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Judiciary Committee
January 25, 2013

[LB52 LB89 LB120 LB123 LB151]

The Committee on Judiciary met at 1:30 p.m. on Friday, January 25, 2013, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB89, LB120, LB123, LB52, and LB151. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Mark Christensen; Al Davis; Amanda McGill; and Les Seiler. Senators absent: Colby Coash.

SENATOR ASHFORD: Good afternoon, Senator Haar. Would you like to begin? We're here today on five bills, starting out with LB89. Good afternoon. Senator Haar is the first testifier. How many LB89 testifiers do we have in the room?

SENATOR HAAR: Probably none. [LB89]

SENATOR ASHFORD: None? [LB89]

SENATOR HAAR: Yeah, except for me. [LB89]

SENATOR ASHFORD: Okay. Well, you're the introducer but... [LB89]

SENATOR HAAR: Yes. [LB89]

SENATOR ASHFORD: Go ahead. [LB89]

SENATOR HAAR: Well, Senator Ashford and members of the committee, I would like to talk to you a little bit about LB89. To give you some background, when I first walked my district, running for election, I walked the trailer parks in my district. There's one corner at North First Street and Adams where there are four huge trailer courts, hundreds of people. And some concerns started to rise about safety, what happens in severe weather, what happens if there's a tornado. These folks have nowhere to go. And so I worked on a bill, which we introduced in the last session, that would have required emergency plans for...emergency evacuation plans for all trailer parks. It didn't get out of committee, and one of the problems we had is that the trial lawyers had some problems with our definitions. So this year I began to work with Doug Ahlberg of the city of Lincoln. He's the Lincoln-Lancaster County emergency manager, and we talked about a number of things. And so this bill has come out of that. First of all, in the past, people from those trailer parks could go across Cornhusker Highway and into Pfizer. Pfizer has a very large facility there and they could actually house a lot of people. People could go there in the case of an emergency or a tornado warning. And the problem became that people didn't just come there. They brought their pets. Pfizer even got cages for the pets they brought. But then people started to bring in things like boa constrictors and so on and so forth. (Laughter) And finally Pfizer just said, you know, we really can't do this anymore. So this bill really comes out of that. And what it does, it

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clarifies the current bill, which provides for immunity to anyone providing shelter during an actual, impending, mock, or practice attack or disaster and expands it to make clear that this would include severe weather events; that in that case the entity providing that protection or that shelter would not be held liable. My eventual goal on this, and we're working towards it, would be to actually have safe rooms in trailer parks, so...because I also ran into this situation of one person who is on disability and she couldn't get around very well and she's elderly and she said, well, you know, even if there is a place to go, I couldn't get there, I don't have a car. And so eventually I would like to see us building safe rooms in trailer parks. There's a lot of federal funding, up to three-quarters of the cost of that, but it's something we can't have done by this spring when, again, there will be severe weather. So this would simply clarify it. We've been in contact with Pfizer to see whether they would open their doors again, and the problem with that right now is that there's some change going on in the ownership of Pfizer. And so they weren't really able to make that kind of commitment whether they would again open their doors. But we will work with them, continue to work with them so that, again, if there's a tornado warning or something, people in those parks have somewhere to go. I ran across other...you know, there was a mother with three young daughters and she said...I said, where do you go? And she said, well, I...and this is in a trailer home. She said, I take my daughters and we go into a closet. And so far a tornado has never touched down in that area, but this last spring, in April, apparently there was a tornado that never touched the ground but as close as Air Park. So we have talked to the trial attorneys again and, again, last time they spoke in opposition. This time they're saying they're monitoring it but they're not opposing this. And really what it does, it just clarifies the existing law to grant immunity in the case of severe weather events. So with that, I'd be happy to take any questions you might have. [LB89]

SENATOR ASHFORD: Do we have any? Yes, Senator Chambers. [LB89]

SENATOR CHAMBERS: If you have a copy of the green copy,... [LB89]

SENATOR HAAR: I do. [LB89]

SENATOR CHAMBERS: ...this is the language I'm looking at, a "warning by the National Weather Service of the National Oceanic and Atmospheric... [LB89]

SENATOR HAAR: Uh-huh. [LB89]

SENATOR CHAMBERS: ...Administration of the United States Department of Commerce." How is that warning transmitted to the operator of this shelter? How will...how do we know that that is the type of warning they got or if it's something of a lesser status than that? [LB89]

SENATOR HAAR: Yeah, good question. Right now these folks communicate with our

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emergency center and this, in Lancaster County, it's Doug Ahlberg and his office. And then they, you know, if it's a tornado warning or whatever, they blow the sirens. [LB89]

SENATOR CHAMBERS: Okay. [LB89]

SENATOR HAAR: So that would be the... [LB89]

SENATOR CHAMBERS: So you...now this says any shelter, I think, from the way I read it, any person can provide a shelter. It could be in a person's basement, couldn't it? [LB89]

SENATOR HAAR: It could be. [LB89]

SENATOR CHAMBERS: How would that person know that a warning came from this outfit, when really it didn't, and let a person go in the basement? There were unsafe stairs. There were boards with nails sticking up... [LB89]

SENATOR HAAR: Yeah. [LB89]

SENATOR CHAMBERS: ...and a person stepped on those nails. That person would be...anybody who acted on a warning that had not come from this entity would not be covered by this bill. Correct? [LB89]

SENATOR HAAR: That would be correct. And right now... [LB89]

SENATOR CHAMBERS: I'm not through. [LB89]

SENATOR HAAR: Oh, I'm sorry. [LB89]

SENATOR CHAMBERS: If there were... [LB89]

SENATOR HAAR: Yeah. [LB89]

SENATOR CHAMBERS: ...something put before the public that would give the impression that this kind of protection is available and somebody misunderstood that it had to be from this specific entity, the warning,... [LB89]

SENATOR HAAR: Uh-huh. [LB89]

SENATOR CHAMBERS: ...and acted on that and somebody was injured, that person, that entity, no matter how large, no matter how well-intentioned, would be subject to all the laws of negligence probably... [LB89]

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SENATOR HAAR: Uh-huh. [LB89]

SENATOR CHAMBERS: ...or generally. [LB89]

SENATOR HAAR: Yes. Right now what usually happens, we're talking about businesses. For example, right around those trailer parks, there's a Kwik Shop, Pfizer... [LB89]

SENATOR CHAMBERS: Not to be rude,... [LB89]

SENATOR HAAR: Yes. [LB89]

SENATOR CHAMBERS: ...I understand thoroughly what you're talking about. [LB89]

SENATOR HAAR: Okay. [LB89]

SENATOR CHAMBERS: You were clear. But the law doesn't just talk about businesses. It talks about any person. [LB89]

SENATOR HAAR: Uh-huh. [LB89]

SENATOR CHAMBERS: Now you said the defense attorneys looked at this and they don't have a problem with it? [LB89]

SENATOR HAAR: Here's what they told us. Last time they opposed when we were asking for immunity again. This time they said we're monitor...this is a quote, they're monitoring it but not opposing it. [LB89]

SENATOR CHAMBERS: What I'm concerned about, and I'm not going to extend it... [LB89]

SENATOR HAAR: Uh-huh. [LB89]

SENATOR CHAMBERS: ...but I'm asking the questions to you... [LB89]

SENATOR HAAR: Uh-huh. [LB89]

SENATOR CHAMBERS: ...because you have a discrete area and group of entities that you are interested in giving immunity to. [LB89]

SENATOR HAAR: Uh-huh. [LB89]

SENATOR CHAMBERS: My concern, as a policymaker, has to be for that much wider

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universe of persons and entities who may think they're covered but they're not. Just reading this you could get the impression that if a warning is given on television or radio and you want to provide shelter to somebody and you're as careful as you can be, then you're not going to be liable for whatever happens to them there. And then they would be liable. And I'm not asking you to answer that. I just want that on the record and I'm presenting it to somebody who could defend himself so I don't have to continue to raise the question. And I'm not saying it puts me in opposition to what you're trying to do,... [LB89]

SENATOR HAAR: Uh-huh. [LB89]

SENATOR CHAMBERS: ...but I do have concerns, even if that lawyer group doesn't. [LB89]

SENATOR HAAR: Uh-huh, yeah. Well, thank you for that. And let me just say that on the people who need the shelter, there is an effort ongoing, and we will continue to make that an ongoing effort, to let people, the people who need the shelter, know that it's the sirens that are the, you know, that are the warning call and so on. [LB89]

SENATOR CHAMBERS: Are the sirens set off only when the warning comes from this Oceanic, Atmospheric outfit? Is that the only time the sirens are set off? [LB89]

SENATOR HAAR: No, actually...and you bring up a good point. The local people are watching the weather even if something doesn't come from the Oceanic center. [LB89]

SENATOR CHAMBERS: So why do you put that narrowing provision in it, for the record? [LB89]

SENATOR HAAR: I can't answer that but we'll look into it and we'll get back to you on that. [LB89]

SENATOR CHAMBERS: Okay. And that's all I have. Thank you. [LB89]

SENATOR HAAR: Yeah. [LB89]

SENATOR CHAMBERS: You've been very helpful to me. [LB89]

SENATOR HAAR: Yeah. Yeah, thank you. [LB89]

SENATOR ASHFORD: Yes, Senator Davis. [LB89]

SENATOR HAAR: Yes. [LB89]

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SENATOR DAVIS: I had some of the same questions that Senator Chambers had, and specifically for rural people. You know, we don't have a siren system but we do...and I'm familiar with this service, it's something that's done on telephones out in rural Nebraska. So I don't want to belabor a point but I just want to be sure that we are going to be looking out not just for businesses in a town but for people that might be...pull along the road and they need shelter right away and so you say come in. So, you know, is that going to be taken care of by this bill? [LB89]

SENATOR HAAR: Again, I can't answer that, but I'll find out. What we're trying to do, of course, and this is a tricky situation to provide shelter to who shows up at your door. The people need shelter, there's no question about it. [LB89]

SENATOR DAVIS: Absolutely. [LB89]

SENATOR HAAR: If a tornado would hit First and Adams, we could have scores of dead people, literally, because of those hundreds of trailers. So we'll look into the concerns that you've raised and hopefully present you with some amendments. My next step, I hope, will be, either through a mandate or through some kind of incentive, that we can provide shelters for trailer parks with some kind of safe structure within the trailer park. I mean that's the best solution. [LB89]

SENATOR ASHFORD: Thanks, Senator Haar. [LB89]

SENATOR HAAR: You bet. [LB89]

SENATOR ASHFORD: I don't...is anyone else here to...I don't believe anyone has come in, so you can close or waive your closing. [LB89]

SENATOR HAAR: I think I'll open and close on that same note. [LB89]

SENATOR ASHFORD: Okay, thank you. [LB89]

SENATOR HAAR: And I appreciate your concerns and this...I do recognize that this is...it's a tough issue to narrow down liability and responsibility, but I am bound and determined to find adequate shelter for these people in my district and people all over the state. So thank you very much. [LB89]

SENATOR ASHFORD: Thanks a lot. (See also Exhibits 1 and 2) Senator Lautenbaugh is next, LB120. [LB89]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman, members of the committee. Did I just miss an immunity bill? (Laughter) [LB120]

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SENATOR ASHFORD: Yeah, that was... [LB120]

SENATOR MCGILL: Yes. [LB120]

SENATOR LATHROP: Yeah. I didn't. (Laughter) [LB120]

SENATOR LAUTENBAUGH: LB120 was introduced to address several issues regarding rental property and evictions and other issues, I guess, beyond that, that have arisen over the last few years. Simply put, it can be discussed in three sections, basically. The first section deals with evictions and what it is meant to clarify is that individuals who are not on a lease but are in an apartment don't have a possessory right. They're mere trespassers should an eviction come around. What this is trying to address is the circumstance where I sign a lease and I eventually get evicted, so the constable shows up to put me out. Well, that's fine but I'm not there anymore but one of my buddies is living in the apartment. The constable won't evict that person because they're...first of all, nobody knows who they are, so they're not on the paperwork, and all they have to do is say, I have a right to be here, and the constable goes away. So this is meant to address that circumstance. It doesn't give landlords the right to rove through apartment complexes at random and say, you're all trespassers unless you're on the lease, because the landlord doesn't have a possessory interest that's current in a premises that's leased anyway. But once that lease is in default and it is time for eviction, the landlord then does have a possessory interest in that premises. And the issue has arisen when there are people who are there who are not on the lease and there's no real way to put them out because nobody knows who they are, or there is a way but it requires two and three different evictions to be filed, clogging up the courts, to try to address that issue. The second issue, just to adjust the amount that may be withheld for a security deposit or a pet deposit. It was previously limited to one month's rent in the case of the security deposit. This would increase both of those by a percentage, if you will. That's simply meant to recognize the reality that if there is damage to an apartment that needs to be repaired, if the rent is \$450 a month, there's not much you can actually repair. If you have to recarpet, that's not \$450. And there's also the phenomenon out there that a lot of times the tenants will, say, you know, not pay the last month's rent and say, use my security deposit, knowing full well that no eviction is going to get them out by the time the last month has come and gone. So this would address that problem. In a sense, I realize it was...it's sort of, based upon that argument, punishing the good actors to compensate for the bad actors, but that's kind of the nature of what we're talking about here, rather than letting the landlord bear the cost of that. Additionally, the third section, if you will, clarifies that if damage to the property is willfully done by a tenant or by his allowance, that it is a crime of criminal mischief, and that would provide, I guess, clarity for the fact that people can be charged for that kind of damage, again, if done willfully or by a tenant's allowance. That in a nutshell is the bill. I'd be happy to entertain any questions you may have. [LB120]

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SENATOR ASHFORD: Yes, Senator Lathrop, then Senator Chambers. [LB120]

SENATOR LATHROP: I do have a question about the definition of...or turning anyone...your definition of tenant would exclude anybody who's not on the rental agreement, turn the balance of everybody else into a trespasser. Is that just for purposes of this act or would that affect civil liability for someone who was living there? For example, if I rent a place and my sister comes into town, stays with me, and then gets hurt in a common area, is she now a trespasser and then, of course, a different standard applies in a civil liability suit? [LB120]

SENATOR LAUTENBAUGH: I'd thought we'd largely abrogated that anyway but maybe not regarding trespassers. [LB120]

SENATOR LATHROP: I think we may recognize trespassers and got rid of the rest, invitee and licensee. [LB120]

SENATOR LAUTENBAUGH: Yeah, I think you're probably right. But be that as it may, this wasn't meant to be directed at that and that's not what I was contemplating in that definition. And if that needs to be clarified, it had nothing to do with civil liability issues for invitees versus trespassers. This was simply to address the issue regarding evictions, I should say. So, no, that was not within my contemplation at all. [LB120]

SENATOR LATHROP: Thanks. [LB120]

SENATOR ASHFORD: Senator Chambers. [LB120]

SENATOR CHAMBERS: My question was similar. If this deals only with evictions, why don't they say, "For purposes of eviction proceedings," and then put what they've got here? Because a trespasser...let me expand on what Senator Lathrop may have been talking about, maybe not, so it will just be mine. If a person is a trespasser, there are legal sanctions that can be brought against a trespasser. The way this is defined, those legal sanctions could be brought against a trespasser and somebody could call the police to remove this person. And the person, if...all the police would have to do is say let me see the lease, and the person is not there, the argument could be made and it could escalate, I'm not staying here, I'm visiting. Well, we got word that you're a trespasser, you're not on the lease, get out, and when you get out, go to the car because we have some additional business. And the person not learned in the law, as people in my community...now I know all the rest of the city people know the law because they don't have those things happen to them so they probably respond appropriately. This is an invitation to mistreatment of people. So what would be the objection to putting in that limiting language that this definition is only for the purpose of eviction proceedings if, in fact, that's what it's for? [LB120]

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SENATOR LAUTENBAUGH: Off the top of my head, I can think of no objection. And I will concede that it is drafted so that it does turn on, you know, who has the current possessory right and then who becomes a trespasser. You're correct. And that might be a too subtle way to get at what we're trying to get at. Your approach may actually be superior, but I'd have to look at the language, you know. [LB120]

SENATOR CHAMBERS: Okay. And I'm not going to belabor it, but... [LB120]

SENATOR LAUTENBAUGH: No. [LB120]

SENATOR CHAMBERS: ...I wanted that in the record. Now on the other one, if this gets out, I fought this battle on these security deposits so I won't fight it here. But if it gets on the floor, if whoever the lobbyist for the realtors is, then he knows and this will have rough sledding on that score. But let's go to the third item: Any person who intentionally, maliciously, or recklessly fails to comply with the subdivision shall be guilty of criminal mischief. Is there a corresponding duty on landlords to properly maintain the premises, with a criminal penalty for failure to do so? [LB120]

SENATOR LAUTENBAUGH: Not that I'm aware of. No. [LB120]

SENATOR CHAMBERS: Me either, but that's going to be an issue with me too. And again, I won't belabor it, because if there's a testifier besides you...or even if there's not, if it gets on the floor, that's where I'll fight it. [LB120]

SENATOR LAUTENBAUGH: I'm hurt, Senator, that you don't think I dreamt this up on my own; that there's some lobbyist coming behind me, but (laughter)... [LB120]

SENATOR CHAMBERS: I've seen... [LB120]

SENATOR LAUTENBAUGH: ...we'll just see how the day plays out. [LB120]

SENATOR CHAMBERS: I've seen this before though. That's what I just assumed. [LB120]

