fiscal impact. LB835 is a place to start. I fully expect that when the Legislature receives the information LB835 would require, more questions will be raised. We may have to go back to Health and Human Services and the Department of Insurance and ask for more information and more analysis. Missouri has a statute similar to ours that requires some additional elements of information. Their Department of Insurance produces a report about the state of malpractice and malpractice insurance that is over 200 pages long. Our own Department of Insurance used to provide a report on the Excess Liability Fund that was somewhere between six and ten pages. I've been told that the Department of Insurance is working on a new computer system and a more

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effective information informative report. Perhaps LB835 can be the catalyst to bring Health and Human Services and the Department of Insurance together to provide some really useful data. LB835 is a rather simple idea to increase the information available to the Legislature and to the public. The reasons are clear: making better policy and better healthcare choices. I appreciate your time and attention to this bill. Thank you. [LB835]

SENATOR ASHFORD: Thank you, Senator Howard. Any questions of Gwen? Seeing none, how many testifiers do we have on this bill, LB835? Okay. Proponents. David. [LB835]

DAVID GEIER: David Geier, G-e-i-e-r, 1141 H Street in Lincoln, and I'm here testifying in favor of LB835. The Hospital-Medical Liability Act was based upon the premise that there was a bargain struck with the people of Nebraska: You will get better healthcare, malpractice will be put under control, nonmeritorious claims will be disposed of, meritorious claims will be efficiently handled. You can read that in the opening sections of the Hospital-Medical Liability Act. You have no data today to evaluate whether or not the act is fulfilling its purpose. What you do know is that the worst injured people are not fully compensated. That's all we know. We do not know if there are more physicians practicing in Nebraska or fewer because of this law. We do not know whether healthcare costs are higher or lower because of this law. We don't know anything about the effect of this law except that it puts a lid on the amount of damages that people can recover when they are injured. LB835 opens the door to starting to gather some information. Alan Wickman at the Department of Insurance is, in fact, working on this topic with the National Association of Insurance Commissioners. The National Association of Insurance Commissioners are also struggling with the problem of the lack of information. There is an effort to strike a bargain in the nation to put a lid on the amount that injured people can recover in medical malpractice cases. The bargain is, you're going to keep good quality healthcare; you just have to surrender your rights. Fine. Let's get some facts so we can find out whether or not it's working for that purpose or is it only doing the one thing that we've heard about today: that is, putting a lid on the amount that injured people can recover. That's all it's doing so far, so far as we know. I think this body, before it perpetuates this kind of a law, should have some facts to go on. LB835 is the beginning. That's all. [LB835]

SENATOR ASHFORD: Thank you. Any questions? Thank you, David. Opponents. I guess we'll move to the opponents. Peter, go. No other proponents, so. [LB835]

SENATOR LATHROP: Are you a proponent or an opponent? [LB835]

PETER WHITTED: Opponent. [LB835]

SENATOR LATHROP: Okay. [LB835]

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SENATOR ASHFORD: We're moving to the opponents. [LB835]

PETER WHITTED: Again, Senator Ashford, members of the committee, I want to thank you for the opportunity to speak on this issue of LB835. LB835 changes the reporting requirements for judgments and settlements involving physicians in medical malpractice litigation, as Senator Howard outlined. It's unclear to me, but a little bit more clear now, what the purpose of this legislation really is. Why aren't all providers included? That's a question I have, is the way the legislation is written. Is there similar reporting requirements for judgments and settlements affecting other Nebraskans involved in litigation? I don't know the answer to that. Providing individual physician data sounds sort of like a scarlet letter marking a physician. This idea perpetuates the name, blame, shame mentality that's hindered meaningful progress in the realm of patient safety and quality care improvement. Individual physician data is already gathered in the national physician data bank and available on-line. In short, this legislation would seem to be redundant. Aggregated data in a single repository, i.e., the Department of Insurance, to be available for study and analysis and reported to various committee chairs upon request makes some sense. As a rule, medical malpractice suits are a relatively poor marker for physician quality. Evaluation for trends, which is exactly the activity performed by hospital credentialing committees, at least biannually, may be helpful, but only as one quality benchmark. If it were the only one, most OBs, neurosurgeons, and orthopods would never be recredentialed. Perhaps it would be more appropriate to mandate hospital staff membership as a prerequisite for practicing medicine in Nebraska so that recredentialed would occur for everybody every two years. Thank you. I'm open to any questions. [LB835]

SENATOR ASHFORD: Thanks, Pete. Yes, Senator Christensen. [LB835]

SENATOR CHRISTENSEN: Thank you, Chairman. So if you're saying everything is available now so we can pull up from every hospital what they have died from, what problems there have been, everything this way? [LB835]

PETER WHITTED: You can get it in the national physicians data bank. That's a national...that recording...how long has that...I'm not sure how long it's been around, but it's been around more than a decade now. So every time you have a malpractice award, every time you're sanctioned for anything, every time you're...an action is taken against your license, that's reported nationally. That's available on-line and you can go on-line right now in the national physicians data bank and get that data. Are all the specifics with respect to the cases? It's a short summary. It's not all the specifics. [LB835]

SENATOR CHRISTENSEN: I want to ask the question. I missed...this is dealing on claims only and not really what my question said. Thank you. [LB835]

SENATOR ASHFORD: Pete, what was your last point about what we could do that

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would...? [LB835]

PETER WHITTED: Well, and this is an important point and it's something...and I, speaking as an individual rather than as representing the Medical Association on this issue. The credentialing process in Nebraska hospitals is extraordinarily rigorous and we spend a lot of time in looking at people every two years, their entire quality record. Quality reporting now on the national level is really a big deal. We've been doing this for a long time. And every two years we look at this, we look at your malpractice claims. We look at everything and we recredential you. If you don't belong to a hospital staff, that doesn't happen. So if you were going to ask me what I would do, is I think to practice medicine in Nebraska you ought to belong to a hospital staff so that you're evaluated every two years. Now, I mean, there's a lot of professions that don't have any of that at all, and we have continuing medical education, medical education which is required by the state to maintain our license. But that's just a cursory review. This is a much more thorough evaluation of what the quality of medicine you practice is. And it will get more rigorous and more robust. [LB835]

