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Judiciary Committee
February 11, 2011

[LB351 LB451 LB475 LB476 LB644]

The Committee on Judiciary met at 1:30 p.m. on Friday, February 11, 2011, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB451, LB351, LB475, LB476, and LB644. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Colby Coash; Brenda Council; Burke Harr; Tyson Larson; Scott Lautenbaugh; and Amanda McGill. Senators absent: None.

SENATOR LATHROP: Good afternoon, and welcome to the Judiciary Committee, our hearing for Friday. (Laughter) We don't laugh in this committee.

SENATOR MCGILL: (Laugh)

SENATOR LATHROP: All right, this is serious stuff.

SENATOR MCGILL: (Laugh)

SENATOR LATHROP: Welcome to the committee. We have...Senator Ashford, the Chair, is going to lead off today. I think it looks like an experienced crowd so we'll not go through the light system, and I think you know everybody. And normally I would go through the formality of introducing everyone, but the Senator, the Chair, needs to be in a meeting in Omaha, soon, so we're going to go straight to Senator Ashford and have him open on LB451. Welcome, Chairman Ashford. [LB451]

SENATOR ASHFORD: Well, thank you, Senator Lathrop, Mr. Vice Chair. This is LB451 which is the annual court's bill, and it has a variety of proposals in it, and we have other bills and other proposals before us that have related matters that we may want to include in one bill at some later date. But let me go through the points in the existing LB451. First of all, the bill will provide for an expansion of funding sources for interpreters. Though this may not seem to be a big deal, it is. It allows for the court to tap into other available funds to help with the interpreter problem across the state--and this committee is very well aware of that issue. It does delay--I see Judge Merritt here and I see the number LB35 for some reason on my sheet, which makes me quiver--but we're asking Judge Merritt and the Lancaster County District Court to be patient for one more year. This was Senator Coash's bill, and hopefully next year we will have the funds that we can implement the judge in Lancaster County, and I am confident we will. It provides for clerks of the district courts to assist clerks of the county courts in the provision of court services. Again, this is a statutory effort to address the fact that there are numbers of county courts in the state that do not have county court clerk employees at the courthouse each day of each week. And this will allow...clear up any confusion about whether or not the district court clerks may assist in those matters. It provides...the bill provides for a new position of judicial hearing officer. To some extent it addresses the juvenile court, and I appreciate the court bringing us this provision. It

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addresses many issues but it does address the truancy issue, at least in Douglas County, where we have had and continue to have a number of filings for truancy emanating from LB800. This would allow the Supreme Court to appoint a judicial hearing officer. It obviously expands way beyond the truancy area but it does address that problem in Douglas County. It provides for more flexibility in determining hours of work at the various courts. It allows...this is a Bar Association, I believe, provision or suggestion. It allows for a divorce decree to be entered without a hearing if both parties waive the hearing requirement. Both parties must certify in writing that the marriage is irretrievably broken; at least one of the parties must certify that reasonable efforts at reconciliation have been made; and both parties have signed an agreement resolving the issues of the divorce. And this would...this provision would allow for entering of a decree without a hearing if those requirements are met. There is an outright repeal of 24-512 which provides for a county court to be at a location...the provision provides that a county court may be at a location other than the county seat by repealing 24-512. And that provision, as you can imagine, deals with filings, on-line filings, and other efforts at addressing some of the technology aspects of the court system. There is also a technical amendment to propose regarding cooperation...I don't actually understand--I've read this. I'm going to have Janice explain it. I don't know why we have a bill on this, but Janice is here so she can talk about the amendment. With that, I will answer any questions. [LB451]

SENATOR LATHROP: Any questions for Senator Ashford? I see none. Thank you. [LB451]

SENATOR ASHFORD: Thank you. [LB451]

SENATOR LATHROP: Are you going to stick around... [LB451]

SENATOR ASHFORD: A little bit. [LB451]

SENATOR LATHROP: ...or are you going to take off? [LB451]

SENATOR ASHFORD: I'm going to wait just a little bit. [LB451]

SENATOR LATHROP: Thanks. [LB451]

SENATOR ASHFORD: I want to see if anybody... [LB451]

SENATOR LATHROP: Tries to (inaudible) on your bill? [LB451]

SENATOR ASHFORD: ...say anything...derisive. [LB451]

SENATOR LATHROP: Okay. Let's take proponents, and if you're in favor of the bill,

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please step forward, and...I will say that if you're not familiar with this, if you haven't been here before, if you could fill out a sheet and provide it to the page, that would make this process go better. [LB451]

PATRICK McDERMOTT: (Exhibit 1) Good afternoon, members of the committee. My name is Patrick McDermott. I am a county judge in the Fifth Judicial District. I was the--and still am, for that matter--the chairman of the Supreme Court's process reengineering committee, and part of LB451 comes from discussions in that committee. I was here last week and I explained to you that we were using a form of analysis known as "what if" analysis, and we went through different ideas and tried to outline those things that were strengths, weaknesses, challenges, costs associated with the implementation. I am listed as a proponent and, personally, I am a proponent of the section I'm going to address, which is Section 7, the judicial hearing officers. Janice Walker will be talking about the clerk situations. But in fairness to the members of the committee, we never took a vote in that committee on any issue. In order to kind of take off the chains that stifle discussion, we agreed that what we would try and do is present policy makers, whether it was the Judiciary Committee or the Supreme Court, with as broad-based a set of information as we could get on any topic that we picked to discuss--and hearing officers was one of those topics. I think it's like a toolbox. And what we're looking to put in that toolbox are very flexible tools that will allow the Supreme Court to manage judicial resources and get them to where they're needed and move them from where they're not so needed. And that's really our whole purpose in process reengineering is to redo the toolbox. For those of you of my vintage, you may remember that, who is now district judge in Omaha, J. Patrick Mullen started his judicial career as the juvenile court referee. When I first came out as a juvenile court public defender, we used to do all arraignments with Judge Mullen. He then advanced to an associate juvenile judge where he could do all the hearings. And those of you from Douglas County are certainly familiar with the success of the child support referee program. This builds on those successes and says "Let's see if this tool will work." Nobody knows whether it will or not. You can have people who are going to say, "Oh, this is horrible; you're going to tear down the judicial branch." Or some who thinks "This is really a good idea, we've needed it." And in honesty, none of us really know how this works and how it plays out until we do it. And that's the only way you can approach the process reengineering. You have to try and do something, and you have a feedback loop. You take that loop, and then you fix the things you find that's wrong; improve the things you find that's right. And that's what LB451, Section 7 does: adds a tool to the Supreme Court's toolbox. I'd entertain any questions. [LB451]