SENATOR LAUTENBAUGH: Fair enough. [LB120]

SENATOR CHAMBERS: Okay. [LB120]

SENATOR ASHFORD: Yes, Senator Davis. [LB120]

SENATOR DAVIS: Senator Lautenbaugh, a couple questions, and the first one is on page 4 and maybe it's something that you don't know. I've just been wondering. Of the Nebraska Housing Agency Act, some of these are, deposits and things, are exempt

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from that? [LB120]

SENATOR LAUTENBAUGH: Uh-huh. [LB120]

SENATOR DAVIS: And why is that and what is that? [LB120]

SENATOR LAUTENBAUGH: I think what we're trying to get at there is to avoid any federal issues with federal programs. [LB120]

SENATOR DAVIS: Because that's a federal program. [LB120]

SENATOR LAUTENBAUGH: Yes. [LB120]

SENATOR DAVIS: Okay. [LB120]

SENATOR LAUTENBAUGH: Exactly. [LB120]

SENATOR DAVIS: Then to the question kind of following up with Senator Chambers about criminal mischief, so is a police officer going to have to come out to the rental property and look it over and decide whether it's criminal mischief or not criminal mischief? [LB120]

SENATOR LAUTENBAUGH: I assume it would be investigated like any other criminal activity. There would have to be a report of some kind. [LB120]

SENATOR DAVIS: So it will be that patrolman's decision as to whether it is or is not? [LB120]

SENATOR LAUTENBAUGH: You know, I'll be honest with you, I don't do a lot of criminal law. I think sometimes you can get the prosecutor to file something even if the police don't ticket, but I'm getting out in the tall weeds from my knowledge at that point. [LB120]

SENATOR DAVIS: But it would end up being a... [LB120]

SENATOR LAUTENBAUGH: Yes. [LB120]

SENATOR DAVIS: Yes, okay. [LB120]

SENATOR LATHROP: Any other questions for Senator Lautenbaugh? I see none. [LB120]

SENATOR LAUTENBAUGH: Thank you. [LB120]

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SENATOR LATHROP: Do you want to stay and close, Scott? [LB120]

SENATOR LAUTENBAUGH: Oh, I'll be here all day. [LB120]

SENATOR LATHROP: All right. Great. Great. Great. All right, the first supporter of LB120 may come forward. [LB120]

WILLIAM WOOD: I'd say good afternoon to Senator Ashford but he isn't in his chair right now. Good afternoon, distinguished committee members. My name is William J. Wood. My address is 808 D Street in Lincoln, Nebraska. I'm here on behalf of the Real Estate Owners and Managers Association of Lincoln and the Statewide Property Managers Association. I think the introducer pretty well summarized the intent of the bill. I think in that first section that was talked about, trespassers, I believe the bill has some language about someone being a permanent resident, so that addresses to some degree the question about somebody being removed that happens to be there visiting, a relative or whatever. I'm mainly going to address my remarks to this second section that increases the deposits. Unfortunately, inflation on doing these repairs and those type of things have exceeded the increase in rents. At least here in Lincoln, the rents have increased very little over the last ten years. Probably carpet is the best example. If you have a two-bedroom apartment, the rent might be \$425 to \$495. To replace the carpet in a unit of that size usually costs in excess of \$2,000. Often when these people that haven't paid their rent leave, there's at least one month's rent that's due, there's late fees that are due, and quite often, the case when there's somebody that didn't pay the rent, there's also considerable damages. So it far exceeds in many of these cases what one month's rent would equal. You know, we try to accommodate people to allow pets. Again, the current deposit for a pet is one-fourth a month's rent. Usually pet damage in many instances has to do with carpet damage. And as I've said, that would be well in excess of even the tenant's one month's rent and the one quarter of a month's rent for the additional pet deposit. Third item here in regard to the criminal mischief, I think we're trying to clarify something. So often when the police are called, when there's been severe damage done, if it's a tenant, they'll say, oh, that's a civil matter. In any other case, if that kind of damage were committed to a property there's no question but what they would be charged with criminal mischief. So we're trying to clarify that. That's the purpose of this section. Are there any questions? Senator Chambers. [LB120]

SENATOR LATHROP: Senator Chambers. [LB120]

SENATOR CHAMBERS: Mr. Woods, you did say Woods, correct? [LB120]

WILLIAM WOOD: No, I said singular, Wood. [LB120]

SENATOR CHAMBERS: Oh, Wood, okay, I stand corrected. I couldn't see the wood for

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the woods. Okay. But here's what I'm looking at. I am very concerned about excuses that police have to hound and harass people. Now if you invite me into your home and I refuse to leave, you cannot have me charged with burglary. I did not break and enter. There are certain situations when a bad check cannot be enforced on the basis, or a no-fund check, on the basis of a criminal sanction. So the mere fact that a certain act occurs does not mean it should be a crime. Now when you talk about damage to other people's property, there is no relationship between these two people where the person is there in the first instance pursuant to a contract or a lease or whatever the consensual arrangement is. So you want to involve the criminal justice system on behalf of private landlords who feel that a certain type of damage has occurred to their property. Is that correct? [LB120]

WILLIAM WOOD: I think it would be a better statement of what I'm saying to say that we want the same protection that the rest of the public has. [LB120]

SENATOR CHAMBERS: Well, you're not entitled to that. If somebody damages my house and there's no...I'm going to use a legal term which is not strictly applicable, has no privity, then that's different. If somebody breaks my window out, then that's not the same as if a person who is a tenant damages that property. You have to show criminal intent. So you're saying there's going to be a presumption or at least prima facie circumstance that would suggest that you impute intention, malice, and recklessness, and you're going to call a cop and say that's what happened. And the cop comes out and he says, well, I don't know that that's intentional. And is he or she supposed to make arrest on the statement of the landlord alone? [LB120]

WILLIAM WOOD: I don't believe so. I think it's like any other case of criminal mischief, that they're supposed to investigate and make a determination. I don't think there's any presumption. [LB120]

SENATOR CHAMBERS: But you're asking the cop, who is not trained in any of these things, to come out, because you called him or her, and go through this apartment and investigate. And you're saying one thing, the tenant is saying another. The tenant says, well, this pipe was leaking and poorly attached to the sink when I got here. And you say, well, no, it wasn't. And the cop has to sit there and then make a decision as to whether this is criminal mischief. [LB120]

WILLIAM WOOD: I think we're more talking about situations where there's intentional defacing of the property or intentional damage, not something of that nature. I think if a neighbor called the police on another neighbor and said, my neighbor broke my window or came over here and wrote graffiti on the side of my house, the police would have to make the same type of determination. [LB120]

SENATOR CHAMBERS: This is a civil matter that you're talking about. And again, I'm

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not going to belabor it here, but I want to serve notice to you. You are a lobbyist, correct? [LB120]

WILLIAM WOOD: No, I am not. [LB120]

SENATOR CHAMBERS: Do you have a lobbyist who's going to speak on this bill? [LB120]

WILLIAM WOOD: I don't believe so. I'm not positive. [LB120]

SENATOR CHAMBERS: Oh, okay. This bill is going to have rough sledding and I'm going to be the one to erect the obstacles. And just so you understand that it has nothing to do with your presentation or you, these are the kind of things that I abhor. These are the kind of things which if our government allowed to happen would lead me to invoke the language of the Declaration of Independence: It is their right, it is their duty to alter that form of government and provide new guards for their future security, which is a justification of revolution. Now I won't engage in actual revolution, but some people on the floor who defend this may feel like they've been in a revolution, metaphorically speaking. And that's all that I have. But I want you to know what my opposition is. And on the other two points, I think I stated that clearly enough so I don't have to run through it with you. [LB120]

WILLIAM WOOD: Well, you're a worthy opponent and I hope you'll find us to be honorable and worthy opponents also. (Laughter) [LB120]

SENATOR LATHROP: Thank you, Mr. Wood. Any other proponents here to testify in support of this bill, LB120, today? Good afternoon. Welcome to the Judiciary Committee. [LB120]

MARY JO BOUSEK: Thank you. My name is Mary Jo Bousek. I live at 2001 South 24th Street here in Lincoln and I just want to address the part of the bill that people that stay...well, I'm actually relating a case of the man that I sold some property to who still owns it had this happen to him. He had a tenant that moved in, signed the lease. He was there alone. It's an efficiency apartment. And at some point he moved a girlfriend or somebody in, soon seemed to be on drugs and whatever. But then the tenant on the lease moved out, but this girlfriend stayed. And the landlord wanted her out because nobody was paying the rent. Obviously, she wasn't paying the rent. I'm not sure he even paid the rent before he left. And she wouldn't move. She used the statement, well, I established residency; therefore, I'm allowed to stay in this apartment. She's not on the lease, not paying the rent either, having lots of people come in and doing drugs, I understood. But she established residency; therefore, she was entitled to live in this apartment. Well, frankly, ladies and gentlemen, that's baloney. She wasn't on the lease. She...just because she was invited in but the friend left doesn't mean she can just stay

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there as a tenant. And I think this addresses this. So this landlord had to go through the eviction process for this nontenant, wasted another three weeks, spent more money and wasted...didn't get the rent for those extra three weeks that it took to evict this nontenant. And it doesn't seem right; that we need to be able to call her a trespasser and have the police come in and say, out you go. Did I make myself clear? [LB120]

SENATOR LATHROP: I think we get... [LB120]

SENATOR ASHFORD: Yes, you did. [LB120]

SENATOR LATHROP: Oh, I'm sorry. [LB120]

SENATOR ASHFORD: Oh, no. [LB120]

SENATOR LATHROP: I didn't see you back. [LB120]

MARY JO BOUSEK: How about that, Senator Chambers? Am I clear? [LB120]

SENATOR ASHFORD: Snuck in through the back door. Any questions? Do we have any? Thank you very much. [LB120]

MARY JO BOUSEK: Okay. [LB120]

SENATOR ASHFORD: Next testifier. [LB120]

MICHAEL DENNIS: I'd like to thank the committee for their time and effort on this. It's very important. We went through this a number of years ago. Ernie had the same problem at that point and I want to apologize for making that... [LB120]

SENATOR LATHROP: Can you start with your name for us? [LB120]

MICHAEL DENNIS: Well, I'm not sure. [LB120]

SENATOR LATHROP: Let's try. [LB120]

MICHAEL DENNIS: I told you 20 years ago when we were here before on this. (Laughter) No... [LB120]

SENATOR LATHROP: Well, let's have you try it over again. [LB120]

SENATOR ASHFORD: Well, okay, don't give us your name. We'll look back in the records. (Laughter) [LB120]

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MICHAEL DENNIS: Yeah. Yes. I'm Mike Dennis and I'm here with the Real Estate Owners and Managers Association. I also have a management firm. We look after about 45 owners' properties here in the city of Lincoln. Our problem is that of money. It isn't about who did what to whom or why. I know that we like to get tied up in, oh, my, this is a civil matter. There, I don't know, when the Landlord, Tenant Act was initiated, if we had any words that described what a civil matter was. We did describe the tenant's rights. The truth of the matter is, it didn't say anything about the person that wasn't on the lease. So what happens is that people such as myself, after years and years and years of spending on court cases because this is the right step to go, and it does provide a lot of work for attorneys. You know, I think that my neighbor always cautioned me, Richard Harnsberger. He passed away this fall (sic) but Richard was a law professor and he said, Mike, err on the side of being very legal. Sure. So I go out and I spend \$300 to \$600 to be very legal, and sometimes this is...you know, and then we also lose the rent for a period of time, and we are very legal. It is so legal that it's pathetic. The point is that did the cops make the right statement when they came up and said, hey, this is a civil matter? I...at what value should I say, hey, I don't think so, and simply put the people out? Since we have rules and we're all very civil and my neighbor, Richard Harnsberger, told me, Mike, don't go that route, I don't. And on advice of counsel, I don't. But the reality is, how many businesses in the state of Nebraska has the right to put somebody out? There is probably not much difference when it comes to making money. You know, the barkeeper, he puts people out when they become objectionable or destructive. Other businesses will call the police; the police will sit out people who are not wanted. There's maybe a little bit of difference but I don't think so. The Landlord, Tenant Act did indeed put in some form the words as to what a tenant is, and a tenant is a person who is, one, identified on a lease, has given some information, and probably has our office approval as to that they are probably nondestructive, nonviolent, perhaps able to pay the rent if they're working, maybe not, but... [LB120]

SENATOR ASHFORD: Michael, I'm going to ask you to sum up and then there may be some questions. [LB120]

MICHAEL DENNIS: Sure. Sure. But the point is that we need to be very careful about, you know, doing the right thing. And the right thing is simply looking at the cost of today's repairs. This goes to the increase in our ability to charge a little bit more, and also the ability to deal with tenants that are not tenants. They're just people off the street. [LB120]

SENATOR ASHFORD: Thank you. Any questions of Michael? I don't see any. Thank you, sir. [LB120]

MICHAEL DENNIS: Thank you. [LB120]

SENATOR ASHFORD: I failed to mention that when...sorry. Go ahead and

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you're...when the yellow light goes on, we ask you to sum up. [LB120]

MICHAEL DENNIS: I saw that and I apologize. [LB120]

SENATOR ASHFORD: I know, and I should...I was not clear. I apologize for that. [LB120]

MICHAEL DENNIS: And I apologize for taking extra time. [LB120]

SENATOR ASHFORD: No, you don't have to apologize. I apologize. [LB120]

SENATOR MCGILL: Let's all apologize. (Laugh) Let's all of us apologize. [LB120]

SENATOR ASHFORD: All right. Senator Davis, would you like to apologize or should we... (Laugh) [LB120]

SENATOR DAVIS: Oh, I'm so sorry. (Laughter) [LB120]

L. DAVID ANDERSON: My name is David Anderson. I live at 1834 G Street here in Lincoln, Nebraska, and I've been a landlord for over 25 years, and I just want to address the security deposit issue for just a moment. Sometimes I've been in situations where a tenant has come to me who has recently been evicted and I've got a \$400 apartment available for him but, given his track record and his...maybe his credit report, I don't feel comfortable renting it to him with a \$400 security deposit, whereas if I could get a \$600 deposit he would then get the apartment. Otherwise, you know, he's out there and still looking and his options are fewer. Over the years, I've actually had situations where people have offered to pay me six months in advance. And as you know, the Landlord, Tenant Act does not allow that. So I think that raising it would give tenants more choices, more opportunities too. That's all I wanted to address. [LB120]

SENATOR ASHFORD: Any questions? Yeah, yeah, Senator Lathrop. [LB120]

SENATOR LATHROP: Don't you think it will become the standard though? I mean... [LB120]

L. DAVID ANDERSON: Well,... [LB120]

SENATOR LATHROP: ...who's going to charge less than a month and a half? As soon as we change it from a month to a month and a half, everybody will be doing that. [LB120]

L. DAVID ANDERSON: Well, I guess my...what I would prefer is that the act just be silent on it. Let the parties negotiate that. If somebody comes to me with six months'

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advance rent and they want to pay it and that makes me feel very secure about renting it to them, then to me that's fine. But I think that I'm okay with the month-and-a-half equivalent. [LB120]

SENATOR LATHROP: Okay. Thank you. [LB120]

L. DAVID ANDERSON: So, yeah. Uh-huh. [LB120]

SENATOR ASHFORD: Thanks. Any other proponents? [LB120]

GARETH REES: (Exhibit 4) I'm Gareth Rees. I rent apartments here in Lincoln. I'm speaking only to the third part, of criminal mischief. I'm giving pictures to the committee. It's not often that I have criminal damage but in these particular pictures I did have criminal damage. And to make it a civil case, it was not an individual that I could make a civil case with. And I have no further things to say. [LB120]

SENATOR ASHFORD: Senator Lathrop. [LB120]

SENATOR LATHROP: Well, I'm just going to make one quick observation. The criminal mischief statute right now, the one that's in place, already the law makes it a crime to maliciously or recklessly cause damage to somebody's property. You know, you're already not getting a remedy with the criminal mischief statute and I don't know that this is going to change that,... [LB120]

GARETH REES: Okay. [LB120]

SENATOR LATHROP: ...but just an observation. [LB120]

SENATOR ASHFORD: Thank you, sir. [LB120]

GARETH REES: Thank you. [LB120]

SENATOR ASHFORD: Any other proponents? Do we have any...where are we, on opponents? Do we have any opponents? Yes, Mr. Krejci. John, it's good to see you again. [LB120]

JOHN KREJCI: (Exhibit 3) John Krejci, K-r-e-j-c-i, 4402 St. Paul Avenue, Lincoln. I should be a better paper shuffler by now, shouldn't I? Good afternoon, Senator Ashford; Senator McGill, my senator; and... [LB120]

SENATOR MCGILL: Hello. [LB120]

JOHN KREJCI: And welcome back, Ernie. [LB120]

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SENATOR CHAMBERS: And "St. John," I say it's very appropriate that "St. John" lives on St. Paul Avenue. (Laughter) [LB120]

JOHN KREJCI: Not many would agree with that, but thank you anyway. Actually, Senator Chambers has stolen my fire because I thought I had critiqued that bill pretty well. But I have a little different angle at it. I'm a retired professor of sociology and social work. I'm currently working with inmates, with homeless, with poor people, and that's why I'd like to oppose LB120. As you're aware, homeless and ex-inmates need support, a job, social support. A lot of them need alcohol and drug treatment, and of course they need housing. So if we...also I'm working with groups like RAN, Reentry Alliance of Nebraska. I'm a board member of Nebraska Aftercare in Action, and I'm on the Homeless Coalition. And all these groups are working for that, so I'm not an official spokesman for them but, you know, I'm speaking anyway. Now it's extremely difficult to find housing for inmates and homeless people, and the limit...the human resources limits are limited and the financial are even more limited. To increase the deposits to one and a half, it makes it more difficult. The resources that are given sometimes to homeless would be depleted much more quickly and add the pet thing on and it's even more. It drains resources, discourages those who are trying to find housing, and the LB just further limits these options, so that's the first thing. The second is the idea of only the person named in the agreement has a right to be there. The first thing (inaudible), what about the family? Do you have to have, you know, all the family people named? So anyway that's...and it's...I quote the statute or the bill, so are we to charge the children or spouses with trespassing if they're not named in the agreement? I know Senator Lautenbaugh was talking about it from another perspective. And then who is to determine if a visitor is permanently residing in the premise, you know? We all have a lot of couch crashers these days and, you know, is it permanent or is it temporary, you know? The third thing, and do we want law enforcement involved in these matters, you know? Ex-cons and homeless people have enough contact with law enforcement already and they usually don't get a fair shake. I think Senator Chambers pointed that out. And the bill says any person who intentionally, maliciously, or recklessly fails to comply with Section 76-1421 is guilty of criminal mischief. Yeah, who determines--and I think we brought that out--intention, malice, or reckless behavior? [LB120]

SENATOR ASHFORD: John. [LB120]

JOHN KREJCI: Oh, I see the red light. I'm going to...I have one rental house. It's occupied by an ex-con who's an alcoholic. Sometimes friends crash on the couch. But this is sometimes the only recourse of the poor, the homeless, and ex-inmates so...and I realize tenants can be destructive and irresponsible, but this bill won't improve that. It will just make it worse. So don't advance the bill. Thank you. [LB120]

SENATOR ASHFORD: Thank you, John. Any questions of John? I don't see any.