SENATOR ASHFORD: And we're not required to credential. [LB835]

PETER WHITTED: No. Huh-uh. [LB835]

SENATOR ASHFORD: And how many physicians... [LB835]

PETER WHITTED: You can practice in Nebraska without belonging to a Nebraska staff. [LB835]

SENATOR ASHFORD: I wonder what the percentage of noncredentialed... [LB835]

PETER WHITTED: Well, far and away, most of them belong to a hospital staff. But there are now, as you see, you know, people...itinerant surgery of all kinds, particularly in the plastic surgery realm. You'll see people come in this state. They have a license here, they practice here. And then they're gone. [LB835]

SENATOR ASHFORD: Do you know of any other state that does that? [LB835]

PETER WHITTED: I don't know. I can't answer the question. One question that you answered earlier about the surrounding states. Colorado has a soft cap of a million dollars, and there is an excess liability fund in Kansas. [LB835]

SENATOR ASHFORD: As a soft cap. So it has a... [LB835]

PETER WHITTED: It's a million dollar cap, and I have the list of the cases that have been there in the last decade. Not very many. Just like there's been four in 35 years.

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You know, the caps are important and a whole different issue and we just discussed it and I won't reiterate it here. [LB835]

SENATOR ASHFORD: Okay. Well, I'm kind of interested in the credentialing thing you just brought up, and maybe somebody can give us some information on that, because...thank you. [LB835]

DAVID BUNTAIN: Senator Ashford, David Buntain, B-u-n-t-a-i-n, registered lobbyist for the Nebraska Medical Association. I will take just a couple of minutes to supplement a couple of things that Dr. Whitted has said. LB835 would require a report to be made to the Legislature about every claim that was settled by a physician or a verdict. There are already three kinds of reports that are made whenever there is a settlement or a verdict involving medical liability. First, the section that's being amended requires that that be reported to the Department of Insurance. Second, there is a state law that requires all healthcare professionals to report to the Department of Health and Human Services whenever they have made a payment either in settlement or if there's been a verdict. The reason for that reporting requirement is it enables the Department of Health and Human Services, as a part of their investigative process, to follow up on that and they do use that as a trigger for disciplinary action. If disciplinary action is taken as a result of that, that is posted on the Web page for the Department of Health and Human Services. You can look up any provider...licensed practitioner in the state and find out if they have been the subject of disciplinary action. And so that is a report that's made. And then you also have the federal National Practitioner Data Bank which has been in effect since about 1975, which requires physicians and dentists to report all medical malpractice settlements and verdicts. So there already is reporting and it's unclear to us what additional value there would be to require this kind of reporting. I think both the kinds of information Mr. Geier talked about and Dr. Whitted talked about, aggregate kind of information that should be produced by the Department of Insurance, they have from time to time produced such reports. We haven't had an annual report since 2006, but...so that kind of aggregate reporting makes sense. The problem with just reporting the names of people who settle cases in any arena is it's going to discourage settlement. I don't think either...a lot of times, I don't think the plaintiffs are any more eager than the defendants to report the outcome of settlements. [LB835]

SENATOR ASHFORD: I think what Dave was talking about, at least what I was hearing, was the relationship between the cap and other facts...the increased costs of healthcare and so forth and so on. There's doesn't seem...I mean, is there a correlation? There doesn't seem to be a correlation on the hospital side. [LB835]

DAVID BUNTAIN: There is national data available. The problem, of course, is Nebraska has a different system than in other states. I mean, you can see it indirectly in...you know, we have one of the lowest levels of malpractice premiums in the country. I mean, there's several factors that contribute to that. I mean, we are not opposed to gathering



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useful data. Reporting who settled claims is not going to advance the ball very far. [LB835]

SENATOR ASHFORD: And I think that Pete had a great point about the best deterrence from some of this is to have a rigorous review of how physicians are practicing. [LB835]

DAVID BUNTAIN: Absolutely, and we support that. [LB835]

SENATOR ASHFORD: And maybe this credentials idea that he's talking about is worth looking at. [LB835]

DAVID BUNTAIN: Sure. [LB835]

SENATOR ASHFORD: I don't know if you have information on that or... [LB835]

DAVID BUNTAIN: No. But we would definitely support a strong credentialing system and... [LB835]

SENATOR ASHFORD: Has that ever come up? I mean, it would seem logical that you would want to have a strong credentialing system. [LB835]

DAVID BUNTAIN: Has it ever come up legislatively? I'm not sure. [LB835]

SENATOR ASHFORD: In your experience, I mean, you've been... [LB835]

DAVID BUNTAIN: Well, the issue of credentialing, it's an issue with the Joint Commission on Hospital Accreditation. I mean, there are a variety of groups that... [LB835]

SENATOR ASHFORD: Well, I guess what I'm getting at is if we have doctors that are rigorously...I think the overall...there are two issues here: the people that are...that these difficult cases where the cap is exceeded. That's obviously an issue. What do you do? But then the other issue is how do we control healthcare costs. And one of the best ways to do that is to make sure that the practice of medicine is being practiced by people who know what they're doing and are accountable. And I think the more we could do to address that in statute would reduce the growth of cost of healthcare. Because if you don't make mistakes and if you're practicing good medicine, you know, healthcare costs should be moderating. [LB835]

DAVID BUNTAIN: Right. And we have a... [LB835]

SENATOR ASHFORD: That's beyond the scope, but I... [LB835]

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DAVID BUNTAIN: There are a number of mechanisms in place designed to improve quality of care. [LB835]

SENATOR ASHFORD: Well, I know that, but I think Pete knows what he's talking about, and I'd like to hear more about it. So thanks. [LB835]

DAVID BUNTAIN: We'll come talk to you about it. [LB835]

SENATOR ASHFORD: Thank you. Okay. Thanks. Any other testifiers on this bill? Okay. Senator Howard. [LB835]