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Thanks. Any other opponents? [LB120]

JOHN MILLIGAN: Good afternoon, members of the Judiciary Committee. My name is John Milligan. I'm a staff attorney with Legal Aid of Nebraska here in Lincoln. We provide free legal representation to low-income individuals on a statewide basis. We do represent tenants in landlord-tenant disputes. We do not represent landlords, but I can tell you from my experience that there certainly are good landlords. There certainly are good tenants. And there are certainly bad landlords and bad tenants. We are opposing all three of the individual proposals. We believe that the increase in the rental deposit by 50 percent will make it too difficult for a low-income person to secure a rental agreement. Increasing the deposit on a \$500-a-month apartment, from \$500 or \$625 to...with a pet, to \$750 or \$1,000 with a pet is a significant change, especially for someone with limited income, like an elderly or disabled person who is on SSI and only receives \$710 a month in income. A large percentage of low-income individuals do not have the income or resources to pay first month's rent and a deposit. Too often this individual is a victim of domestic abuse or an individual just released from a period of incarceration. Some of these individuals are able to access assistance for security deposits from various community agencies, including housing authorities, community action agencies, or even the Nebraska Department of Health and Human Services. The proposed security deposit increase would adversely affect the ability of these agencies to provide assistance to as many individuals with this specific need and would likely result in longer periods of homelessness for certain individuals. Rather than there being an increase in security deposit by 50 percent or more for those individuals with pets, we suggest that perhaps landlords consider the increased use of cosigners or co-guarantors in their rental agreement, or to take reasonable steps, such as regular inspections of the property to reduce claims for damages at the end of leases. In addition, labeling as trespassers all persons who are...permanently reside in the premises but are not named in the rental agreement, in our opinion, is too broad and could lead to the ejection of individuals who may either be a guest of the tenant, a sublessee of the tenant, or a co-lessee in fact. There has been talk about this being limited only to situations where it's a matter of an eviction. Well, practicing in the local county court, I've learned that landlords certainly can bring and evict individuals easily by naming unnamed tenants as John Does or other occupants and having them served at the same time that they serve the actual individual-named tenant. That is not a problem under current law, in our opinion. Finally, creating a statutory criminal offense for a civil matter, and it's a contract matter between a landlord and a tenant, and this...the potential penalty involved in this would be up to five years in prison, \$10,000 fine for violation of a contract between a landlord and tenant, we believe that it's inappropriate and we believe that extending criminal laws and penalties in civil matters is something that should be used very rarely. [LB120]

SENATOR ASHFORD: Thanks. [LB120]

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JOHN MILLIGAN: Thank you. If you have any questions, I'd be happy to address them. [LB120]

SENATOR ASHFORD: Any questions of John? I don't see any. Thank you, sir. [LB120]

JOHN MILLIGAN: Thank you. [LB120]

SENATOR ASHFORD: Any other opponents? Neutral testifiers? [LB120]

DANIELLE HILL: (Exhibit 5) Good afternoon. My name is Danielle, D-a-n-i-e-l-l-e, last name Hill, H-i-l-l, and I'm the director of the Nebraska Housing Developers Association and here on their behalf. Our organization was established in '96, 1996, and we have more than 60 members, some of which are probably part of REOMA, so that's why we are testifying in the neutral capacity. And our mission is to champion affordable housing and so that's why I'm here today, is to say that although we understand the plight of property owners that experience the negative impact of tenants that are irresponsible, especially have sympathy towards the property owners that actually maintain safety and sanitary housing. I have no sympathy for property owners that don't do that. So although we understand that, to tenants that already earn low wages or are on limited incomes the cost of housing is already overwhelming, as you've already heard. And just one statistic for the Omaha-Council Bluffs metro area, is there 48 percent of all the renters in that area are already paying more than 30 percent of their gross income on housing. I haven't seen too many units that rent for \$425. The fair market rent for rent-restricted projects is \$751 for a two-bedroom in the Omaha area. I have a daughter that lives off of 30th and...of course I forgot it, but it's north Omaha. She pays over \$700 for a two-bedroom. So at any rate, the...there's already a burden on folks that don't earn adequate wages and don't...so the plug I want to make is, through our experience, in working to champion affordable housing and to try to bring people together, is that education and incentives work a lot better than punitive measures, and we have established in the last couple of years a statewide tenant education program called Nebraska RentWise. And the networks, there's one in Omaha that's beginning, there's one in Lincoln, in North Platte, in Scottsbluff. You know, they're growing all over the place and it's a community network that delivers this tenant education and they engage property managers and property owners in this. And a lot of property managers that I've talked to in the instance where, hey, I'd rent to this guy but he has a shady background, so if I charge him a couple hundred dollars more I'd be willing to rent for him. Well, landlords in that same instance say, if you go to this tenant education, we'll look beyond your past history and give you another chance. And the Lincoln Housing Authority was the first community network to establish itself. They provide an incentive to move you up on the waiting list if you attend RentWise and they also have seen a dramatic change in tenant behavior. And I really like the question about if we're going to hold the tenant accountable, are we holding the landlord accountable for maintaining that property in a safe and sanitary condition? And I'm happy to supply anybody with RentWise

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information and I listed a couple of Web sites. [LB120]

SENATOR ASHFORD: Very well. Do we have any questions of this witness? Seeing none, thanks. [LB120]

DANIELLE HILL: Thank you. [LB120]

SENATOR ASHFORD: I agree with you about the Lincoln Housing Authority. They have. They've done a great job. Senator Lautenbaugh, do you wish to close? [LB120]

SENATOR LAUTENBAUGH: Well, thank you, Mr. Chairman and members of the committee. It sounds like this is consent calendar bound (laughter), so if you're "execing" this afternoon I'd appreciate you acting swiftly. [LB120]

SENATOR ASHFORD: I hope you have a lot more bills to introduce in our...this committee still. [LB120]

SENATOR MCGILL: Oh, the next one. [LB120]

SENATOR LAUTENBAUGH: I don't know, a few. [LB120]

SENATOR ASHFORD: What? No, no... [LB120]

SENATOR LATHROP: The next one. [LB120]

SENATOR LAUTENBAUGH: Well, aside from the next one and the one after that. [LB120]

SENATOR ASHFORD: Yes. [LB120]

SENATOR LAUTENBAUGH: No, there are concerns here. I understand that. I think there is a misunderstanding, and maybe it's a drafting problem, regarding the point of declaring people who aren't on the lease trespassers, but I think that is a significant issue. And I think, especially if you look at the dockets in Douglas and Lancaster County, there are enough evictions on there without having to file an eviction and then file a subsequent eviction when you find out that the people who are living there aren't the ones that are named in the lease. It's certainly a problem that bears looking into. And I know that it has happened where the constables have said, look, this isn't the person named; you don't have the right to evict them as long as they maintain they have a right to be there. So it's certainly worth addressing. As is always the case, I'd be happy to work with any of you who had concerns and see if we can craft something that's more palatable to all involved without a lot of speed bumps and roadblocks on the floor. [LB120]

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SENATOR ASHFORD: You've elicited some questions. Senator Lathrop. [LB120]

SENATOR LATHROP: I just have a question, though. If you took this to sort of its logical place, which is, he's in my apartment, he won't leave, you've evicted me, now you got to get Davis out of there and he won't leave, don't you, even if you call him a trespasser and we label him a trespasser under this bill, don't you have to bring another proceeding? Or do you expect...is your thought that the police will then come in and just grab him and pull him out of there? [LB120]

SENATOR LAUTENBAUGH: Yeah, they'll remove a trespasser. It clears up that there's no possessory right just by asserting there is. [LB120]

SENATOR ASHFORD: Senator Chambers. [LB120]

SENATOR CHAMBERS: I just want to tell him how he can help him. He said he was willing to work with people and help them. The only way you could help me on this shovel...on this bill is if you bring a shovel. (Laughter) That's all I had. [LB120]

SENATOR LAUTENBAUGH: Whatever it takes, Senator. [LB120]

SENATOR ASHFORD: I wouldn't take that as any necessarily opinion as to the... [LB120]

SENATOR LATHROP: One day you're on the same page, the next day you're not. [LB120]

SENATOR LAUTENBAUGH: Yeah. Hmm. [LB123]

SENATOR ASHFORD: Okay. We're ready now to proceed to the next matter, which is LB, what is it, 123? LB123. [LB123]

SENATOR LAUTENBAUGH: Yes. Thank you again, Mr. Chairman and members of the committee. LB123 is a very straightforward bill and we did have this same bill last year. As a matter of fact, my notes say LB908, so here we are again talking about this issue. As you all know, the Commission on Public Advocacy, at least as I understand it, is basically meant to be a statewide, if you will, public defender for counties that may not have the resources to defend higher dollars, more serious criminal cases. That's just often a fact of geography. If you have a murder trial, there may not be local counsel in some given counties that are well-versed in defending a murder case, or a capital case especially, and the effect on a county for having to hire someone could be ruinous in a smaller county. This was meant to address that. I believe, however, and the reason we brought this bill, was that there has been, I guess, sort of an embarrassment of riches

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from the court fee that we're charging for these...to build this fund, to fund the Commission on Public Advocacy. The commission does not have a lot of casework in Douglas County. Douglas County is a county that has a relatively well-developed and diverse bar association with lots of people specializing in different things, and so the need has never been acute. And as I understood it, the larger counties were never meant to be the focus of this program and this commission anyway. The bill simply provides, as drafted, that the \$3 per filing that is generated would go toward, in the case of Douglas County, to be maintained in Douglas County with an eye towards providing conflict counsel when and if the public defender cannot handle a matter. I think it makes sense to approach it in this way. I think that attorneys that are in Douglas County again may represent a more diverse population than in other parts of the state and are certainly more well-versed with the traditions and practices within the Douglas County, Omaha, area of legal practice. I know as a fact now Douglas County is funding a very, very competent and professional Public Defender's Office and paying for conflict counsel in cases where there are multiple defendants with conflicting interests or other conflicts that would cause the public defender not to be involved in a particular matter. I believe the numbers show that the commission does have excess capacity and money, and has become essentially, in a lot of ways, a conflict counsel for the public defender here in Lancaster County with the additional time and resources it has. I don't think that's what it was designed for. I do feel that Douglas County may be subsidizing it disproportionately, especially considering what Douglas County takes from the fund, which is approaching nothing. And that is the reason for the bill in a nutshell. [LB123]

SENATOR ASHFORD: Yes, Senator. Let me just ask. Can I ask one preliminary question? I can't recall, Scott. What was the...what is the amount, portion of the fee, that goes to this? Or what is the... [LB123]

SENATOR LAUTENBAUGH: It's a \$3 fee. [LB123]

SENATOR ASHFORD: Right. [LB123]

SENATOR LAUTENBAUGH: And of the amount that the commission receives annually, I believe these are last year's numbers though, about 38 percent of what the commission takes in annually comes from Douglas County filings. [LB123]

SENATOR ASHFORD: Okay. And my...I still...and correct me if I'm wrong, the actual, what we collect--we have this discussion from time to time--what we collect overall in fees, not just this but all the fees we collect, I think, is relatively smaller, I mean as I recall, relatively smaller than our surrounding states. I mean we still...our court fees are relatively smaller. [LB123]

SENATOR LAUTENBAUGH: Oh, I don't know the answer to that, Senator. [LB123]

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SENATOR ASHFORD: Yeah. I was wondering. Yeah, Senator Christensen and then Senator Davis after that. [LB123]

SENATOR CHRISTENSEN: Thank you, Chairman. You mentioned you think there's a lot of money in the fund right now. Do you have any idea what's in that? [LB123]

SENATOR LAUTENBAUGH: If memory serves, last year it was \$1.2 million. I have not checked this year. I'm going from memory, so I'd hate to be held to that, Senator. [LB123]

SENATOR CHRISTENSEN: And what does it typically cost? Because I know a number of different areas have had to have this, from Norfolk to Rulo to... [LB123]

SENATOR LAUTENBAUGH: Right. [LB123]

SENATOR CHRISTENSEN: ...across the state. When you get into one of these high-profile cases in these smaller counties like I represent, what's it typically going to cost? How much reserve is needed, things this way? [LB123]

SENATOR LAUTENBAUGH: I would have to say there's no way to answer that. There is no typical case. These are, first of all, we don't happily have a lot of capital murder cases in Nebraska and I would say that a lot of the more serious felonies tend to be localized in Lancaster, Douglas, more so Douglas even. So I don't know how to answer...I don't know how to describe what a typical serious felony or murder case would be in greater Nebraska or what it would cost to defend because it would depend on whether or not...what issues that were involved, the number of witnesses, the number of experts you needed, if it was an insanity offense. I mean there's so many variables, I can't answer the question. [LB123]

SENATOR CHRISTENSEN: Okay. I know I get concerned if...because basically, to me, you'd be making a one-county slush fund. There's only one of metropolitan class as you wrote this. And just get concerned that you'll put that fund in jeopardy for the original intent. I think you hit on the original intent was to help the smaller counties when they have these crisis. We hope they don't ever happen again. But, I guess, is there anything prohibiting Douglas County for asking for help from this fund? [LB123]

SENATOR LAUTENBAUGH: Well, the fund isn't a fund you can request money from, per se. What you're asking, I guess, is asking the commission to use...or asking the county to use the commission. And the Douglas County judges have not requested that the commission appear there with any regularity, is my understanding. [LB123]

SENATOR CHRISTENSEN: Isn't that because of the number of lawyers you have available to work? [LB123]

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SENATOR LAUTENBAUGH: Well, frankly, it's relatively contrary to what I understood to be the intent of the commission. I did not...I don't understand, the history of this is that it was contemplated that people working for the Commission on Public Advocacy would be seen very often, if ever, in Douglas or Lancaster or one of the more populous counties. And as you may recall, we worked on a compromise last year that failed on the floor where the larger counties would still continue to contribute in but at a lesser rate, so there would be no danger of the commission going away. But at the same time, it would not be performing services in the counties that can pay their own freight; namely, Douglas, Lancaster, and Sarpy. That, I think, was more consistent with what the initial purpose of this was. [LB123]

SENATOR CHRISTENSEN: So is your real intent is you think there's getting to be too much in the fund? [LB123]

SENATOR LAUTENBAUGH: Well, I think they certainly have adequate reserves. Let me say that. My real intent is to say that this was not designed to be a spare public defender for Lancaster County in their spare time. And the solution is not to say, well, then you should go have more attorneys and work in Douglas County too. We're getting farther from the purpose of what I understood we did this for in the first place. [LB123]

SENATOR CHRISTENSEN: Correct. [LB123]

SENATOR LAUTENBAUGH: But the purpose is to have a pool of attorneys available. And honestly, I don't understand why it couldn't just be a pool of funds to hire attorneys to be available as the smaller counties need them, but to have either a pool of attorneys or a pool of funds from which to pay attorneys if and when the smaller counties that would be financially imperiled by such an expense need them. I don't think the solution or the original intent of this was to ever start expanding the mission out into Lancaster and then, by extension, Douglas, because Douglas one is the one saying, hold on, we're paying a huge amount into this and this isn't for us and they're amply funded and we have our own expense now with our own private attorneys that are conflict attorneys. [LB123]

SENATOR CHRISTENSEN: Well, I guess I just feel like you said the original intent wasn't for Lincoln or Lancaster and Douglas County. Now you're saying that's what you're wanting to make it. [LB123]

SENATOR LAUTENBAUGH: No. [LB123]

SENATOR CHRISTENSEN: So you're wanting to change the purpose of the commission. [LB123]

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SENATOR LAUTENBAUGH: What I'm saying is, no, the commission, as I understand its intent, was to help the smaller counties, not to spend a lot of time in Douglas, Lancaster, and I guess Sarpy as well. What we're talking about now is the fact that we've had quite a bit of success building up a pool of money and the commission seems to be adequately funded and staffed to the point that they're doing a lot of conflict work in Lancaster County. It's time to revisit whether or not this fee is properly charged, especially to the counties that weren't meant to benefit from this in the first place in full. [LB123]

SENATOR CHRISTENSEN: Well, I guess with what you just said, that's the line of thinking I'm going. If there's plenty of surplus and so they're starting to use it in counties where they aren't supposed to, why don't we reduce the fee and get back to the original intent of the bill? [LB123]

SENATOR LAUTENBAUGH: That's another way of proposing what I'm doing and that was part of the compromise, I think we proposed last year, at least regarding some of the larger counties--reduce the fee that comes from those large counties and don't come to those large counties; focus on the smaller counties. And there would be plenty of funding there to do that. [LB123]

SENATOR CHRISTENSEN: But you could just reduce the fee to everybody and get back to the original intent and do the same thing, and come up with a decision of maintaining a certain level... [LB123]

SENATOR LAUTENBAUGH: That would be another approach. [LB123]

SENATOR CHRISTENSEN: ..and putting inflation factor in there if you need, because, I guess, I think the commission has done great work. I've got a picture of the map that we used last year of where all they've worked, including Douglas County and Lancaster County and all these, and I don't think anybody would argue we don't need the commission, we don't need... [LB123]

SENATOR LAUTENBAUGH: Right. [LB123]

SENATOR CHRISTENSEN: ...the pool of lawyers or the money to hire lawyers that you've addressed on. But I'm not sure that we need to change the bill from the original intent. And if we determine a max, maybe if we just lowered everybody's fee would be the best approach, because I think the original intent was to help them counties that don't have the lawyer or the lawyer that has a conflict because they know the person there and you only have one in that county. And so I think the original intent needs to be held. And if you're concerned about the amount of money, you handle that rather than changing the original intent that I see this bill doing. [LB123]

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SENATOR LAUTENBAUGH: Right. [LB123]

SENATOR CHRISTENSEN: Thank you. [LB123]

SENATOR LAUTENBAUGH: And I think, honestly, the corollary of what you're saying, too, is experience may have taught us that when you create basically a public law firm like this and the funding, if we're not constantly revisiting it every five minutes, there is going to be mission creep. I mean now you've got an office of people that are doing a lot of things here in Lancaster County and there doesn't seem to be any point to that other than they're there and they've got the excess capacity, I assume, waiting for something to go awry in one of the smaller counties. It would almost seem to suggest that we could get by very ably with a fund out of which to pay attorneys who do this kind of work. And when a county needs that kind of help, they would ask for money from the fund and a private attorney would go there. There is not an expertise in this area. What we're saying, you're thinking, okay, that would mean you'd have to hire an attorney probably from Lincoln or Omaha to come do this out in a rural county. Well, that's what you have now with the commission. I think we could just probably be a little more efficient about it. [LB123]

SENATOR CHRISTENSEN: And I'm willing to have that discussion, but I guess I understand the creep, if they've got the money, and the creep, because they're trying to keep busy. And I appreciate that part. But at the same time, we all like to keep costs down and maintain. And would you say if we took your approach of using money to hire lawyers instead of having that pool that we could keep the expertise that we've had in this group to be as successful? Because I guess I've had people share with me, and I can't tell you if it's true or not, that this group is very good at what they do and very seldom have challenges to their cases coming back as often as maybe some of them in Douglas County because they maybe didn't have somebody with as much expertise doing it. And I can't say if it's true or not. But are we going to lose that expertise if we don't have that pool, is the question? [LB123]

SENATOR LAUTENBAUGH: Honestly, Senator, you're in good company because I don't think anybody can honestly say that or not. I have no doubt people say that, but assertions like that, much like the map you pointed to there showing the amount of dollars saved in counties, are subject to, well, let's just be charitable and say interpretation. But I don't think you could make the case that we have, I don't, if it's six or seven attorneys that are in the Commission on Public Advocacy and there are no private attorneys in the state with the level of expertise and competence other than those six that can go around to these rural counties and do these things. That, in a word, is absurd. And these six did come...you know, they aren't aliens, they came from the practice here in Nebraska. And there are other attorneys. I'm not saying they're not skilled. I'm saying there are many, many able attorneys in the criminal law area, not me, but many very able attorneys in the criminal law area who can and do, do this same

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thing very well. [LB123]

SENATOR CHRISTENSEN: I guess my concern would be, you know, I've always said, private practice, the better you are, the more you're used, so that gets them tied up. They may be busy and not available to western Nebraska. You don't think our quality would suffer if we didn't have that pool? [LB123]

SENATOR LAUTENBAUGH: I'll represent to you with absolute certitude that there is no attorney shortage in Nebraska... [LB123]

SENATOR CHRISTENSEN: (Laugh) Well, I understand that but the expertise can be. [LB123]

SENATOR LAUTENBAUGH: ...and not even a quality attorney shortage in Nebraska, yes, so... [LB123]

SENATOR CHRISTENSEN: Thank you. [LB123]

SENATOR LAUTENBAUGH: Yes. [LB123]

SENATOR ASHFORD: Senator Davis. [LB123]

SENATOR DAVIS: Well, I think Senator Christensen asked a lot of the questions I was going to ask, but you say there's \$1.2 million built up in the fund? [LB123]

SENATOR LAUTENBAUGH: Yes. [LB123]

SENATOR DAVIS: Do you have how long has it taken for that to build up, any idea? [LB123]

SENATOR LAUTENBAUGH: If memory serves, it's been accruing, I think, recently at about a couple hundred thousand a year, but again I'm going from memory on that particular number. [LB123]

SENATOR DAVIS: There's nothing that precludes Douglas County from taking advantage of using this. [LB123]

SENATOR LAUTENBAUGH: Other than...well, I think what we learned last year was that they're doing a lot of things in Lancaster County now and that's how they keep their days full. So if Douglas County started using them, I guess their choice would be to expand further and get further away from the purpose of why they exist in the first place, which is to take care of the counties that are not Douglas and Lancaster County. [LB123]

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SENATOR DAVIS: But... [LB123]

SENATOR LAUTENBAUGH: You can see the problem there. [LB123]

SENATOR DAVIS: But my question still is, Douglas County does have the ability to access this if it chooses to do so. [LB123]

SENATOR LAUTENBAUGH: Yes. Yes. [LB123]

SENATOR DAVIS: Okay. Thank you. [LB123]

SENATOR ASHFORD: Thanks, Scott. Do we have any proponents for this bill? Any opponents? [LB123]

JAMES MOWBRAY: Senator Ashford, members of the committee, my name is Jim Mowbray, M-o-w-b-r-a-y. I'm chief counsel for the Commission on Public Advocacy here to testify in opposition again to LB123. Part of, I think, the problem, in all due respect to Senator Lautenbaugh, is there's a lot of numbers floating around and some of them are true and some of them aren't. But to answer your question, we've been in business for 17 years. We're coming up to our 17th year anniversary. And there were years where we were getting...probably had a surplus of around \$200,000 a year. And what I find kind of ironic is the fact that I run an efficient office and we've been able to bank some of our money, I end up getting penalized for that, for running an efficient office. But let me give you some actual facts. Last year the commission serviced Antelope, Box Butte, Cheyenne, Dakota, Dawson, Dixon, Douglas, Gage, Hall, Jefferson, Johnson, Kimball, Lancaster, Madison, Platte, Red Willow, Richardson, Saunders, Scotts Bluff, Valley, and York. There's also a misconception that when we first started, I would be the first to agree and I've testified to this, that, yeah, Lancaster County was...wisely used our services until we started getting cases across the state. Because it took me a number of years even to...in fact, there are still some judges I don't really think understand exactly what my office does, even though I spent years sending out letters twice a year explaining what we do and how we operate. And in fact, just recently, a case in Valley County, one of the county commissioners asked me how much our services were going to be for a murder case we have up there, and I said, it costs nothing. He said, didn't you used to charge? And I said, yeah, over ten years ago there was a small fee and now we do it for free. So there is some misinformation, but part of that, as I say, is it goes back to when we started. Lancaster County did use us a lot but currently, like last year for example, there were 11 cases in Lancaster County; there were 3 murder cases and 8 other kinds of cases. In Douglas County we had four cases, two of which were homicides, one was a death penalty case. So again, this idea of us being a local public defender office for Lancaster County is simply not true and it hasn't been true for years. In terms of our cash, we did have, at one point, \$2 million last year when I testified.

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Senator Ashford, I believe through LB463, took \$400,000 of that, so we were down to around \$800,000 as of the end...at the end of...June 30 of this fiscal year, 2013. [LB123]

SENATOR ASHFORD: Jim. Jim,... [LB123]

JIM MOWBRAY: Yes, sir. [LB123]

SENATOR ASHFORD: ...the Legislature took \$400,000 in LB463. [LB123]

JAMES MOWBRAY: Well, I'm sorry. (Laughter) Sorry, yeah, it was the Legislature. [LB123]

SENATOR ASHFORD: Yeah. [LB123]

JAMES MOWBRAY: It was the entire...they voted for it. As we project out, that means that we have approximately \$800,000 cushion. We now have reached the point where, as I anticipated we would, where again costs have increased, salaries have increased. We're now...where we're also watching is our revenue decrease. The filing fees have gone down substantially, or filings, numbers of filings over the last four years, and I don't know why, other than possibly crime rate is simply going down. Secondly, people are driving less. Most of our money does come from misdemeanors and traffic violations. But we've seen an 11 percent decrease so, for example, since 2008 to 2012, our revenue has decreased \$144,000. So when we had a \$200,000 excess two or three or four years ago or five years ago, we now maybe have a \$40,000 or \$50,000. But when we project it out, looking at our budget for the next biennium, our cash balance will go from \$800,000 to \$710,000 by the end of fiscal year 2015. So we're starting to use up our balance because our costs have increased. And in talking with the Fiscal Office and Doug Nichols, he was saying that he would not recommend any additional money being taken out of our fund because we need it for operations so that we don't have to come in and ask you to raise the \$3 fee. But the bottom line is, as you can see by the number of counties that we represent and the types of cases, we can do cases in Omaha. During the summer, last summer, I was contacted by the Douglas County Court Administrator and he asked me, can we help? I said, sure. I called Tom Riley, who is the public defender up there, and I said, how many cases do you have, roughly, homicides that you have either multiple defendants or you conflict out of? And he said, at least six to ten. So I told the court administrator, we can take six to ten homicide cases, we'll be happy to do that; if you want me to talk to the judges, I'll do that. I get a call back a couple of months later and I'm told that the judges aren't interested in appointing this. We still can handle cases in Douglas County. There's not a problem with that and it's not because that somehow that means that we have to handle less in rural. We can do both. And we are handling, as I said, homicide cases right now in Douglas County. I know we're going to be appointed to two more DNA cases up in Douglas County. And some of the newer judges are appointing us in Douglas County

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where some of the older judges don't. But the system is working really well. And I appreciate what Senator Christensen said. You know, we file postconviction cases or represent people on murder postconviction cases and we've been successful in having those cases reversed, meaning that the lawyer that handled it initially at trial was ineffective and we had the case come back, and we then retried it. We've been postconvicted, because we've been around long enough, and no one has succeeded to ever have any of the cases that we represented anybody on ever reversed on postconviction or ineffective assistance of counsel. So not only do we provide effective assistance of counsel, we save the counties a tremendous amount of money. We're very effective in what we do. We're good at what we do. And don't try to fix what's not broken. Thank you. I'll answer any questions. [LB123]

SENATOR ASHFORD: Does anybody have any questions of Jim? [LB123]

SENATOR LATHROP: Can I just ask a couple? [LB123]

SENATOR ASHFORD: Yes. [LB123]

SENATOR LATHROP: Was the commission set up to do capital? It wasn't intended, at least initially, just to handle... [LB123]

JAMES MOWBRAY: It was intended... [LB123]

SENATOR LATHROP: ...I'll say the garden variety murder case, but it was...wasn't it set up for the cases that were going to involve death penalty because of the expense involved? [LB123]

JAMES MOWBRAY: Yes. I mean death penalty, first-degree murder cases, yes. And where the expansion came from was because of the need for other serious violent felonies. There was federal money, the Byrne Fund money, was being...there was a whole bunch of federal money aiding prosecution and law enforcement in serious violent felonies, domestic abuse, and drug cases, and that money was also available for defense. So we took advantage of it and I added two additional attorneys to handle those cases and we got federal money for that for a number of years. That money has dried up. But initially, yeah, it was for homicides, not just death penalty but murder, first-degree murder, second-degree, and death penalty, yes. [LB123]

SENATOR LATHROP: Okay. I got another question for you. When a criminal proceeding is filed in Douglas County or any county, for that matter, does the county pay a filing fee for that? What's the filing fee now, 120 bucks or something? [LB123]

JAMES MOWBRAY: Oh, no, on criminal cases \$44. [LB123]

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SENATOR LATHROP: \$44? So is that...if Kleine, Don Kleine, files a criminal proceeding, does he pay this? Does Douglas County pay this \$3 fee? [LB123]

JAMES MOWBRAY: They may pay it up-front, but then they get paid back when the court costs get paid. [LB123]

SENATOR LATHROP: If the criminal defendant pays the court costs. [LB123]

JAMES MOWBRAY: The only time the county pays the court costs is if it's never collected. [LB123]

SENATOR LATHROP: Okay. Well, that's...I mean, the guys that are going to prison, they're not paying it back, are they? [LB123]

JAMES MOWBRAY: No, but since, you know, roughly 400,000 filings are misdemeanors and traffic, so most of those do get paid. [LB123]

SENATOR LATHROP: Is this filing fee come out of county court and district court, or just district court? [LB123]

JAMES MOWBRAY: County court and district court. [LB123]

SENATOR LATHROP: Okay. [LB123]

JAMES MOWBRAY: Yes. [LB123]

SENATOR LATHROP: Thank you. [LB123]

SENATOR ASHFORD: Senator Davis. [LB123]

SENATOR DAVIS: We had a case that I'm sure you're familiar with which resulted in the death of the person, perpetrator, but the pharmacy attendant in Alliance who was taken hostage this summer. [LB123]

JAMES MOWBRAY: Yes. [LB123]

SENATOR DAVIS: And it was a long, involved case. The person also killed the father and then had killed someone else last fall. [LB123]

JAMES MOWBRAY: Correct. [LB123]

SENATOR DAVIS: So just if you've got an idea, what would that end up costing a county to try to convict something like that with the various charges and the drugs and

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everything else involved in it and it was a death penalty case? Any idea? [LB123]

JAMES MOWBRAY: Well, with a...when you have a death penalty case, what you have is basically two trials. You have the guilt/innocence trial, and then you have the sentencing trial. So you almost double your cost right there just when you add the death penalty. It's like doing two different trials. So if you spend \$100,000 to \$200,000 on the guilt/innocence, you're going to spend about the same then on the sentencing part of it because of the need to do the mitigation. And a lot of times, in fact, in Nebraska, in many of the recent cases we've had have been from illegal immigrants where we have to go, for example, I've had lawyers down in Mexico traipsing around, trying to find family members to interview them, those kinds of things. So you have those additional costs in a death penalty case, you wouldn't necessarily have in just a homicide case. And I believe the case you're talking about, we just were appointed to do the appeal because if it's the same case, it's the defendant had private counsel through the trial. Was this in Alliance? [LB123]

SENATOR DAVIS: No, I'm talking about the pharmacy. You know, the guy was killed by the police but, I mean, he shot... [LB123]

JAMES MOWBRAY: Oh, okay, I'm sorry. [LB123]

SENATOR DAVIS: ...shot at several people but he killed his father and he killed... [LB123]

JAMES MOWBRAY: And then he was killed by the police. [LB123]

SENATOR DAVIS: ...he killed another guy last...this year. [LB123]

JAMES MOWBRAY: I'm sorry. I was thinking of a double homicide in... [LB123]

SENATOR DAVIS: So it would be three, it would be three murders basically. I mean, so what would that end up running a county to try then? [LB123]

JAMES MOWBRAY: It could run from \$250,000 to \$500,000. [LB123]

SENATOR DAVIS: For each of the cases? For each of them? [LB123]

JAMES MOWBRAY: Well, for each defendant, it depends. [LB123]

SENATOR DAVIS: No, I mean for each of the victims. [LB123]

JAMES MOWBRAY: You would be trying one case with three victims. [LB123]

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SENATOR DAVIS: Okay. [LB123]

JAMES MOWBRAY: So there would be three counts of first-degree murder. So you'd have one trial with three victims so it would still be just one cost of around \$250,000 to \$500,000. [LB123]

SENATOR DAVIS: Okay. That would be pretty tough. Thank you. [LB123]

SENATOR ASHFORD: I don't see any other questions. Thanks, Jim. [LB123]

JAMES MOWBRAY: Thank you. [LB123]

SENATOR ASHFORD: Any other opponents? Neutral? Or, sorry, opponents? [LB123]