SENATOR HOWARD: Here is the Missouri malpractice report that comes out. It's from 2008. I didn't make you all a copy of this. And this is Nebraska which last came out in 2006. So there is definitely a difference here in the information that's provided. LB835 is a commonsense bill. We need more good information to make better policy decisions. Citizens need more information to make the best healthcare decisions for themselves and their families. LB835 gives us access...LB835 would give us access to information that is essential for both these things. Thank you. [LB835]

SENATOR ASHFORD: Thank you, Gwen. Thanks. [LB835]

SENATOR HOWARD: Thank you. (See also Exhibit 18) [LB835]

SENATOR ASHFORD: The next bill is LB1094. Steve. Oh, it's Steve's bill. I'm sorry. I didn't realize that you had to leave early, Senator Lathrop. I'm sorry. [LB1094]

SENATOR LATHROP: Mr. Chairman, members of the Judiciary Committee, my name is Steve Lathrop, L-a-t-h-r-o-p. I'm the state senator from District 12 in Omaha. I'm here today to introduce LB1094. And maybe I can start by explaining what happens to people that get in...that have been injured and have a claim pending for their injuries. Oftentimes, the folks who have been involved in catastrophic injuries that take them from their jobs find themselves in a position where their income stream has been interrupted, they have no income. They eventually go through their savings and then they look to places for resources while their claim is pending. The claims are intended to compensate them for the lost income, the lost wages, and the loss of earning capacity. But while their claim is pending, while they can't work the bank still wants to get paid, the utilities have to be paid, the kids need to be fed, clothed. The law does not permit lawyers to advance money. In fact, the lawyers can't even guarantee a loan over at the bank, the lawyers that handle these kind of claims. So the people who are injured and need resources turn to family and they eventually exhaust their family and then they go to banks and the banks say, no, we can't because this claim of yours is too contingent. That has given rise to nonrecourse civil litigation. And you see these outfits that

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advertise on television that offer to advance money against a personal injury settlement. They are perfectly legal in the state of Nebraska. The problem and the reason for LB1094 is they are entirely unregulated. They do not loan money in the traditional sense in that they give somebody money and they charge a particular interest rate. They take an assignment of part of the claim and in taking...and then charge something that's usually much higher than a bank would charge. But people can't get money from any other place, so they turn to these places. And LB1094 is an attempt to regulate this industry. LB1094 creates the Nonrecourse Civil Litigation Act in order to regulate civil litigation funding companies doing business in Nebraska. While civil litigation funding companies currently operate in Nebraska, LB1094 would provide greater protections for individuals who enter into contracts with these companies by providing statutory requirements for all civil litigation contracts, as well as a process for registering civil litigation funding companies. The bill would establish a statutory structure that would ensure that if these companies are going to do business in Nebraska, they will be accountable for their business practices and to the consumer of their product. Under LB1094, civil litigation companies would register with the Secretary of State. There would be specific requirements for civil litigation funding contracts entered into by individual plaintiffs. Provisions that speak to the attorney-client relationship, as well as the attorney-civil litigation funding company, would be spelled out. And registered civil litigation companies would annually submit specific data to the Secretary of State. That's a part that I'm particularly interested in so that we can see who's operating in the state, how much are they charging people, is this...are they helping people or are they just taking and cherry-picking cases where they're essentially charging a very significant interest rate and not taking the more risky cases. All in all, these places are here. There are some unscrupulous people in the industry and this would have the effect of making sure that we regulate and keep a close eye on people who do this kind of work.  
[LB1094]

SENATOR ASHFORD: Thank you. Thanks, Senator Lathrop. Any questions? Seeing none, are you going to waive your closing, or...? [LB1094]

SENATOR LATHROP: I probably will but I think I'll sit and listen. [LB1094]

SENATOR ASHFORD: Okay. I didn't know if you had to...okay. Any proponents to this bill? [LB1094]

ERIC SCHULLER: (Exhibit 9) Good afternoon, Mr. Chairman and members of the Judiciary Committee. My name is Eric Schuller, spelled E-r-i-c S-c-h-u-l-l-e-r. I'm the director of government affairs for Oasis Legal Finance. I'm here today on behalf of the American Legal Finance Association for your favorable consideration on LB1094. As a way of introduction, the American Legal Finance Association, also known as ALFA, is comprised of 21 civil litigation funding companies currently doing business across the United States. One of ALFA's first projects was to establish a set of industry best

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practices and to have clear transparency and full disclosure to the consumers. As a founding member of ALFA, Oasis and 20 other members abide by these set of best practices, but not every funding company is a member of ALFA. So as a result, not everyone providing civil litigation funding in Nebraska follows our set of standards. What this legislation does before you today is built on our experience in other states and we think it will have a positive impact both for consumers here and in our industry. One thing, we currently operate in 46 states, including Nebraska, and of the business we do, about 60 percent of our business is the result of direct referrals from attorneys to our offices. And we believe that we have developed a good relationships with the attorneys and the consumers here in Nebraska, and we're looking forward to doing business. As Senator Lathrop has outlined, the purpose of this legislation is to ensure the consumers in Nebraska are protected when they get into an agreement with a nonrecourse civil litigation funding company. Due to time constraints, I know you've all been here for a long time and you do have copies of my testimony in front of you, I can...be happy to answer any questions that you have or maybe go into a little more detail on to how a case might work, and handle it that way. [LB1094]

SENATOR ASHFORD: Do we have any questions? We have Senator Lathrop to fill us in. Yes. [LB1094]

SENATOR ROBERT: I would be interested in an example, just for the (inaudible). [LB1094]

ERIC SCHULLER: Okay. A quick example I have in the testimony here is, you know, we have a...our typical consumer is a single mother of two. Get involved in a car accident, and because of her injuries she can't work. And her employer probably doesn't offer disability insurance, so she's kind of without income for several weeks or several months, and may have...just be able to provide basic needs from savings accounts that maybe she has had, but can't pay her mortgage. And as a result, going back to work, she's now four or five months behind on her mortgage. Now the bank is knocking at her door. They want to foreclose on her home. Instead of taking a short settlement, that initial offer, for which could be in some cases, an example I have in here is about \$10,000; her take-home from that point would probably be about \$1,900. But by being able to, us giving her that funding, allowing her to stay on the case a little bit longer and having it go to full maturity, the initial settlement on that instance was \$25,000 and she was actually ahead by over \$6,000 by being able to get the funding. Didn't lose the home. Was able to provide a roof for her children, and still provide for her basic household needs. [LB1094]

SENATOR ASHFORD: It's nonrecourse backwards. [LB1094]

ERIC SCHULLER: Right. It's totally not...so if the case doesn't settle for any reason whatsoever, the consumer still has the original funding. So if for some reason the...you

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know, consumer gets tired. In other words, doesn't want to wait two years for their settlement and drops the whole case, or it comes out that there was extenuating circumstances in which, while their injuries really weren't the result of the accident, the result of the slip and fall putting up the Christmas decorations the day before, and there's not enough money to settle it, then we have no recourse against the consumer. The consumer still has the funds. [LB1094]

SENATOR ASHFORD: Okay. Thank you. Yes, Senator Council. [LB1094]

SENATOR COUNCIL: Yes. And thank you, Mr. Schuller, and I really appreciate you traveling in from Illinois, and appearing, speaking on behalf of the industry. It's not often that an industry comes in seeking to be regulated. So it does give rise to a couple of questions, and one of them is, is it my understanding that LB1094...and Senator Lathrop, I could probably ask you this question. Before the consumer enters into a contract in Nebraska, they would have to have legal counsel? [LB1094]

ERIC SCHULLER: Yes. We could...and that's specified in this and that's how all our businesses in ALFA do but it's not specified in statute. With this specified in statute, that before they can get involved in this transaction they have to have an attorney. So if it's \$500 or \$5,000, they have to have an attorney up-front before we can go any further, and their attorney has to sign off on the agreement. It's a check and balance system for them as well. [LB1094]

SENATOR COUNCIL: Yeah. And as I indicated to you in our conversation before the hearing, consumer protection, particularly in areas like this where the public is being inundated on television with, you know, these companies from all over, you know, promising these sums of money. And people who are injured find themselves in very difficult situations. You know, can't make their car payments, can't make their house payments. So anything that would provide a greater level of protection to Nebraskans who find themselves in that position... [LB1094]

ERIC SCHULLER: And one of the other biggest things with this, too, is the full notice of disclosure so the consumer knows exactly what it is they have in front of them. [LB1094]

SENATOR COUNCIL: Thank you. [LB1094]

SENATOR ASHFORD: Seeing no other questions, thanks. [LB1094]

ERIC SCHULLER: Thank you very much for your time. [LB1094]

SENATOR ASHFORD: Next proponent. [LB1094]

WILLIAM MUELLER: Mr. Chairman, members of the committee, my name is Bill

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Mueller, M-u-e-l-l-e-r. I appear here today on behalf of the Nebraska State Bar Association in support of LB1094. When the bar looked at this legislation and understood what its intent was, we voted to support it. Not to repeat what Senator Council said, but this really is a consumer protection-type bill that the bar does support. [LB1094]

SENATOR ASHFORD: Thank you, Bill. No questions? [LB1094]

WILLIAM MUELLER: Thank you. [LB1094]

SENATOR ASHFORD: Any other proponents? [LB1094]

JOHN LINDSAY: Senator Ashford, members of the committee, I noticed there are some lights in front of us. I'm not quite sure why they're here, because...I'm just kidding. John Lindsay, L-i-n-d-s-a-y, appearing on behalf of the Nebraska Association of Trial Attorneys. We...first, we appreciate Natalie Peetz and Mr. Schuller coming to the Trial Lawyers prior to the session, running some of the concepts and the legislation past us. We took this back to the Trial Lawyers legislative committee. And I will tell you, there was a split on our committee. Some members of our committee just simply do not like the industry and they would argue that some of the companies will prey on people who are in very difficult circumstances. As Mr. Schuller mentioned, they may be four or five months back on their mortgage. Just caught between...in some bad situations. There's others on our committee that can and do work with the companies and don't have a problem doing that. So there was a split. What they agreed on was to support Senator Lathrop's efforts to regulate the industry, if the industry is...and it is in place and doing business. If it's going to be in place, it ought to be regulated. And our committee felt that Senator Lathrop's step toward regulation was a good step in at least getting some of the bad actors out of the arena. And I think just as significant as some of the data information that is included towards the end of the bill, really important to have that data available so that if further regulation is necessary, that there is data available for this committee to look at in the future to see if further action is necessary. We would...we support the bill and we would ask that the bill be advanced to the floor. [LB1094]

SENATOR ASHFORD: Any questions of John? Thanks, John. Any other proponents? Opponents? Neutral? [LB1094]

COLLEEN BYELICK: (Exhibit 10) Chairperson Ashford and members of the Judiciary Committee, my name is Colleen Byelick. I'm the associate general counsel with the Secretary of State's Office and the licensing director with the Secretary of State's Office. We're aware of the registration and reporting requirements set forth in the bill, and we're capable of fulfilling those requirements. We currently have a licensing division in which we issue licenses to collection agencies, debt management companies, private detectives, polygraph examiners, and most recently, athlete agents. So we're aware of

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the procedures and the processes involved with registering various types of entities and we're capable of handling that role. We do want to point out some language in the draft, particularly Section 9. It provides that the Secretary of State may refuse to issue a certificate of registration if the Secretary of State determines that the character, fitness, or financial responsibility of the civil litigation funding company are such as to warrant belief that the business will not be operated honestly or fairly. We are also required to have a hearing before denying registration. So we recognize that this language is somewhat subjective. We're, you know, willing to do our best to make this work. However, we put in a very limited fiscal note on this bill and recognizing that if we do have to deny a lot of these applications and we do have to have hearings, that we will probably have to come back and seek further fiscal authority. I can try and answer any questions you may have. [LB1094]