MARSHA FANGMEYER: Chairman Ashford and members of the committee, my name is Marsha Fangmeyer, that's M-a-r-s-h-a F-a-n-g-m-e-y-e-r. I'm a practicing attorney in Kearney, Nebraska, and I am the president of the Nebraska State Bar Association. I'm here to testify in opposition of LB123. In 1995, the Commission on Public Advocacy was created not only as a way to protect private property, provide property tax relief to counties such as yours, but was also established to ensure that the justice system has access to well-trained, qualified attorneys to provide effective assistance of counsel in the most serious of cases all across the state. The Nebraska State Bar Association supported the establishment of the commission in 1995. We supported its expansion in 2003. And we are here again today to voice our opposition to LB123, which would effectively cripple the agency's ability to serve the entire state of Nebraska. The budgetary protection that the commission provides remains important all across the state, including Lancaster and Douglas County. Representation in capital cases requires exceptional dedication, skill, and expertise. And the attorneys that work for the Commission on Public Advocacy are among the most qualified in the state to provide the kind of representation that is necessary in capital and other serious felony matters. It is also important to remember that this case...this is not...well, it is important to remember it's not just about Douglas County. If this is passed, this bill would severely limit the commission's ability to effectively serve the state and would set a dangerous precedent for the funding of the judicial system. Basically, if Douglas County tries to opt out, who's to say somebody else might try to do the same? Also, on principle, the Nebraska State Bar Association does not support any legislation that would allow counties to divert filing fees which are allocated to serve the interests of the justice system as a whole. Except for the commission, the cost of public defense is strictly a county obligation. Public defense for indigent individuals accused of a crime is a constitutionally protected right. If Douglas County were permitted to divert its statutory obligation to a statewide program, that sets a dangerous precedent. The services provided through the commission have been available to Douglas County in the past and should remain so in the future. I remember when this commission was established

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and I was around when the Rulo cases occurred and I know what that, those cases, what that did to Richardson County, and it was my...it's my remembrance that this...we all agreed that providing good representation in these kinds of cases without bankrupting a county is a statewide obligation, from Douglas County all across the state, and it should remain that way. Thank you, and I'll take any questions. [LB123]

SENATOR ASHFORD: Let me just...what I struggle with...and I agree with you, it's a statewide issue and every defendant deserves the best representation possible, especially in high-grade felonies. I'm wondering though if the state...if it's the state's obligation, why shouldn't...and we can make...we should make available sufficient funds to try these cases no matter where they occur, why don't we just appropriate the money at the end of each year for those cases that meet those standards? [LB123]

MARSHA FANGMEYER: You mean rather than do it through filing fees? [LB123]

SENATOR ASHFORD: Well, I guess what I'm...and I respect what Jim does. This is not about someone being a good or bad lawyer or whatever. [LB123]

MARSHA FANGMEYER: Uh-huh. [LB123]

SENATOR ASHFORD: It just seems to me that you have a difficult Rulo case. You have the Alliance cases or whatever. They're very, very difficult. It can bankrupt a county. I get it. I mean Norfolk had to raise taxes, I think, or Madison County did to some extent to pay for the...maybe I'm wrong but I think Mike indicated that to me, that they had to do that. So why wouldn't we just have a policy that we handle these like we do other claims? I mean if you have a...if a case fits a particular place, you know, or particular criteria and the state has an obligation to defend these people on this level, this level of felony, why don't we just say that, is that the state has an obligation to defend and provide adequate defense, and pay for it? And then at the end of the year, those cases, those claims are submitted like any other claim, rather than have an office to do it. And again, I appreciate what Jim does, but wouldn't that makes sense as well? I mean why create an agency to do this when, in fact, what you really are talking about is making sure...I mean there are a number of defense attorneys... [LB123]

MARSHA FANGMEYER: Uh-huh. [LB123]

SENATOR ASHFORD: ...in the state who are clearly qualified to defend difficult cases. I agree with that. So they do it. The judge approves the fee. At the end of the case, that approved fee then is paid by the state. I guess I don't under...why don't we just do that? [LB123]

MARSHA FANGMEYER: I may be speaking for myself more than the Nebraska Bar Association at this point and I may not be the person who can best answer that

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question, but I...would seem to me that this is a little bit like...well, first of all, I'm not sure that that's correct. There are certainly many competent attorneys in this state. Whether there are attorneys all across the state who can handle these kind of cases... [LB123]

SENATOR ASHFORD: No, I mean you'd have to hire someone. [LB123]

MARSHA FANGMEYER: Sure, sure. [LB123]

SENATOR ASHFORD: I mean if there isn't... [LB123]

MARSHA FANGMEYER: Sure, sure. But it seems to me what you're talking about is just shifting the funding source here, and I guess I would question whether making the kinds of claims, and, again, I remember what it was like with Rulo. I mean that was a huge fight over fees and which I would prefer to avoid of course. And it seems to me that this commission can probably handle it more efficiently and economically than the system that you're suggesting, but I don't know that for sure. [LB123]

SENATOR ASHFORD: Well, couldn't the court...and then I'll... [LB123]

MARSHA FANGMEYER: I would question that. [LB123]

SENATOR ASHFORD: Couldn't the...I think Scott brings up a good point. I mean couldn't the court devise a set of criteria to say you qualify, as you do a guardian or something else, you qualify...or a mediator. Obviously, these are more complex cases, but you qualify as a defense attorney... [LB123]

MARSHA FANGMEYER: Uh-huh. [LB123]

SENATOR ASHFORD: ...that is qualified to do death penalty cases, for example. The money, the state has an obligation to pay that fee. The judge approves the fee. The fee is paid. [LB123]

MARSHA FANGMEYER: My answer to that is I don't know what's wrong with the system we have. Why change it? I think what Jim does, as everybody has acknowledged, he does great work. The commission does great work. [LB123]

SENATOR ASHFORD: Well,... [LB123]

MARSHA FANGMEYER: Why move it? [LB123]

SENATOR ASHFORD: What I...but my question is, it's the job of the Legislature to determine the policy, the overriding, overreaching policy here, and the policy has been well-stated and that is the most serious... [LB123]

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MARSHA FANGMEYER: Uh-huh. Yes. [LB123]

SENATOR ASHFORD: ...cases... [LB123]

MARSHA FANGMEYER: Uh-huh. [LB123]

SENATOR ASHFORD: ...that cost counties a lot of money and then, in many cases, put them in to a... [LB123]

MARSHA FANGMEYER: Uh-huh. [LB123]

SENATOR ASHFORD: ...position where they have to raise taxes in order to pay. And that, when that happens, what my concern is, is that there's...the overriding concern becomes money and not justice, and I think the two rub up against each other. Whereas, if we were to...if we were to simply say that one-eighth...and I don't know where we'd draw the line but it's our job to draw that line and say, in cases of X, that the state is responsible to pay those fees and it's up to the judge and the court system to look at a list of qualified attorneys,... [LB123]

MARSHA FANGMEYER: Uh-huh. [LB123]

SENATOR ASHFORD: ...and say, here is the list of qualified attorneys and, you know, we're going to appoint one of these attorneys and the state is going to pay it. [LB123]

MARSHA FANGMEYER: A couple of things come to mind when you're talking about that. I guess we do sort of do that in another realm. You know, we have the Attorney General's Office regularly provides people to go out to other counties to assist... [LB123]

SENATOR ASHFORD: Prosecute cases. [LB123]

MARSHA FANGMEYER: ...to prosecute cases,... [LB123]

SENATOR ASHFORD: So I guess what I'm getting...that's right. [LB123]

MARSHA FANGMEYER: ...such as the sexual assault cases,... [LB123]

SENATOR ASHFORD: Right. [LB123]

MARSHA FANGMEYER: ...children cases. And you know, the counties don't pay for that. [LB123]

SENATOR ASHFORD: Right, and I guess that's really what I'm getting at, is if the state

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is paying for... [LB123]

MARSHA FANGMEYER: Uh-huh. [LB123]

SENATOR ASHFORD: ...for a prosecutor for someone to...for Attorney General's Office to prosecute a case, why should the state not pay... [LB123]

MARSHA FANGMEYER: Uh-huh. [LB123]

SENATOR ASHFORD: ...for the defense of that same case? [LB123]

MARSHA FANGMEYER: You know, Senator, if you figure out a way to do this so there is ongoing... [LB123]

SENATOR ASHFORD: Well, mine is pretty simple. They just... [LB123]

MARSHA FANGMEYER: ...competent counsel all across the state, well-funded, I don't think any of us would have an objection to that. We're here today because there is a bill on board to take Douglas County out of that system,... [LB123]

SENATOR ASHFORD: No, I understand why you're here. [LB123]

MARSHA FANGMEYER: ...and I'm very opposed to that. [LB123]

SENATOR ASHFORD: No, no, and I respect what you're saying and I'm not arguing with you. All I'm saying is if it's a statewide... [LB123]

MARSHA FANGMEYER: Sure. [LB123]

SENATOR ASHFORD: ...concern. [LB123]

MARSHA FANGMEYER: There's a... [LB123]

SENATOR ASHFORD: But what I think Senator Lautenbaugh is suggesting is, if it's statewide, then the entire state should pay. And that if we...should pay it. And the dispute here is that Douglas County and Lancaster County...well, certainly Douglas County pays a proportionately high portion of that cost. One could argue that's good or bad or whatever. But if in fact we're trying to get to a statewide obligation, similar to the prosecutorial side, it seems to me, you know, what's good for the goose is good for the gander and basically the defense costs ought to be paid too. []

MARSHA FANGMEYER: I don't know the answer to the question of whether Douglas County actually does pay a higher amount,... [LB123]

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SENATOR ASHFORD: Well, they do, because they... [LB123]

MARSHA FANGMEYER: ...especially if they were to use the commission, you know, which they choose not to. [LB123]

SENATOR ASHFORD: Well, I think...but you can't... [LB123]

MARSHA FANGMEYER: But... [LB123]

SENATOR ASHFORD: It's not that Douglas County chooses not to. It's that the judges choose not to. [LB123]

MARSHA FANGMEYER: I agree. Uh-huh. [LB123]

SENATOR ASHFORD: So... [LB123]

MARSHA FANGMEYER: But it seems to me that...well, never mind. [LB123]

SENATOR ASHFORD: Okay. But I just...we've had this before us and I think Senator Lautenbaugh is bringing it to us for a very legitimate reason, which is if this is a statewide obligation, why should Douglas County or any county really be paying the cost? It should be all the whole...all the citizens of the state. So anyway, thank you. [LB123]

MARSHA FANGMEYER: And I would reiterate what I said before. If you can figure out a way to do it,... [LB123]

SENATOR ASHFORD: And I...it's so noted. I understand. Thank you for coming. [LB123]

MARSHA FANGMEYER: I guess I don't get to talk unless you tell me to, right? [LB123]

SENATOR ASHFORD: No, you can talk. Talk. No, I'm not trying to cut you off. [LB123]

MARSHA FANGMEYER: (Laugh) No. [LB123]

SENATOR ASHFORD: I'm just trying to offer another option. I'm just trying to understand the difference why the state shouldn't...why the counties should be paying it and not the state. [LB123]

MARSHA FANGMEYER: Okay. [LB123]

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SENATOR ASHFORD: Okay. Thank you. [LB123]

SENATOR DAVIS: I guess I'm just going to throw in here. But Douglas County pays, on a per-case basis, the same as everybody else. Is that right? [LB123]

MARSHA FANGMEYER: The fee, you mean? [LB123]

SENATOR DAVIS: The fee. [LB123]

MARSHA FANGMEYER: Yes, the fee is... [LB123]

SENATOR DAVIS: So how in the world is Douglas County paying a disproportionate share? [LB123]

MARSHA FANGMEYER: I don't know. [LB123]

SENATOR DAVIS: They're paying the same as everybody else in the state, aren't they? [LB123]

MARSHA FANGMEYER: I don't know. That's why I said I don't know that they're paying a disproportional amount. [LB123]

SENATOR DAVIS: Okay. Well, that's... [LB123]

MARSHA FANGMEYER: Don't know that. [LB123]

SENATOR ASHFORD: Thank you. [LB123]

MARSHA FANGMEYER: Anything else? [LB123]

SENATOR ASHFORD: Yeah. [LB123]

MARSHA FANGMEYER: Thanks. [LB123]

DENNIS KEEFE: Sorry, Mr. Chair. [LB123]

SENATOR ASHFORD: No, that's good. [LB123]

DENNIS KEEFE: Mr. Chairman and members of the committee, my name is Dennis Keefe. I'm the Lancaster County Public Defender and I appear in opposition to LB123, not because I don't believe...I'm appearing, by the way, on behalf of Lancaster County Board of Commissioners and my own office. And in its...we're not opposed to it because we think the counties don't need money for indigent defense, because they do, and the

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state needs to become a better partner with the counties in providing for indigent defense, but this is not the way to do it, in my opinion. It would hurt the agency, the Nebraska Commission on Public Advocacy, and that agency I have a little bit of history with because I helped with the task force, I served on it with your colleague, Senator Campbell. We followed the legislation as it was passed and the commission was established and the Governor signed it. And even though Richardson County was the poster child for that law, nobody said that it was exclusively for rural counties. And it was throughout the legislative process people talked about the possibility that Lancaster and Douglas County could and would use it in conflict cases. Now the judges in Lancaster County are very astute and they realize that if they were able to use that commission in a number of cases they'd save the county a whole bunch of property tax dollars, and they have to the tune of hundreds of thousands of dollars. The question hanging over this whole thing is, why didn't the judges in Douglas County do that? And I can't answer the question for you. But I can tell you Lancaster County has benefited, not as extensively as some people would suggest, but they have benefited because our judges use the commission. I just want to make one other point that I don't think has been made here. You would be moving, with this bill, I think, to a very bad fiscal policy because right now this money is being used for an agency that...where the attorneys are staff attorneys. They're provided oversight. They're provided supervision. They're provided training. They're provided resources to do their jobs, and you would be throwing it into what apparently is a pit that nobody knows exactly how that money is going to be used but I guarantee you there are no standards as to how that money would be used in Douglas County. And I think that's a bad move just for that very reason. I'll stop there. [LB123]

SENATOR ASHFORD: Well, Dennis, it seems to me if we kept the fund, I don't care where, if we keep the commission or not keep the commission, but the point is, what I'm struggling with, is why we're using property tax...well, why we're using fee income to...from one county to pay for a case in another county when this is an overall statewide concern, which is to make certain that in difficult cases, and it can run through...I don't care where you run it through. But it seems to me that the state has an obligation that transcends property tax from...what I don't like is when we start...justice is what we're all trying to achieve here. It's not who pays. You know, it's not that. When you get into the issue of the county can't afford it or Douglas County is paying too much or Lancaster County is not paying enough, we're demeaning the over...not you. But, I mean, this whole way of doing it seems to be demeaning what our overriding policy is here, which is to provide justice in the system to those who cannot afford it. And I'm not sure, to be...I'm not sure Senator Lautenbaugh is not absolutely right that that...in fact, I think he is right that that money, that source of funds ought not to be divided between who files the most or who pays the most fees and what county, but it should be the state's responsibility. [LB123]

DENNIS KEEFE: Well, I think that... [LB123]

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SENATOR ASHFORD: Now it's not. Now it's each county that pays the fees. [LB123]

DENNIS KEEFE: I think this is a very small amount of money overall on what the counties spend on indigent defense. [LB123]

SENATOR ASHFORD: No, I understand that. [LB123]

DENNIS KEEFE: The state puts in a very small piece of... [LB123]

SENATOR ASHFORD: But it's \$3 on the filing fee and I'm just saying, you know, why don't we just pay it? [LB123]

DENNIS KEEFE: Why don't we pay...? [LB123]

SENATOR ASHFORD: The bill. I mean if... [LB123]

DENNIS KEEFE: Well, now you're talking about systems of providing the delivery of services and what are the best models out there. [LB123]

SENATOR ASHFORD: Well, maybe a public advocate... [LB123]

DENNIS KEEFE: And I'll tell you, there's 24 states, Senator, where the state government pays the entire cost of it. [LB123]

SENATOR ASHFORD: Well, that's what I'm... [LB123]

DENNIS KEEFE: Maybe that's what you're suggesting. [LB123]

SENATOR ASHFORD: Well, that's what I'm suggesting. What I'm suggesting is I don't like all this talk about...all this talk about, oh, my goodness, we're going to bankrupt the county by providing adequate defense. That, to me, is demeaning the idea of justice. The idea of justice is to provide the best possible defense for the defendant. [LB123]

DENNIS KEEFE: That's true. [LB123]

SENATOR ASHFORD: And if the...and you're a poster child for that,... [LB123]

DENNIS KEEFE: Absolutely true. [LB123]

SENATOR ASHFORD: ...okay? You do it every day and you're, you know, you're very, very good at it; so is Tom Riley. So when we get into these conflicts between, for example, Tom Riley or yourself, who I consider to be two of the best attorneys in the

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state, where what I think when I think... [LB123]

DENNIS KEEFE: This isn't a conflict between Tom Riley and me. [LB123]

SENATOR ASHFORD: No. No, I'm just saying I don't think that these discussions should even be going on. I think we should pay the bill for an adequate defense...or not adequate, for the best defense that that defendant can get. And whether we run it through Jim's agency or, you know, wherever, it should not be the...it's not even an issue of responsibility. It should be the...of a county, should be the responsibility to the state of Nebraska. If the state...if the Attorney General can run around the state, which is fine, and prosecute, help prosecute cases, then on the defense side that should happen as well and...it seems to me, and it should be the responsibility of the state. So that's how we should fund this, in my opinion. [LB123]