SENATOR ASHFORD: Any questions? Okay. Thank you. All right, I believe...Senator Lathrop, I think that... [LB1094]

SENATOR LATHROP: (Exhibit 8) Yeah. And I don't have a close other than to let the record reflect that I've handed out a letter from the Attorney General Jon Bruning, dated February 11, 2010, supportive. [LB1094]

SENATOR ASHFORD: Very good. We have that. All right, that concludes the hearing, and we now go to LB901. Senator Wightman is back. My gracious. You are going to become an honorary member of the Judiciary Committee soon. [LB1094 LB901]

SENATOR WIGHTMAN: I was getting homesick. [LB901]

SENATOR ASHFORD: You can always not accept the honor, but...(laugh). [LB901]

SENATOR WIGHTMAN: (Exhibits 11, 12, 13) Senator Ashford, members of the Judiciary Committee, I'm John Wightman, spelled W-i-g-h-t-m-a-n, representing the 36th District. LB901 addresses two issues. First, it addresses the restoration of specific factors the courts are to consider in determining custody and parenting time issues. Second, it grants the courts very limited authority to waive the requirement for mediation of custody and parenting time disputes. If you'll remember probably two years ago when Senator Flood brought the Parenting Act before the Unicameral, you know, that was his bill and we worked with him on this. It was brought to me by my district judge, Judge James Doyle of Lexington, because of issues that he has experienced in the custody-type cases. So in determining custody and visitation arrangements, current law, Section 42-364 of Nebraska Revised Statutes of 2008 now provides that custody is to be determined on the basis of the best interests of the child as defined in the Parenting Act, LB554, One Hundredth Legislature, First Session in 2007. That Legislature enacted the Parenting Act and amended Section 42-364. LB554 removed a list of factors district courts previously considered to determine the child's best interests in custody and

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visitation matters. The legislative history and the court cases, to date, indicate that the complete elimination of the custodial factors applied under the "best interest standards" was not intentional. To remove any uncertainty, LB901 restores previous statutory language concerning the specific factors the court shall consider in determining custody and parenting arrangements. By adding back this language, we would be adding back all of the statutory interpretations that have been made in past court decisions. This will aid trial judges in making good decisions. The reinstated language is found on page 8 of LB901. Interested parties have brought to my attention that the language of LB901 should be amended to harmonize the previous statutory language with the terminology and definitions found in the Parenting Act. As a result, I would offer for the committee's consideration as a committee amendment AM1865 which accomplishes two necessary changes. First, AM865 adds a new section (e) which was added to clarify that another factor to be considered by the judge in custody and parenting arrangements is the Parenting Act. The judge must consider the best interests of the child, including "(e) Credible evidence of child abuse or neglect or domestic intimate partner abuse. For purposes of this subdivision, the definitions in Section 43-2922 shall be used." And I might inform the committee that this has been kind of an evolving situation in which the last draft, which is now AM1865, is kind of hot off the press within the last half-hour. We've made various changes and we did have AM1857, but AM1865 addresses an additional issue that was found in reviewing the act and now would apply to custodial matters outside...or would...custodial matters where there was not a marriage involved and not necessarily a divorce. The second issue that LB901 addresses is a requirement that becomes effective July 1, 2010. After that date, the law requires referral of all cases without a parenting plan to mediation as provided in the Parenting Act. In some limited circumstances, a waiver of this mediation requirement is justified. For example, where one parent leaves the United States--and we have a lot of this out in Lexington, Nebraska--and is unwilling to participate in any effort to resolve the issues or where the parents of an older child who preferred one parent did not want to mediate. But the first example is one where we have a high minority population and many of them do go back to their native country and they aren't even there at the time the proceedings are filed and mediation becomes almost an impossibility, and results in a lot of delay. To deal with the extraordinary situations, LB901 authorizes the court to waive mediation if good cause is shown and then one of the following three: when both parents agree and such parental agreement is bona fide and not asserted to avoid the purposes of the Parenting Act, or when mediation or specialized alternative dispute resolution is not possible without undue delay, or when it would cause a hardship to either parent. In cases where such a waiver is sought, the court is required to hold a separate evidentiary hearing and the burden of proof or the party or the parties seeking the waiver is clear and convincing evidence. These changes are found on page 2 of LB901. The second change found in AM1865 addresses another valid concern. And it was brought to our attention just this morning by representatives of The Mediation Center that LB901 should be amended to include specific amending language to the Parenting Act. Mandatory mediation language is found in both the dissolution statute, which is Section 1 of LB901, and the



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Parenting Act. We agree that Section 43-2937 of the Parenting Act should be amended with the same waiver language. This is the second change found in AM1865. And even more recently, as late as this afternoon, it was brought to our attention that current law does not authorize the court to waive mediation in modification proceedings. So we've addressed that issue in AM1865, so we have added appropriate language to LB901 to allow waivers in modification agreements. So that is now addressed. LB901 addresses these key issues that should be addressed as soon as possible in the Parenting Act. I offer for the record a letter from District Judge Doyle, James. E. Doyle of Lexington. Judge Doyle was unable to attend today due to an extensive number of hearings in Dawson County District Court. His letter provides more information and so that will be before you. I also offer, for the record, a letter in support of LB901 as amended by AM1865 from Kathy Moore, executive director of Voices for Children of Nebraska. I also will tell you that since we were amending an act that was introduced by our Speaker, as I've said in 2007, Judge Doyle has worked--and he addresses that in his letter--at length with Speaker Flood and with other judges around the state of Nebraska, and you will find that in his testimony in letter form. So with that I would urge the advancement of LB901 with AM1865 to the floor for further consideration; hopefully, as a consent bill or other priority designation. With that, I'd be happy to try to answer any questions. You may find better answers in the information that I'm submitting from Judge James Doyle, but. [LB901]

SENATOR ASHFORD: Senator Lautenbaugh. Thanks, Senator Wightman. [LB901]

SENATOR LAUTENBAUGH: Thank you for bringing this, Senator. Were you contacted by anyone opposed to this concept, either one of the two issues (inaudible)? [LB901]

SENATOR WIGHTMAN: Some were without the amendments, but we have attempted to address those in the amendments. I mean, they weren't necessarily opposed to the concept but they didn't think that it covered...and particularly, Voices for Children. And the Bar Association will testify on behalf of the changes. Judge Doyle addresses the fact that he has discussed this with other district judges, and so much of that you'll read in his testimony by letter. [LB901]

SENATOR LAUTENBAUGH: What was the purpose for requiring the special evidentiary hearing before the mediation is waived? [LB901]

SENATOR WIGHTMAN: Just to I think be clear that there was sufficient evidence and that it wasn't some attempt by the parties to avoid the mediation requirement. [LB901]

SENATOR LAUTENBAUGH: And I have to tell you, I do support this. I think we may have made a mistake in civil litigation when we gave judges the authority to order people into mediation. I think we may have gone too far. And I think in the domestic area this is a good step towards providing a safety valve, if you will, where mediation

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won't necessarily work or be done expeditiously. [LB901]

SENATOR WIGHTMAN: And that's my feeling, as well, that the absolute requirement without taking into account the myriad of circumstances that might really indicate there's no need for such a mediation. It's costly for one thing. And I'm not saying we ought to do it lightly, but there are circumstances where I think that it might very well be waived, speed up the process, and be beneficial. [LB901]

SENATOR LATHROP: Just one question. John, do you think it's necessary that the standard be clear and convincing? [LB901]

SENATOR WIGHTMAN: Well, I suppose it could be by a preponderance of the evidence. But I think at least Judge Doyle was comfortable with that, and I think that might have been some of the discussion between the Speaker... [LB901]

SENATOR LATHROP: I'll ask Mike about it, too. [LB901]

SENATOR WIGHTMAN: ...and his judge in Norfolk. [LB901]

SENATOR LATHROP: Okay. [LB901]

SENATOR ASHFORD: Thanks, John. Okay, proponents. Do we have...? Jim. [LB901]

JIM GORDON: Yes, sir. [LB901]

SENATOR ASHFORD: Two Gordons. That could be a movie, couldn't it, or some sort...? [LB901]

JIM GORDON: (Exhibit 14) It could be. It can't be "Jimmy Gordon's War." I'm still alive, I guess. By way of introduction to some of the newer members of the committee, my name is Jim Gordon. And in deference to one of your Assistant Sergeant at Arms, I'm the son of Sally. That's for you, Mom. My appearance here today is to voice support for the LB901 introduced by Senators Wightman and Conrad and Flood. By way of background and not as a statement of any credentials that I may possess, let me just say that my life as an attorney since 1974 has been spent for the most part in litigating family law cases throughout many of the counties in the state of Nebraska. Just as an aside, I also did some lobbying, and it was in the early 1980s that I met my wife to be. When she was a young senator, I was a young lobbyist and testifying before this very committee. So I have now touched on both of the things that are most important on this side of the counter. When Senator Ashford and others began promulgating new laws introducing the concept of mediation, I really took notice. The fight was there in almost every dissolution case in which I was involved, but the solution was not. And it took judicial time, it took a considerable lot of money, it took a considerable amount of effort

on the part of the parties to literally fight that fight and never, ever have a chance to talk about what their interests were rather than battling about what their positions were. And when it came down to talking about their children, they never even got in the same room to talk about it. So in the mid-1990s, I began to mediate cases and began to try to be a little bit more of a peacemaker instead of a gunslinger. And I found that mediation really does suit not only my practice but my clients, and more important, their children. So when I first saw LB901, I thought that this was going to be exactly where we needed to go with what Senator Ashford started back in the early '90s, what Senator Flood and the Legislature passed this Parenting Act. And I have some specific comments about each of the sections of the bill which I've distributed to you. I had the benefit of the concept of the amendments that have become AM1865 but I didn't have a print of them, so I'm just going to leave with you two thoughts. We, as members of the board of The Mediation Center, as members of the Nebraska Mediation Association, and myself as a litigator and a mediator, support LB901. We believe the waiver of mediation in appropriate circumstances is desirable and we believe that the burden of proof should be clear and convincing for the reason that, and less than that I would probably see leakage of cases that should otherwise be mediated. Last, as Senator Wightman has addressed, we do also believe that the amendments, the technical amendments, if you will, that are included in his AM1865 are appropriate and do tend to better address the best interests of the child, with which we are all concerned. So rather than repeat what I've given you, I would ask only that you refer to it, but we're in support of the bill and of the proposed amendments. [LB901]

SENATOR ASHFORD: Thank you, Jim. Any questions of Jim? Thank you for your testimony. [LB901]

JIM GORDON: Thank you, sir. [LB901]

SENATOR ASHFORD: Other proponents. Casey. Welcome. [LB901]

CASEY KARGES: (Exhibit 15) Thank you. Senator Ashford and the Judiciary Committee, I'm Casey Karges. I'm the executive director of The Mediation Center and I'm in Lincoln and I'm representing the six directors from across the state. We are testifying in favor of LB901, particularly the waiver of mediation provision found in Section 1 of the bill. Parents who are given the opportunity to mediate important issues in the midst of divorce or a custody battle benefit themselves and their children. When parents can come to a mutually agreed upon solution for how to parent together when they are no longer living together, they shift from an imposed win-lose solution to a solution gained from a collaborative approach. It meets not only their interests, but the important interests of their children. A mediated agreement often has a high rate of compliance, as both parties have worked together to create the agreement and now spend their time and energy making that agreement work instead of letting it fail and go to court so they can win again. What we're finding in the midst of the Parenting Act is