DENNIS KEEFE: Well, the best systems nationally are ones that are mixed systems where you have the institutional office, such as the commission, and private...the involvement of the private bar, because it's important to have the involvement of the private bar. But to just throw money out and say, here, Douglas County, you can have this money back for whatever reasons you want with no standards... [LB123]

SENATOR ASHFORD: That's this bill. I'm just...I'm disregarding the bill and talking about... [LB123]

DENNIS KEEFE: Okay. [LB123]

SENATOR ASHFORD: ...how I perceive how... [LB123]

DENNIS KEEFE: I gotcha. I don't think we disagree. [LB123]

SENATOR ASHFORD: ...how I perceive justice. Justice overrides any of these. What Senator Lautenbaugh is bringing is an issue that needs to be addressed. What I'm saying is I think the best way to address it is to relieve all the counties of this responsibility and those...and make it the public advocacy. I have a lot of respect for Jim and what he does. But let's fund it out of the General Fund, where it belongs. Okay. [LB123]

DENNIS KEEFE: Well, you know, you should increase it because the counties are struggling. Some of the counties beyond Douglas and Lancaster are struggling. [LB123]

SENATOR ASHFORD: I know they're struggling. So let's do it out of the General Fund. [LB123]

DENNIS KEEFE: Yeah, all right, not disagreeing. [LB123]

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SENATOR ASHFORD: Okay, Senator. [LB123]

SENATOR CHAMBERS: I wish Senator Ashford had not brought up the Attorney General. He knows what that does to me. (Laughter) Now the Attorney General can be concerned about companies investing in Iran. He took a trip to Israel and said it was a life-changing experience. I've seen him come to the aid of big businesses. But in Omaha just the other day a socialite, who killed a person, was charged with vehicular homicide, got a small fine, 30 days' suspension of license or something like that and some hours of community service. I have seen the Attorney General upset about some sentences being too soft. Now if we reverse that and one of the ordinary citizens killed a socialite under the same circumstances, that ordinary citizen would be sitting in jail now. And I wonder if Senator Ashford's good friend, Jon Bruning, and I want it on the record, is going to intervene in this case and show that no man, no woman, no class of people is or are above the law. If this indeed is a nation of laws rather than men, then the blindfold is to be on justice not so that she cannot see what she's doing but so there's no respecter of persons. And this is one of the worst scenarios I have seen. And ordinarily I could be called a defender of the defendant, but when I see such an obvious bias on behalf of what are considered the better class, the upper crust, then I find it deplorable. It is reprehensible. It is inexcusable. And until some justice of the kind Senator Ashford is talking about in kind of a theoretical, abstract sense is applied where ordinary people can see that not only is there justice but there appears to be justice, there's not going to be any respect for the courts or any of the accoutrements of the court. But now, with what Senator Ashford said about it being the state's responsibility and there ought to be a fund that would tap into the General Fund to get this money, I agree with that. I don't think any of the court's processes or activities should be funded by fees. It makes it a matter of cash register justice, hustling, bickering, barking back and forth as we have going on now. But to bring it back to this bill, I see Douglas County as a bloated, greedy, insensitive operation. The county, in collecting money that the Learning Community, of which I was a member, would assess, I think they got over \$1 million for doing it. Then they came to the Learning Community and out of that relatively small budget got several hundreds of thousands of dollars to operate a truancy program that the state created. And my view, since we're talking about Douglas County and how poor they are and how unfairly they're being treated, when a duty is reposed by the state and that county attorney is involved, that county attorney should have gone to the county board and said, this is what I need to carry out this state duty. But instead, he came to the Learning Community, which is supine, which is trying to find a way to get friends so it can keep its existence. So without adequate money to carry out its own duties, hundreds of thousands of dollars, literally, were paid over to the Douglas County Attorney. So when somebody comes here and says, do something for Douglas County, I know what I would do for them and I know what I'd do to them. But I will not support anything where they, with all of their largess, are going to try to take from an agency that I think is doing a better job overall than Douglas County overall. I'm not talking

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about Tom Riley or the Public Defender's Office. So if the aim is to cripple the advocacy agency, this would be a way to do it. I'm not going to say that that is Senator Lautenbaugh's view, intent, because I haven't detected that, but as in the law, sometimes you look at the result and not necessarily the intent. If it's an intentional type of thing, then you're going to parcel out culpability and punish. But in other situations, you don't need to find intent, you don't need to find culpability. You look at the result, and if the result is unfair then you correct it. And I have yet to see Douglas County unable to get the money it needs. I see how they hire lobbyists. I see how they hire the wives of lobbyists, how they hire friends. I see how they hire a guardian ad litem who was in bankruptcy, federal government after him, and the lawyers in Douglas County don't say anything, those judges don't say anything, nobody says anything. There is no accountability in Douglas County. And I believe that guy's name is Incontro. And I think that there was notification of what I'm talking about in The Daily Record and yet I didn't see an outcry from lawyers, judges, or those who pretend to be so concerned about justice and children. I want those votaries of Douglas County--I'm not saying voting, a votary is somebody, you know, that you worship--I want them to go back to Douglas County and say what I said and let Incontro call me a liar and sue me, although he can't because anything said in the legislative process is immune from suit, but I'll say it outside of this Chamber and this room. And I'm saying it because I want to see if the people who work for Douglas County, who bring bills for Douglas County, who talk about what lawyers are supposed to do have got a guardian ad litem doing this kind of...can't even take care of his own affairs. And they won't say anything about it. Then they're going to come down here and ask me to take some money from the Advocacy Commission, which has done good work. I will not do it. And the only reason I said it, Senator Ashford opened the way. I've been good today. (Laughter) I have not talked a lot. I haven't asked a lot of questions. But you know what they say, you wave the red flag...calm down. (Laughter) Wave the red flag in front of the bull and this is what you get. [LB123]

DENNIS KEEFE: Anything else? [LB123]

SENATOR CHAMBERS: Oh, and there should be a question in there somewhere. (Laughter) Are you here...are you here as an opponent or proponent of the bill? [LB123]

DENNIS KEEFE: I'm opposed to the bill. [LB123]

SENATOR CHAMBERS: Okay. That's my question. [LB123]

DENNIS KEEFE: I'm opposed to the bill, make that clear. [LB123]

SENATOR ASHFORD: Thanks, Dennis. I think that's all. [LB123]

DENNIS KEEFE: Thank you. [LB123]

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ELAINE MENZEL: Actually, can I...? [LB123]

SENATOR ASHFORD: Can you speak? [LB123]

ELAINE MENZEL: Yes, please. [LB123]

SENATOR ASHFORD: Yes, you can. [LB123]

SENATOR MCGILL: You just want to grab a cup and maybe try to pick up some of that ice? [LB123]

SENATOR ASHFORD: Or stomp on it or whatever you want to do. [LB123]

SENATOR MCGILL: Yeah. [LB123]

DENNIS KEEFE: It's a good lawsuit. [LB123]

SENATOR MCGILL: I just don't want anyone to slide on it. [LB123]

SENATOR LATHROP: We don't want anybody slipping and falling in here. [LB123]

ELAINE MENZEL: Senator or Chairman Ashford and members of the committee, for the record my name is... [LB123]

SENATOR CHAMBERS: Oh, wait a minute. Just a minute. You're not going to pick that up with your hands and put it in a cup, are you? [LB123]

PAGE: No, I was going to get a broom. [LB123]

SENATOR ASHFORD: No, why don't we just get...why don't we just... [LB123]

SENATOR CHAMBERS: Why don't we just leave it there and tell... [LB123]

PAGE: Okay. [LB123]

SENATOR ASHFORD: ...leave it and we'll bring the... [LB123]

SENATOR CHAMBERS: ...and tell these grown people to watch their step. [LB123]

SENATOR MCGILL: Okay, just... [LB123]

SENATOR CHAMBERS: But the staff are not going to be put in a demeaning position

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while I'm here. And if the ice had to be picked up, I will pick it up out of consideration for our staff. They are human beings, they should be respected, and we are the ones who should show the way. So if the committee votes that the ice must be picked up, I will deliver on what I said. Does the ice have to be picked up? [LB123]

SENATOR ASHFORD: I think it will melt, Senator Chambers. I mean I... [LB123]

SENATOR MCGILL: Okay. [LB123]

SENATOR CHAMBERS: That's not my question. Does the ice have to be picked up? [LB123]

SENATOR ASHFORD: Well, no, because it's going to melt. No. [LB123]

SENATOR MCGILL: I'm sorry for suggesting it. (Laugh) [LB123]

SENATOR CHAMBERS: Oh. Okay. [LB123]

SENATOR LATHROP: Senator Chambers, as the civil lawyer in the group, I think all we have to do is warn the people not to step on it. [LB123]

SENATOR ASHFORD: Yeah. [LB123]

SENATOR CHAMBERS: Right, (inaudible). [LB123]

SENATOR LATHROP: There will be no liability. We're good. [LB123]

SENATOR CHAMBERS: I only get upset but I thought she was going to go do that. [LB123]

ELAINE MENZEL: I'm not quite sure how to testify after that now. For the record, I'm Elaine Menzel, it's M-e-n-z-e-l, and I'm here on behalf of the Nebraska Association of County Officials and we are appearing today in opposition to LB123. I just wanted to inform you that it was...our board just took a position, it was this morning and it was not unanimous, but it's obviously comprised of board members throughout the state. So with that said, I believe the people prior to me have indicated what the history of the commission was in terms of its creation in 1995 and came about in large part due to a task force and a study. I believe it was called the "Spangenberg Report" that had been done in 1993. It was Senator Kristensen that had previously served here that was the introducer of LB646. He made a couple of telling points during General File debate that I'd like to reiterate and paraphrase and it was: The intent of the legislation is to provide a statewide service that is available for people to use. And then further on in his testimony he said: Of course, those larger counties that have already got a public defender system

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established did so because it did save them money, but they also have conflicts to use this, meaning the system. An amendment to allow counties to opt out was not agreed to by the body. I suspect there are members of this Judiciary Committee that also remember the debate. And then correspondence from our office in the 1995 time range also indicates that LB646 was to be a system for all counties to use. Property tax measures addressed in 1995 continue to be important to counties at this time because of past funding and potential current funding provisions that will be depleted from our resources. Our organization was supportive of the Public Advocacy Commission being established in 1995 and we continue to be supportive at this time and largely because of the indigent defense system and the need for that. I hope this information is beneficial to you as you make a decision. We ask you at this time to oppose the legislation as written. And while I've not reviewed the statements of this afternoon's hearing with my boss, I think I can safely say that we would not be opposed to additional funding for these types of things in counties. [LB123]

SENATOR ASHFORD: Okay. Thanks, Elaine. Thank you. [LB123]

ELAINE MENZEL: Thank you. [LB123]

SENATOR ASHFORD: Any other opponents? How many other opponents do we have back here? Okay, Jerry. [LB123]

JERRY SOUCIE: (Exhibit 6) My name is Jerry Soucie. I'm an attorney in private practice. It's S-o-u-c-i-e. My business address is 1141 H Street here in Lincoln. I'm not going to go over any of the same ground regarding the commission. I just want to be here to address an issue that I think has been overlooked by this committee in other matters, and I believe that this bill is actually, on its face, unconstitutional. I think you need to look at Article III, Section 18 of the Nebraska Constitution which prohibits local legislation. If you look at that bill, you'll see that special legislation that exempts certain groups or certain counties or certain cities from taxes is unconstitutional under Article III, Section 18. And I provided some research that I've done on that issue and I don't think it has a chance of surviving constitutional...I don't think you can elect to have one county not pay taxes. Thank you. [LB123]

SENATOR ASHFORD: Thanks, Jerry. I don't think we have any questions. Any? No questions. Any neutral testifiers? Mr. Kelley. [LB123]

MIKE KELLEY: Mr. Chairman, members of the committee, my name is Mike Kelley, K-e-l-l-e-y, appearing here as a registered lobbyist for Douglas County. We're appearing neutral today because we didn't meet on Tuesday, due to the national holiday, and they didn't have a chance to get a resolution supporting it. So what I'll do is kind of tap-dance around here and talk to why we had Senator Lautenbaugh introduce it last year and that is basically because 40 percent of the fund...well, nobody is mad at the Public Advocacy

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group. They do great work. They are public servants. They do fantastic work. I was a lobbyist for the criminal defense attorneys back in '95 and helped set this up. It's worked well, does good things for everybody. We kind of walked into a situation or morphed into a situation where 17 years later the fines for Douglas County make up almost 40 percent of the fund. And for some reason, the judges in Douglas County--Douglas County doesn't have any option here, it's the judges--don't appoint Public Advocacy. I don't know if it's our tradition of Omaha people not appointing Lincoln people to anything or vice versa. I don't what the...if it's a feud, if it's parochial. I don't know what the answer is. But the result is Douglas County doesn't get any benefit back out of it where every other county does. So we're thinking we ought to be able to figure out a way to even that up. And we're not trying to dismantle the Public Advocacy group at that. I'm thinking if...of course, Senator Ashford, Chairman Ashford has got even a greater idea: Have the state pick up the whole tab. We would, obviously, wholeheartedly support that as a better system for all of it. But short of that--I think that's an uphill political climb--short of that I would say, you know, if this committee or a member of this committee would put the parties in a room, we probably could resolve this. You know, that would be my suggestion. [LB123]

SENATOR ASHFORD: Senator Davis. [LB123]

SENATOR DAVIS: Aren't you, Mr. Kelley, aren't you saying we're going to defund this because Douglas County judges won't participate? So isn't it really a judicial problem with your judges in Douglas County rather than has... [LB123]

MIKE KELLEY: Well, yeah, and we... [LB123]

SENATOR DAVIS: What does it have to do with us? [LB123]

MIKE KELLEY: ...and we can't...well, because you run the whole place. (Laugh) [LB123]

SENATOR DAVIS: Well, you want us to change the rules for you so that... [LB123]

SENATOR MCGILL: (Laugh) That's not true. [LB123]

SENATOR DAVIS: You know, I'd like to have the rules changed for me out in Grant County too. That would be nice. [LB123]

MIKE KELLEY: We'd just like some fundamental fairness, Senator, somehow, and we think this committee could help us get there. [LB123]

SENATOR DAVIS: But your judges are not taking advantage of what's out there. That is not...that is not our doing. [LB123]

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MIKE KELLEY: Nor is it ours, so that's, anyway, that's why we're here. I think there might be a way to devise that if we got the parties in a room and talked about it so at least some of that money went back into criminal defense in Omaha. That's all we're trying to get done. [LB123]

SENATOR DAVIS: Have you talked to your judges about it? [LB123]

MIKE KELLEY: I haven't. I only have anecdotal stories and I'd rather not repeat them. (Laugh) [LB123]

SENATOR ASHFORD: Thanks, Mike. You know, I think it's very unlikely that this is going to be done in a room anywhere. I think the state ought to pay for it. That's my position; it was my position last year. I think we ought to appropriate the money. I don't think \$1.1 million is too much for justice in the state, and so that's what I advocate for. I don't think you're going to solve this any other way. [LB123]

SENATOR LATHROP: So would you do away with the \$3 fee? [LB123]

SENATOR ASHFORD: I hadn't thought about the \$3 fee, but I certainly...certainly Senator Chambers, I think, would advocate for that. But I would...this...the Commission on Public Advocacy does a great job. It needs to be funded by the state. That's what needs to happen. This is one of these things we're just tiptoeing around the real issue, and I think that's what we ought to do. If we're going to do anything at all, that's what we ought to do. But anyway, thanks, Mike. [LB123]

MIKE KELLEY: Thank you very much. [LB123]

SENATOR ASHFORD: Yeah. Senator Lautenbaugh. [LB123]

SENATOR LAUTENBAUGH: Well, sorry for the awkward departure. [LB123]

SENATOR ASHFORD: No, I mean it... [LB123]

SENATOR LAUTENBAUGH: I was told...I hear there's an important Exec Session going on this afternoon... [LB123]

SENATOR ASHFORD: Yeah. [LB123]

SENATOR LAUTENBAUGH: ...and I was told I was missing it, but I was misinformed. [LB123]

SENATOR ASHFORD: Okay. [LB123]

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SENATOR LAUTENBAUGH: So in any event, I do think it's an important issue that we need to discuss. And as you know, I'm open to compromise, as we had amendments and ideas last year in that regard, and I'd be happy to talk to anyone interested about it and take any questions you might have, now that I'm back. [LB123]

SENATOR ASHFORD: I know Senator Lathrop settles all these matters for us but I think he spent all last year on it. [LB123]

SENATOR LATHROP: I thought I had it last year. [LB123]

SENATOR ASHFORD: Yeah, we thought...so I think we just ought to pay for it. But thanks, Scott, very much. [LB123]

SENATOR LAUTENBAUGH: Thank you. [LB123]

SENATOR ASHFORD: Okay, let's go to Senator Christensen's bill and, yeah, LB52. [LB123]