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even in the most difficult of cases, sometimes in high conflict cases, the opportunity for people to come together and try to work out a solution can move a conflict level from a conflict level 9 to maybe a 6 or a 7. It may not come to a total solution, but it may help that family. And what we're working on here may also help the children not have such stress. We do think in certain instances, though, that it is helpful for the court to have the option to waive the mediation rule. At the present time, neither the dissolution statutes nor the Parenting Act provide for judicial waiver of mediation. Senator Wightman's bill amends this dissolution statute that allows the court in certain cases to show good cause to waive the mediation in contested cases. We're imagining if one party is in prison and have not been an active part of a child's life, and that would be something that we would probably not see as a good mediation case, or there are criminal actions pending for child abuse or sexual abuse. There are examples that we've got together we think, you know, it would be good to have the judge to have that ability to do this. So we affirm Senator Wightman's addition of the amendments of putting this also in the Parenting Act as well as in the dissolution statutes. As a director of The Mediation Center, I want to let you know the past two years have been exciting and challenging. In 2007-2008, The Mediation Center had opened 1,789 cases, of which 895 were family cases. In 2008-2009, 2,389 cases were opened of which 1,309 were family cases. That's a 46 percent increase in a caseload in this past year. What we're excited is, is that we were able to help a lot of people. A lot of those cases were indigent and low income, which is a challenge for our centers to maintain to do what we do. We're excited about the 83 percent resolution rate in the cases that we worked on. Those increased numbers increase also the sensitivity and training for domestic intimate partner abuse and high conflict cases. Our hope is for less time for these families in the court and, when cases need modified, a healthier communication and dispute resolution pattern. Thank you for the opportunity for us to affirm LB901. Any questions? [LB901]

SENATOR ASHFORD: Thank you, Casey. And thanks for your work. We knew it would work. We did it. So any other proponents? Yes, sir. [LB901]

BRYAN FUNK: My name is Bryan Funk, F-u-n-k. Senator Ashford and the committee. A couple of years ago I was married and divorced, and something I ran into a lot of trouble with is the fact that when the best interests of this child was looked at, it was looked at that it was...the child was always in the best interests of the mother. So a lot of the factors were overlooked: home life, stability, and stuff like that. So that's why I support this bill. [LB901]

SENATOR ASHFORD: Thank you. [LB901]

BRYAN FUNK: Thank you. [LB901]

SENATOR ASHFORD: Thanks, Mr. Funk. Bill. [LB901]

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WILLIAM MUELLER: Mr. Chairman and 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 in support of LB901. The bar does support granting the court the authority to waive the requirement to mediate. Effective July 1, 2010, there will be a requirement that mediation be mandatory in domestic relations matters, generally. Douglas County has had mediation for several years for custody and parenting time disputes. And according to Judge Doyle, they have always had a waiver process in place where a court could waive mediation. Senator Lautenbaugh, you raised the question about whether an evidentiary hearing should be required, and Senator Lathrop, you raised the question about whether clear and convincing evidence should be required. We've had lawyers raise those same questions. We think that this bill is an improvement. There needs to be some process in place for a judge to waive that. We would be comfortable giving the court more discretion than is contained in the bill, but the bill is certainly an improvement over the current situation. [LB901]

SENATOR ASHFORD: But remember, you do have the requirement that a mediator pull back if there's any indication of abuse, and... [LB901]

WILLIAM MUELLER: Exactly. [LB901]

SENATOR ASHFORD: So, I mean, that's built into the statutes... [LB901]

WILLIAM MUELLER: Oh, it is. [LB901]

SENATOR ASHFORD: ...and there are numbers of guarantees in the statute already to...so we're not mediating cases that are... [LB901]

SENATOR LAUTENBAUGH: I'm sorry. I didn't mean to interrupt you, Mr. Chairman. Thank you for coming today. So there were other members of the bar had the same concern that maybe the evidentiary hearing might be overkill, considering the panoply of things judges do decide perhaps without evidentiary hearings now? [LB901]

WILLIAM MUELLER: The questions were raised that if...and you've heard two situations: where one of the parents may be in prison; the other one is out of the country. Do you really need to have an evidentiary hearing to determine that you shouldn't have mediation. Yes, those issues were raised. [LB901]

SENATOR LAUTENBAUGH: And evidentiary hearings are more expensive than your random telephonic hearing sometimes without a court order, a court reporter, and everything. [LB901]

WILLIAM MUELLER: They are. They are. [LB901]

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SENATOR LAUTENBAUGH: Okay. Thank you. [LB901]

SENATOR ASHFORD: Thanks, Bill. Any other... [LB901]

WILLIAM MUELLER: Thank you. [LB901]

SENATOR ASHFORD: No other questions, so next proponent. Thank you for staying all afternoon. You've been there patiently waiting. [LB901]

NANCY JOHNSON: Thank you. Good afternoon, members of the committee. My name is Nancy Johnson, N-a-n-c-y J-o-h-n-s-o-n. I am a experienced mediator and have been a mediator for approximately ten years, and a practicing attorney for five years. I had a solo practice in Hitchcock County and am literally in transition to join the firm of Conway, Pauley, and Johnson, in Hastings. I'm here on behalf of that firm to support LB901 and the changes that are proposed. Chris Johnson of Conway, Pauley, and Johnson, exclusively does family law. My solo practice was about 95 percent. It will quickly become exclusively family law. And Conway, Pauley, and Johnson, specifically Chris Johnson and myself, represent clients all over the state. So we can see the different impact that the Parenting Act and the changes that have been made over the years are having on our clients. It's difficult to be last because everybody has made very good points that I have in front of me, so I may just elaborate on what's already been said. Certainly there is the need for the waiver process. The burden of proof is questionable so it's a question of is what...the specific language there a little stringent. The examples that were just given, you know, if we have an undue hardship, we have somebody who is in prison, the reality question is, how do we hold an evidentiary hearing on that? So there's some specific issues that we're excited to work with Senator Flood on in the future, and we think there's some important and significant changes that will be coming. That being said, the second portion, the best interests of the child requirements, we support that 100 percent. It got lost in 2007. It essentially vanished. And we've been out there with the judges with no criteria. The gentleman that spoke earlier who had gone through a divorce experienced his divorce without a minimum standard for best interests of the children. So that's critical and we certainly support that. I think just to summarize, again on behalf of Conway, Pauley, and Johnson, I think the points that have been made here today are critical. And although mediation is good in some cases, it's just not going to be practical or doable in every case. So that waiver requirement or procedure is important to have in there. The details may need to be worked out. I appreciate your time and I'll take any questions. [LB901]

SENATOR ASHFORD: Thanks, Nancy. Any questions of Nancy? Seeing none...thorough explanation of your position. Thank you. [LB901]

NANCY JOHNSON: Thank you. [LB901]

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SENATOR ASHFORD: That concludes...well, no it doesn't. Senator Wightman, I'm sorry. Do we have any opponents? Didn't look like there was anybody left. Any neutral testifiers? Deb, do you want to testify? You never want to testify. I know she used to. (Laugh) John, would you like to close? [LB901]

SENATOR WIGHTMAN: I'll take about a fraction of a minute. The only thing that comes to mind is we may have a little bit of lapse between the date that this, the July 1 date when it would be effective. And it might be addressed by the emergency clause. I'm not real strong, because there's only going to be about a 15-day lapse that would appear in that. Maybe 12, I don't know. I haven't got my calculator out. So that would be the only thing that I would think that we might address is that there would be a slight lapse in the 90-day period and July 1. So thank you. [LB901]

SENATOR ASHFORD: Senator Council. [LB901]

SENATOR COUNCIL: And I apologize, Senator Wightman, and to the other persons who testified. I had to step out of the room, but I did hear much of the testimony as to the basis for the support of the waiver. And what I'm seeing is it may be a disconnect and maybe it's just me, but I was hearing some of the rationale for why we need to have the judicial discretion to waive mediation, yet the language says, "not possible without undue delay or hardship to either parent." I don't know if that question was raised, because what I was hearing was it's not practical or it's not appropriate. And I don't know whether this language is unduly confining in terms of exercise of that discretion? [LB901]

SENATOR WIGHTMAN: A lot of this came about as a result of discussions between Speaker Flood, who had originally introduced the bill on the Parenting Act, and my district judge and a number of other district judges. And I guess this was a consensus. This was more their language than mine in introducing the bill, and I think it was a consensus of what they thought might be justification in addition to the good cause. [LB901]

SENATOR COUNCIL: Okay. But see, but the good cause--and maybe I'm reading it wrong--the good cause as I read it related to where the parties agree, "For good cause shown and when both parties agree and such..." [LB901]

SENATOR WIGHTMAN: Well, any one of these three factors, as I understand it, Senator Council, along with good cause, would constitute the basis for the court waiving the mediation, because the good cause "and"...and then it lists the three, and they're in the...they're all "or". So I think it would require the good cause plus any one of those three to meet that test. [LB901]

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SENATOR COUNCIL: All right. With all due respect, the and-and-and are all in the sentence with, "For good cause shown..." And then it says, "or when mediation or specialized..." so I don't see the good cause applying to the... [LB901]

SENATOR ASHFORD: It's something we may have to... [LB901]

SENATOR COUNCIL: I don't want to prolong it, but I see those are two separate and distinct... [LB901]

SENATOR WIGHTMAN: And it may be. I'm not looking at the...was not looking at the bill... [LB901]

SENATOR COUNCIL: It's on page 2. On page 2, line...beginning at line 13. See, as I read that, it's you have to have good cause shown, you have to have the parties agree, and you have to have "the parental agreement is bona fide and not asserted to avoid the purposes..." That's one. And then, "or when mediation or specialized alternative dispute resolution is not possible..." So I see two opportunities for waiver and I'm just concerned that the undue delay or hardship to either party, which is the one that's designed to apply in the situation where the parties don't agree, don't you want to either have the good cause or where mediation is not practical or appropriate? Just... [LB901]

SENATOR WIGHTMAN: My understanding, Senator Council, and I could be wrong. You know, I was reading, first of all, from my prepared testimony and not from the bill itself, that the good cause would always have to be shown, and then any one of those three, combined with the good cause, would be grounds for the waiver of the mediation. And perhaps if that is not the feeling of the committee, we might need to look at some language change in that. [LB901]

SENATOR ASHFORD: Well, sometime...yeah, maybe we will...and going...and good cause shown might be enough. [LB901]

SENATOR LAUTENBAUGH: Or just numbering the three factors. [LB901]

SENATOR COUNCIL: Or numbering them. [LB901]

SENATOR ASHFORD: Or numbering them. One or the other. But we could certainly address that...that is a good point, though, but we'll... [LB901]

SENATOR WIGHTMAN: And, you know, possibly some language change might be necessary there. And I don't think that AM1865 probably addresses that, so. [LB901]

SENATOR ASHFORD: Yeah. I think that's in the green copy, so. Thank you, John. [LB901]



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SENATOR WIGHTMAN: Thank you. Oh, wait. [LB901]

SENATOR ASHFORD: Wait. Senator Lautenbaugh. [LB901]

SENATOR LAUTENBAUGH: Just so I want to make clear, if we should do something that either removed the evidentiary hearing or changed...and/or changed the burden of proof from clear and convincing to just a preponderance, would that upset the applecart on this bill, in your mind? [LB901]

SENATOR WIGHTMAN: I can't speak for all the parties involved so I don't know that for sure. [LB901]

SENATOR ASHFORD: We'd like them to mediate as much as possible. [LB901]

SENATOR WIGHTMAN: You know, whether that...excuse me. Whether that would create a dissent on the floor, I don't know the answer to that. [LB901]

SENATOR LAUTENBAUGH: How do you feel about it? I'm putting you on the spot, I realize, so I... [LB901]

SENATOR WIGHTMAN: Since this was a negotiated language, you know, I really...and I don't practice in the area. I used to but I don't practice anymore in this area, and so I may not have as strong a feel for it as others that are involved. [LB901]

SENATOR LAUTENBAUGH: I'll withdraw the question. [LB901]

SENATOR ASHFORD: We can spend some quality time going over the language. Thank you, Senator Wightman. [LB901]

SENATOR WIGHTMAN: Thank you. [LB901]

SENATOR ASHFORD: (See also Exhibits 16 and 17) I think that concludes the hearing. [LB901]