SENATOR CHRISTENSEN: (Exhibits 7, 8, 9, 10, 11, and 12) Thank you, Mr. Chairman, members of the Judiciary Committee. I'm Senator Mark Christensen, M-a-r-k C-h-r-i-s-t-e-n-s-e-n. I represent the 44th Legislative District, here to introduce LB52. LB52 amends Section 83-183 to allow the director of Department of Correctional Services to enter into arrangements with any charitable, fraternal, or nonprofit corporation for labor services that have a public benefit by persons committed to the incarceration work camp. Currently, Section 83-183 allows the director of the Department of Correctional Services to enter into arrangements with any other board or agencies of state, any natural resources district, or any other political subdivision for labor services. LB52 seeks to provide the ability for labor services to again be arranged with nonprofit organizations which previously had entered into such arrangements in the past for laborers at the Work Ethic Camp. From 2002 to 2008 the department entered into arrangements with nonprofit groups for labor with the Work Ethic Camp. In 2008, Corrections stopped entering into these arrangements after reevaluating whether the Work Ethic Camp was included under the restrictions of Section 83-183, since the passage of LB83 in 2007. LB83 was introduced by Senator Synowiecki, allowing inmates and not just probationers into the Work Ethic Camp. The department felt it was unclear at that time whether they could continue to enter into such arrangements with nonprofit organizations, so they quit the practice. Community leaders from McCook, Nebraska, and surrounding areas came to me this fall and expressed their desire to again allow nonprofits to enter into arrangements for labor services from offenders at the Work Ethic Camp facility located in their community. I have given the committee clerk several support letters from the community and organizations that felt the previous arrangements were successful and beneficial for both the community and the offenders who participate. In my discussion with Director Houston of the Department of

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Correctional Services, I was concerned that if there was an obligation by an offender to participate in labor for a particular nonprofit group, would they be forced to work on that assignment. He assured me that they have plenty of work opportunities and that any work assignments with nonprofits would be voluntary. If the committee feels that it should be amended into the bill, I would have no objections to doing so. In addition, the current language narrows the application of this bill to offenders from incarceration work camps, seen on page 3, line 1. If the committee so chooses to open it up to allow the department to enter into arrangements with nonprofit entities throughout the correctional systems with work programs, I have no problem with that. It was not my intent to limit to just the Work Ethic Camp. In closing, I believe LB52 is an appropriate bill to continue and expand the successful partnerships between the Department of Corrections and local communities. Unfortunately, no one was able to make the trip to Lincoln today from McCook, but, as I mentioned before, you have several letters of support given to you by the committee clerk. Thank you for consideration of LB52, and I'd urge its advancement to General File. Are there any questions? [LB52]

SENATOR ASHFORD: Any...no questions. I don't see any, Mark. I agree with you it's a great program. Any opponents to LB52? Or, I'm sorry, supporters? Opponents? Neutral? Mark, do you waive closing? [LB52]

SENATOR CHRISTENSEN: Yeah. [LB52]

SENATOR ASHFORD: LB151. Senator Seiler. [LB151]

SENATOR SEILER: Good afternoon, members of the Judiciary Committee. My name is Les Seiler and I'm a senator from District 33 and I have brought to you LB151 that I thought was going to be pretty simple and forthright. I think most of these people behind us are waiting to testify. [LB151]

SENATOR ASHFORD: All right. [LB151]

SENATOR SEILER: And I have no doubt that we can work out the problem. Here's...let me tell you what I...as I worked through this language what occurred to me. And Hastings may be a little different than anyplace else in the state, but right now the Mary Lanning Hospital out there is buying up private practices. They are taking their records, incorporating them into their own system. If it need be that those records for those individuals needed to be brought to court, I have serious doubts whether the business record act would cover those at this time, because it's acquired. And the people that set up the testimony that is required, that the records were in the hands of a custodian, well, the original custodians are going to be retired. They're going to leave, the doctors, the professional staff, business managers. And I think this is just one record that we need to adapt and make it a continuing...the act, acquiring of a business and the business records is an exception to 803, section (5), and I think we're labeling it 5(b). So that's

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where we're started. I've had one proposed amendment already submitted to me and I have no problem with other people looking at it and let's get this language right. I was just thinking about a veterinarian service that I'm selling, and we're going to sell the stock. And so all those business records are going to transfer. I can tell you right now, the owners are going to disappear all over the retirement areas of the South. Who's going to be around to testify? And this would allow the new owners to testify that those records were kept and were purchased in the normal course of business and, therefore, they should be admitted under the exception to the hearsay rule. Yes. [LB151]

SENATOR ASHFORD: Yes, Senator Lathrop. [LB151]

SENATOR LATHROP: Can I just ask, Senator Seiler, do you know, has the Federal Rules of Evidence been amended to address this problem or has it addressed it? [LB151]

SENATOR SEILER: I don't believe it has. [LB151]

SENATOR LATHROP: So you're... [LB151]

SENATOR SEILER: There are a number of states that have had case law that have adopted the acquired records act but... [LB151]

SENATOR LATHROP: And have they put that into statute, or has that been a judicial interpretation of the particular rule? [LB151]

SENATOR SEILER: I believe it was judicial,... [LB151]

SENATOR LATHROP: Okay. [LB151]

SENATOR SEILER: ...from what I've been told. [LB151]

SENATOR LATHROP: Okay. [LB151]

SENATOR ASHFORD: If we get rid of the income tax, maybe they'll stay. [LB151]

SENATOR SEILER: (Laugh) That also crossed my mind. [LB151]

SENATOR ASHFORD: Yeah. Anyway, enough said. That's fine. (Laughter) [LB151]

SENATOR LATHROP: We don't need to debate that in Judiciary Committee. [LB151]

SENATOR ASHFORD: (Laugh) Yeah. [LB151]

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SENATOR SEILER: Anybody else have any questions of me? Okay. Thank you.
[LB151]

SENATOR ASHFORD: That's my job. No. Thank you. I know I don't do it very well. Do we have any proponents on this one? Mr. Hoppe. [LB151]

WARD HOPPE: My name is Ward F. Hoppe. I'm an attorney from Lincoln. I represent mostly real estate matters and, in a real estate matter last summer, I was defending a first mortgage from a second mortgage foreclosure, which seems pretty elemental. But in the process of defending that first mortgage, the note that was the basis of the first mortgage happened to have a number of iterations. It started with a company down in Alabama, I believe, and that company merged with another company and they accepted payments on the note for a period of time. Then that note was transferred to another company which accepted payments for a period of time, and then to another lender, ultimately City Bank, for whom I worked to defend their first deed of trust. During the course of the trial, a very good counsel that was representing the second lienholder objected to the evidence regarding the payments on the deed of trust because we could not produce the original custodians of the records that took the payments. A secondary issue in this same case...and the case was City Bank v. Malone in Lancaster County. A second issue in the case was that an outside servicer had worked for one of the lenders and the outside servicer was the one who actually took the payments, recorded them, and provided the information to the holder of the note. Well, under the Uniform Commercial Code, we have a very open system of transferring promissory notes. They're tender like cash. Well, in this situation, if there isn't an acquired business records exception, you have to transfer a witness with every note to ultimately know you're going to get paid on, which doesn't make sense. So we had this problem. We sweated through it but won the case. But there really needs to be an exception for acquired business records. It's not just in the banking field, as was pointed out by Senator Seiler. Anytime there's a business acquisition, if you sold any business assets, if you sell a truck that has maintenance records and those records go with the truck, the subsequent owners couldn't use those on an evidentiary basis unless they had someone to testify as to how they were originally made. So long story short, we need a business...acquired business records exception to the trust. [LB151]

SENATOR ASHFORD: How did you get the first mortgage in then? [LB151]

WARD HOPPE: Well, the first mortgage is of record in the register of deeds office.
[LB151]

SENATOR ASHFORD: Oh. [LB151]

WARD HOPPE: So there's a different method of proving the mortgage. It's the payments on the mortgage that are the issue. [LB151]

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SENATOR ASHFORD: Okay. How did you get the payments? [LB151]

WARD HOPPE: Well, we called, we called the...one of the staff of the holder of the note who then testified about the whole process and they didn't have an adequate challenge. [LB151]

SENATOR ASHFORD: Okay. Any questions of Mr. Hoppe? Thanks, Fred. [LB151]

WARD HOPPE: Sure. [LB151]

SENATOR ASHFORD: Bob. [LB151]

BOB HALLSTROM: (Exhibit 13) Chairman Ashford, members of the committee, my name is Robert J. Hallstrom, H-a-l-l-s-t-r-o-m. I appear before you today as registered lobbyist for the Nebraska Bankers Association in support of LB151. We support the bill which would create an acquired or integrated business records exception to the hearsay rule. My testimony goes through in a little more detail the City Bank and Trust v. Malone case from Lancaster County District Court. But since Mr. Hoppe has touched on the basic background and, I think, explained how these issues, at least in the financial institution industry, come about, I will gloss over most of that. I do want to draw your attention to pages 4 and 5 of my testimony where we talk about the general background in due diligence that buyers of loans on the secondary market may undertake. Specifically, one of the components is that the sellers and buyers of these loans get together. The buyers are provided with a spreadsheet or some type of documentation that will reflect unpaid principal balance, interest rates, total debts, due dates, whether the loan is secured or unsecured, what the lien perfection priority position is, and so forth. And then at the back end of the transaction, that spreadsheet or those loan documents are provided to the buyer of the loans and incorporated as a part of their business records; thus, the definition or the description of acquired or incorporated or integrated records as an exemption to the hearsay rule. On page 6 of my written testimony, I'll just read real quickly, I think it highlights what some of the courts have done. And, Senator Lathrop, I think there has been a number, there have been a number of judicial determinations, both with respect to the Federal Rules of Evidence and from state courts, with regard to rules of evidence that are patterned after those federal rules that have, in fact, judicially incorporated the acquired or integrated records exception. But the Massachusetts Supreme Court, for example, we note there they recognized the problem of proving a debt that has been assigned several times is of great importance to mortgage lenders and financial institutions. They conclude that it is normal business practice to maintain accurate business records regarding the loans and to provide them to those acquiring the loan. Therefore, the bank need not provide testimony from a witness with personal knowledge regarding the maintenance of the predecessor's business records. I think with the passage or the adoption of LB151, we

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will have a situation where the business that has acquired the records will treat those records as their own in offering them into evidence. They will acknowledge that they have incorporated them into their business in the ordinary course of business and that they typically rely upon the contents of those documents, as their predecessors have. And then there will obviously be questions regarding the trustworthiness or the reliability of the document. In conclusion, I think in looking at LB151 we're maintaining the ordinary course of business as a foundational requirement. We're simply eliminating the potential need to have a witness from the business that created the record testify as to how that record was prepared and replace it with testimony that the records were incorporated or integrated into the acquiring business records and used in the ordinary course of business. Senator Seiler noted the... [LB151]

SENATOR ASHFORD: Time out. [LB151]

BOB HALLSTROM: Yep. Okay. [LB151]

SENATOR ASHFORD: Any questions? [LB151]

SENATOR LATHROP: Just one question, if you know, Bob. Is the...the folks that do the Federal Rules of Evidence, whatever working group they have, did they address this or are they addressing it? [LB151]

BOB HALLSTROM: Not to my knowledge, Senator. I think there are federal rulings that have adopted the acquired or integrated business records exception that are applicable and probably sufficient. Had we had a higher court ruling in Nebraska that did the same thing, we might not be here. But that case settled. The lower court had determined that they were going to let, notwithstanding the objections, the evidence that was proffered in. So the bank won at the lower court level and, presumably, rather than the parties take the risk of having it appealed without the certainty of what the decision would make, we do not have a higher court determination in Nebraska. [LB151]

SENATOR LATHROP: What if we...I get the bank thing. You're...somebody is selling the loan. It gets transferred four or five times and there's a default and you're, you know, you're literally to have personal knowledge to testify and lay the foundation, where this exception would require that you haul in somebody from every bank who held the note. Take the doctor's office that was Senator Seiler's example. A hospital buys a doctor's office. You need the records. You bring in the...you...in this instance we would bring in the hospital and have the hospital say, well, we bought this practice from the doctor and the both of us have been maintaining this. What if the person who has the objection legitimately believes there's an issue about whether the records have been kept in the normal course of business? [LB151]

BOB HALLSTROM: Well,... [LB151]

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SENATOR LATHROP: What's their opportunity to say, wait a minute, no one here has personal knowledge of what happened back in the doctor's office so who do I haul in and why should the burden be on me and not the guy offering the evidence? [LB151]

BOB HALLSTROM: Well, I think the burden is still on the person that's offering the evidence. The issue, Senator, and there may be those that litigate more frequently than I that would be better placed to answer that question, but I think the fact that you still have the trustworthiness and the credibility of the information as a prong of the requirement, even under the acquired or integrated business records. [LB151]

SENATOR LATHROP: But the person who's testifying doesn't have personal knowledge of that, right? [LB151]

BOB HALLSTROM: That is...that's correct. [LB151]

SENATOR LATHROP: So if I'm the hospital that bought the doctor's practice and I'm the keeper of the records and they bring me in to testify and I bring in not only the records from the hospital or the clinic, now that the hospital owns it, but the clinic that was run before the hospital had an interest in it. I, the testifier, the records keeper at the hospital, have no personal firsthand knowledge of what the practices were of the clinic. [LB151]

BOB HALLSTROM: And that would be correct. But I think the court decisions that have been handed down have recognized, and at least the ones that I've reviewed with regard to financial institutions, that there is a recognition that everybody is using those records for the same purpose--to determine the payoff. And as a result, without using a legal term of presumption, but there's a presumption that bank A would have had not only for evidentiary purposes or litigation purposes but they are also maintaining that for notifications to customers so that they would have the same level of reliability, if you will, that they've maintained them for the same purposes. [LB151]

SENATOR LATHROP: Then haven't we done away with the requirement that anybody come in at all? If all you have to do is produce somebody's business records and just drop them on the table in a trial, why would we need anybody to come in and say they were ever kept in the normal course of business,... [LB151]

BOB HALLSTROM: Well,... [LB151]

SENATOR LATHROP: ...because we have somebody now who doesn't have any firsthand knowledge about the earlier persons' maintenance of those business records? So we're skipping what happened earlier, which is exactly what you're trying to get to or prove. [LB151]

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BOB HALLSTROM: Well, and I don't know whether this goes directly to the heart of the issue. The bar association amendment that they have proposed has indicated that the acquiring institution must not only maintain the records in their normal course of business but must have acquired them in the normal course of business. I don't know if that goes back far enough to your question. [LB151]

SENATOR LATHROP: We still don't have anybody with firsthand knowledge about what the first guy did though. [LB151]

BOB HALLSTROM: But again, notwithstanding that, many judicial determinations have been founded upon, I assume, knowledge that that is the case. But there's still a recognition that they are trustworthy and reliable for those reasons. [LB151]

SENATOR LATHROP: Okay. Okay. Thanks. [LB151]

SENATOR ASHFORD: Senator Chambers. [LB151]

SENATOR CHAMBERS: I might walk over some ground that has already been trod and, if so, then you all just have to listen to a repeat. When you were testifying...you're here for the Bankers Association... [LB151]

BOB HALLSTROM: Correct. [LB151]

SENATOR CHAMBERS: ...and I'm aware of that. This doesn't refer to bankers. It says any entity, right? [LB151]

BOB HALLSTROM: That is correct. [LB151]

SENATOR CHAMBERS: And a "compilation, in any form," "any form," does that mean it could be microfilm, microfiche? [LB151]

BOB HALLSTROM: Senator, I... [LB151]

SENATOR CHAMBERS: Could it be in pencil? [LB151]

BOB HALLSTROM: I don't have the answer to that. All I can tell you is that the language of the new...the new language that is proposed with regard to that introductory language is taken verbatim from the existing business records exception language. So there would be no change in terms of what form the document may take. [LB151]

SENATOR CHAMBERS: But, see, that has never daunted me. Sometimes attempts to amend a statute will focus my attention on what the existing law is. And although it's the

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existing law, that doesn't mean it meets my standard. And I have amended existing law which was not intended to be amended by the bill that was brought to us. [LB151]

BOB HALLSTROM: Understood. [LB151]

SENATOR CHAMBERS: That's why I'd like to explore this with you, because I'm looking at underlined language which to me is new language. And you're the expert in this field, not I. So I'm... [LB151]

BOB HALLSTROM: I'm not sure I'd agree with that either, Senator, but... [LB151]

SENATOR CHAMBERS: ...I'm collecting information. [LB151]

BOB HALLSTROM: Carry on. [LB151]

SENATOR CHAMBERS: But this is "in any form." Would that include, if I'm a shade-tree mechanic and I just write things down on whatever piece of paper that I have and my customers do the same thing and then I put it all in a box, that's a compilation, isn't it? [LB151]

BOB HALLSTROM: It certainly could be. [LB151]

SENATOR CHAMBERS: And it's in any form. It's in a form and it is in the course of the business of mine, the way I conduct it. [LB151]

BOB HALLSTROM: Correct. [LB151]

SENATOR CHAMBERS: So if I pass that on to a receiving entity, then it would qualify under this, based on the way the language is constructed. Is that true or false? [LB151]

BOB HALLSTROM: I believe that's correct. [LB151]

SENATOR CHAMBERS: So are people trying to avoid having to undergo cross-examination? Are they trying to slip something in by saying it's a compilation in the ordinary course of business, and if you want to challenge any of it, here it all is? You've got to read it all and see what you object to, otherwise, everything in it is accepted. And what is presented is accepted based on its being true, not evidence that a record was kept but that what is in the record is true. If I were to want to...if I were in a case and this is allowed, this evidence, as an exception to the hearsay rule, that means that it can be introduced, as Senator Lathrop pointed out, without anybody involved having direct knowledge of what's in it. The one offering it wouldn't have to know what's in it, would he or she? [LB151]

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BOB HALLSTROM: You will presumably know what's in the document, Senator. You may not be able to testify as to how and when it was created, would be my observation. [LB151]

SENATOR CHAMBERS: Would...suppose the person making the offering doesn't even know what it says. Would you have to, when you make this offer, establish, by way of referring to what it contains, that it's trustworthy and so forth? Or does this excuse you of that and all you have to do is show that it's a memorandum, report, or record, or data compilation, in this particular form, with the exceptions noted, and it's a part of the regular course of business? That's all you have to show, isn't it, to be within the exception? [LB151]

BOB HALLSTROM: That's for the introduction of the evidence. I would presume that there will be testimony regarding what is in the document. [LB151]

SENATOR CHAMBERS: But does there have to be? If it's accepted in evidence, then that means it can be considered when you're going to reach an ultimate conclusion, doesn't it? [LB151]

BOB HALLSTROM: Correct, if it's admitted. [LB151]

SENATOR CHAMBERS: Now here's what I want to do, to get away from that. When a criminal case is presented and there is some evidence presented, physical evidence, you have to establish what they call that chain of custody. And if it's broken anywhere, then you have nullified your attempt to get that evidence in, in the way you were trying to do. And you might have to go through a circuitous route and you may not be able to succeed because somebody who would have been a part of bringing that evidence to where it is now no longer exists. So that takes away the validity or the admissibility of the evidence. Is there anything in this language that would indicate that during the regular course of business everybody who touched that handled it the way they should have, that it is what it purports to be; there are no modifications, no alterations, no deletions, no additions? That wouldn't have to be established, would it? [LB151]

BOB HALLSTROM: It would not, Senator. I would note, with regard to the criminal aspect of things, we have been contacted since the introduction of the bill by some representatives of the defense attorneys. I think Mr. Peterson from the ACLU... [LB151]

SENATOR CHAMBERS: I'm not talking about the criminal aspect now. I use that as an example. I'm back to yours with the business. Could a report be six inches tall, have enough papers/pages in it to rise from the table to six inches above the table? Is there anything in here that limits the size or magnitude of this report? [LB151]

BOB HALLSTROM: Not to my knowledge, Senator. [LB151]

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SENATOR CHAMBERS: Could a judge say, that is too much that you're asking to come in as an exception to the hearsay rule and I won't let it be an exception? Can the judge refuse to accept something as an exception if the law says that it is an exception? Can the judge overrule the law? [LB151]

BOB HALLSTROM: I would assume the judge could make that determination and may be subject to challenge as to whether or not he was correct or accurate in making that decision. [LB151]

SENATOR CHAMBERS: I didn't hear everything that Senator Lathrop asked, but are these kinds of terms that are in this new language found in existing exception language under the Nebraska Evidence Rules? [LB151]

BOB HALLSTROM: Not in statute in Nebraska or other states, Senator. We did have a question as to whether or not there are any changes to the federal rules of this nature or in other states. What the language that is new in that bill is taken from is the compendium of cases that have adopted, by judicial decision, the acquired or integrated exception. [LB151]

SENATOR CHAMBERS: Oh, I don't care about judicial decisions in this regard because it was by judicial decisions that there had to be corroboration of an accusation of sexual assault before you could even admit it. Now if it's allowed to be, if you're allowed to make the accusation, that doesn't mean that's the same as proof. You couldn't even make the accusation and it be accepted and acted upon without corroboration, and that was not pursuant to statute but, rather, judicial determination. There are other elements that are considered to be the law because of a judicial decision, so that's not enough for me. When you say, from a compendium of cases, is any of this language lifted from any statutory sources? [LB151]

BOB HALLSTROM: No, sir. [LB151]

SENATOR CHAMBERS: Yes or no? [LB151]

BOB HALLSTROM: No. [LB151]

SENATOR CHAMBERS: So then this would be cutting-edge. This would be the first time something like this is in a statute. [LB151]

BOB HALLSTROM: To my knowledge. [LB151]

SENATOR CHAMBERS: Why did you put so much into it? How long can a memorandum be... [LB151]

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BOB HALLSTROM: I don't know that there's any rules with respect to that, Senator. [LB151]

SENATOR CHAMBERS: ...or a report or record? We don't really even know what we're being asked to approve of, if we go by the language, at least I don't know. [LB151]

BOB HALLSTROM: Well, and, Senator, again, this may not...this may be nonresponsive, but the language that you're focusing on is in existing language, both under the state rules of evidence and the Federal Rules of Evidence after which they were patterned. So to that extent, whatever they mean is what they've meant under those particular guidelines. [LB151]

SENATOR CHAMBERS: Well, every word in most novels are found printed in the dictionary, but it's when you put them together and formulate statements, assertions, and whatnot that the words now are building blocks. And I'm not trying to hound but I wasn't here earlier. Did your group submit this bill or somebody else did and you're just speaking in favor of it? [LB151]

BOB HALLSTROM: We have prepared the bill in response to a request for us to initially be involved in the City Bank v. Malone case that was on appeal to the Court of Appeals. [LB151]

SENATOR CHAMBERS: Oh, so this does grow out of a case involving banking. [LB151]

BOB HALLSTROM: Correct. [LB151]

SENATOR CHAMBERS: Then why don't you say banks? Would that be special legislation? [LB151]

BOB HALLSTROM: No. [LB151]

SENATOR CHAMBERS: Then why didn't you say banks? [LB151]

BOB HALLSTROM: My assumption is, Senator, there are other scenarios that it would apply to. Certainly on behalf of the Nebraska Bankers Association, if this committee is inclined to take a direction where it would apply only to financial institutions, we certainly would explore that. [LB151]

SENATOR CHAMBERS: I'm glad to see that the banks are now becoming sensitive because, when they were dealing with all these mortgages and other things, they didn't show concern for even the people who could be considered their customers, but now they're interested in other industries, of the businesses and so forth. So that pleases me

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and it might modify my opinion. But right now, just looking at the language, I have a difficulty with it because I think it's so broad, so all-encompassing. And I don't even understand what I'd be voting in favor of. [LB151]

BOB HALLSTROM: Well, and, Senator, there are other interest groups that have raised similar concerns, and Senator Seiler and myself, on behalf of the Bankers Association, have certainly indicated our willingness to work on those issues. [LB151]

SENATOR CHAMBERS: Well, thank you. [LB151]

BOB HALLSTROM: Thank you. [LB151]

SENATOR CHAMBERS: And as I apologized in the beginning, not having heard everything, I wanted to say what I had on my mind. Thank you. [LB151]

BOB HALLSTROM: Thank you. [LB151]

SENATOR LATHROP: Thanks, Bob. Any other questions before he gets away? Seeing none,... [LB151]

BOB HALLSTROM: Thank you. [LB151]

SENATOR LATHROP: ...other proponents. Anyone here to testify in favor? Anyone here in opposition, care to testify? [LB151]

THOMAS STRIGENZ: Good afternoon. Tom Strigenz. I'm the Sarpy County Public Defender. Also, I sit on the...I'm actually head of the legislative board of the Nebraska Criminal Defense Attorneys Association. I'm not speaking specifically on behalf of them because we're meeting right now. We were going to go over this to see whether or not we decided this. But as I was reading this bill, I came across it and, of course, I always get heightened when I see changes to evidentiary rules, but I was...I didn't know where this was coming from. I, of course, now have spoken with...and seen that it's more of a civil side thing. But the bill as written, in my opinion, is absolutely unconstitutional from the criminal law side. I mean this violates the confrontation clause of the Sixth and Fourteenth Amendments. You know, basically it just...a criminal defense defendant has right to cross-examine any accuser that is brought before him, him or her. So from that standpoint, I mean, this bill as written, of course, in my opinion, is...would not pass constitutional muster. Now in my discussions and trying to say that...I mean constitutional muster, Sixth Amendment doesn't apply to civil matters. Changing this to only civil matters would get me out of the case. (Laugh) But there might be other issues or problems. But I wanted to bring that to this committee's attention because I think that's very important. And again, I was just curious where it was coming from. I didn't know where it was coming from until I started investigating this. But with that, I'll submit

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it. [LB151]

SENATOR SEILER: Alan suggested that earlier today. [LB151]

THOMAS STRIGENZ: (Laugh) And I spoke with Alan so, yes. [LB151]

SENATOR SEILER: Okay. [LB151]

SENATOR ASHFORD: Sounds good. Thanks. [LB151]

THOMAS STRIGENZ: Thank you. [LB151]

SENATOR LATHROP: Thanks, Tom. [LB151]

THOMAS STRIGENZ: Thank you. [LB151]

SENATOR ASHFORD: Do we have any other interested? Yes. Welcome back. [LB151]

MARSHA FANGMEYER: Thank you. [LB151]

SENATOR ASHFORD: I think the state should pay for it. What do you think? [LB151]

MARSHA FANGMEYER: I think so, and I'm not going to mention that phrase, except to say that I still have my "Ernie C for Attorney G" button at home, so how about that? [LB151]

SENATOR ASHFORD: Well, I was behind him too. That...I...that was a great campaign. [LB151]

MARSHA FANGMEYER: It was. I'm trying to remember what year it was, and I can't remember. [LB151]

SENATOR ASHFORD: Well, don't get to the year. (Laugh) [LB151]

SENATOR MCGILL: But I want to know what year that was. I want to know. [LB151]

MARSHA FANGMEYER: Chairman Ashford and members of the committee, my name is Marsha Fangmeyer. I am a practicing attorney in Kearney, Nebraska, and I'm president of the Nebraska State Bar Association. I appear here today on behalf of the bar association in opposition to LB151 as it was introduced or it's been introduced. Our concern is that the proposed legislation too broadly expands the already existing, current business records exception in the Nebraska Rules of Evidence. We've talked to Senator Seiler about a proposed amendment. This amendment, and I think he spoke

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about it himself, the amendment does two things. First, it would include this provision, if it is passed, in 27-803(5) as part (b), which is...803(5) is the current business records exception. It's important to do this. For those of you who are practicing attorneys, there is a numbering system on the rules of evidence that's uniform across the country, and if you start messing with that and make an entirely different rule, it makes...the renumbering system makes it very confusing and it just makes sense to just keep that consistency. If I might cite a newly numbered rule and it might include a statement that was a formerly numbered rule differently, then we all get confused. The other part of the amendment is that we recommended to Senator Seiler that the language include the phrase "in the regular course of business," that that be added in the language. We believe that's important because if it was acquired in the regular course of business then there's reliability there. And our concern is that it's so broad that it allows somebody to just stick something in a file and say, well, I've acquired this and now I want it to be in to use it in evidence. This way that it's made clear that it's in...this acquired record is done in the regular course of business. With that amendment, however, the Nebraska State Bar Association would remain neutral on the bill. We would move our position from opposed to neutral. Any questions? [LB151]

SENATOR ASHFORD: Thanks, Marsha. Thank you. [LB151]

MARSHA FANGMEYER: No questions. All right, that's great. [LB151]

SENATOR ASHFORD: Any other testifiers? Okay. Any neutral? Are you neutral, Alan, or what's your position? [LB151]

ALAN PETERSON: Mr. Chairman and Senators of the Judiciary Committee, I'm Alan Peterson, P-e-t-e-r-s-o-n, the Swedish spelling I think that is. [LB151]

SENATOR ASHFORD: Thank goodness. [LB151]

ALAN PETERSON: I represent ACLU Nebraska. In 1603, a gentleman named Sir Walter Raleigh was tried and convicted of a capital crime of treason against James I of England. About 13 years later, after they'd let that conviction ride, King James decided he was enough of a threat to execute him, and they did. He was convicted on hearsay. The primary witness against him would not testify, and the prosecutor didn't want to bring him in, to avoid cross-examination. Okay, let's jump forward 300 or 400 years. The hearsay rules always bump up against, in criminal matters, the confrontation clause of the Sixth Amendment, and that clause apparently arose out of Sir Walter Raleigh's case. That's the history. I'm here usually for the Bill of Rights or some aspect of them, including the Sixth Amendment confrontation clause. I talked with Senator Seiler and several of the other witnesses and pointed out that if this is to be applied in criminal matters, as the evidence rules, the federal rules and the state rules, they do apply in both civil and criminal matters, then we've got a confrontation clause problem because

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this will make it easier to get some kinds of reports into evidence, even in a criminal case, without the normal foundation of proving how the document was produced, who produced it; just that it's been kept by some entity that calls itself a business of some kind and that it was transferred or acquired by another business. It's skipping some steps in proving even a criminal case. U.S. Supreme Court and even the Nebraska Supreme Court has said that that confrontation clause applies if the hearsay evidence being offered is in the nature of testimonial. Usually that means it was gathered or partly gathered by the government with an eye toward prosecution. I suggested to Senator Seiler an easy solution, as far as that problem, would be to say this new expansion of the business records exception only applies in civil or administrative cases. Then you won't have the Sixth Amendment problem. Even in civil cases though, you might have a due process problem that the plaintiff or defendant doesn't get a shot to cross-examine a very harmful witness. So I'm neutral because Senator Seiler and others indicated an ongoing process of trying to fix these problems. Assuming we do get them fixed, I would be neutral on the bill. [LB151]

SENATOR ASHFORD: Thank you, Alan. Senator Seiler, do you wish to close or...?
[LB151]

SENATOR SEILER: Just a couple things. Mr. Peterson reflects our conversation this morning and I have no problem working along with him and on those matters. One thing that is a counterbalance to Senator Chambers' argument about how broad and how thick, how tall is relevancy, and a judge will make the records be relevant before he'll allow them to come in, and that would cut down considerably on what records you would be able to bring before the court. And they would review those in pretrial conferences and make decisions on those before it gets that far. Other...and then the other thing is, is if you'll note on page 3, 17 and 18 line, it has specific exclusion of "opinions" and "diagnoses." So what they're really keeping it down to is business records themselves. You just can't toss something into the file and reach a conclusion that that is not warranted. The records themselves have to reflect it and they have to be kept in the normal course of business. [LB151]

SENATOR ASHFORD: Yes, Senator. [LB151]

SENATOR CHAMBERS: Senator Seiler, maybe if I were practicing law I could accept what you're saying, but we're formulating a policy and it's statutory. You have more confidence in judges than I have reason to have. I don't think all judges are competent. I think many of them are appointed for political reasons and not because of their expertise in the law. And there was a particular judge in Douglas County. Just for the sake of it, I did some research to see how many of his cases were reversed by the Supreme Court and so many were reversed for reasons that even a law student would avoid that, under the ethical requirement that a judge be competent, I thought an ethical complaint could be brought against him. But I didn't bring it because he's not,

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unfortunately, the exception. I think judges, by and large, pay too much attention to who the lawyer is and what the lawyer wants to do. I'm aware of cases involving DUIs and people being put on probation, and if they're a member of the proper family, the lawyer is allowed to get delays and delays and delays, have hearings with the judge when interested people are not notified. But there's no recourse. If you say, well, that was ex parte, they say, well, so what, sue me. So here's how I'm going to sum up what I'm trying to get across as far as my regard for judges. First of all, Shakespeare had one of his characters say the law is "a ass," not an ass but "a ass." And there was a situation where a judge was handling a case and a person wanted to present some evidence out of an Advance Sheet because it was the most recent statement of the court. The judge said, I'm not going to have law given to me out of no comic book. And then I did some research about judges in England who wore these hats. And whether they were outdoors in the wind, the hat never came off. If they got angry and shook their head, the hat never came off. And somebody inspected and you know why it never came off their head? Because they were nailed on. Senator Seiler, I understand what you're trying to do and I will listen and watch whatever the final product is. [LB151]

SENATOR SEILER: Thank you. [LB151]

SENATOR CHAMBERS: But it's going to have to be a lot different from this. And even if it's restricted to the civil area, when they talk about any entity, a compilation in any form, that could be Sanskrit. It could be anything. And then if the judge...if somebody wanted to tell the judge, well, that doesn't fit, well, the language says "any form." This is a form. It's covered by this statute. Now you can't get it in as an exception; bring it in the usual way. So those who see this as solving a particular problem that they have should keep in mind that hard cases make bad law. That's even in court. But I think it makes bad legislation also so I'm going to be the naysayer. I'm going to be the questioner. And one of the reasons is this. I read this as though I were a layperson. And if I cannot understand it and I'm the one who is putting it into the statute...and not everybody who goes to court has a lawyer. There are lay people who not only go to court but they're allowed to represent themselves. If I don't know what it means, how can I expect the public to know? And the statute is the place where people go to find out what we have said as a state you're allowed to do, what you're not allowed to do, what you'll be punished for if you do it, and to what extent you'll be punished; if it's in the civil realm, what somebody is going to be allowed to do to you and hurt you or help you, I don't mean physically, maybe financially or whatever. And this kind of language, in my view, goes way too far, especially when those who support it can't tell me what it means. If it means nothing to the one bringing it, it certainly means nothing to me. So I'm not going to just be critical of a bill you brought. I'll be critical of anything brought like this. But my criticalness can be overcome. My education does have to be improved on issues where I have no expertise, and if enough information is given to me then I will take a position. And if my position was anti, I can be won over by enough facts. But I'm not anti this bill right now because I understand, from what's been said so far, this is not what the final

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version is going to look like. [LB151]

SENATOR SEILER: That is correct. [LB151]

SENATOR CHAMBERS: Okay. That's all I have. [LB151]

SENATOR ASHFORD: Any other comments? [LB151]

SENATOR SEILER: And I've felt many times, walking away from a courtroom, just like you described the judge. Thank you. [LB151]

SENATOR CHAMBERS: Oh. (Laughter) Okay. [LB151]

SENATOR ASHFORD: That concludes the hearings. Thanks, everyone. [LB151]