SENATOR ASHFORD: No, go ahead, Pat. Go ahead for...if you want, just for a few more...if you want to... [LB451]

PATRICK McDERMOTT: I'm good. [LB451]

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SENATOR ASHFORD: Are you? Okay. I'm sorry, Senator Lathrop. Go ahead. [LB451]

SENATOR LATHROP: Okay. I do have a question for you, Judge. [LB451]

PATRICK McDERMOTT: Sure. [LB451]

SENATOR LATHROP: Who is going to be...who are these people going to be? Are they lawyers? [LB451]

PATRICK McDERMOTT: Yes. They have to be lawyers. [LB451]

SENATOR LATHROP: Okay. So we're going to make it...we're going to have lawyers that serve as hearing officers... [LB451]

PATRICK McDERMOTT: That's right. [LB451]

SENATOR LATHROP: ...which is a little bit different than being a judge. And I see that the pay is going to be set by the court. Are these going to be lawyers that continue in their practice, and they come down to the courthouse and hear traffic arraignments? [LB451]

PATRICK McDERMOTT: There's a couple of concepts that I don't think are fleshed out yet. What their practice restrictions would be, if they agree to become a hearing officer, obviously it would be restricted from the kinds of cases where they perform judicially--at least in the county where they do that--is what I would anticipate. Now we didn't draft this legislation, but that's what I would expect. I am hopeful that the people who would actually step forward and be interested in doing this would be attorneys of my vintage who are getting ready to retire, who don't want to work full time but still have an interest in the law, and that look to themselves and say, "You know, that would be something interesting to do. I was never a judge; it would give me a chance to experience that." That's my hope. I think how extensively they would be used is going to depend upon how we use what is going to become a growing cadre of retired judges from both benches who, under legislation of about two years ago, can also be compensated by the Supreme Court to hear cases. So it's my toolbox thing. I'm going to have some retired judges in that toolbox; I'm going to have some hearing officers, depending on what we need and where we need it, to do that. [LB451]

SENATOR LATHROP: Do you think these people are most likely to be appointed in urban areas like Omaha, or is there a use for them or a place for them in Greeley County? [LB451]

PATRICK McDERMOTT: You know, I think it can happen both places. I think you might use them in the rurals where you want to cut down the amount of time that judges

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spend on the road traveling, if you had attorneys that were located nearer to certain courthouses, but I suspect the majority of our discussion was building on the child support referee concept and the juvenile court's experience in Douglas County. And I would expect that, you know, even pro se litigants in the district court in divorce actions, things like that, where going to a hearing officer might be useful to get their pleadings and things lined up so that they can get through the system easier. [LB451]

SENATOR LATHROP: Okay. Thanks. [LB451]

SENATOR ASHFORD: Yes, Senator. [LB451]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman. Thank you for coming again today, Your Honor. I think this is a wonderful idea and I think we discussed this in one of our hearings over the interim...in the interim, I should say. As I understand this, this would allow...this would free up judicial resources and I'll say "real" judges--because these would be hearing officers--this would free up real judges to be handling weightier matters more expeditiously? [LB451]

PATRICK McDERMOTT: That's exactly the concept. I mean I've never kept a clock on how many hours a year I spend giving the general rights advisory in misdemeanor cases. When a great many of those people come in, they plead guilty, and then I have to do the Hays advisory as now just expanded by the appellate court. A hearing officer can probably do that at less expense than it takes for a judge to do it, and that should theoretically give me more time to do the termination of parental rights cases within my juvenile jurisdiction and the contested trials in the full jurisdiction. That's the theory. [LB451]

SENATOR LAUTENBAUGH: Great. [LB451]

SENATOR ASHFORD: Thanks, Senator Lautenbaugh. Thanks, Pat. [LB451]

PATRICK McDERMOTT: Okay. Thank you. [LB451]

SENATOR ASHFORD: Thanks for your continued work on this, obviously. It's great stuff. Janice. [LB451]

JANICE WALKER: Good afternoon, Senator Ashford, members of the committee. My name is Janice Walker. I'm the State Court Administrator, and I am here just to testify on two portions of LB451. The first is the language in Section 1 and Section 9 that has to do with interpreters. This would give the Supreme Court a little bit more flexibility in how they could pay interpreters in the court system. For several years there have been bills introduced in Congress that would provide funds for state courts because this is a growing need in every state in the country--the costs that state courts are facing with

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interpreters. Under our current statute we're limited to using only the General Funds appropriated to us for interpreters. So this would just provide us the flexibility to, if we found other funding sources, that we could go ahead and use those funds. The other portion of the bill that I am going to talk about are the sections that relate to clerks. And as you know, and as we have shown you graphically many times, we have a map of Nebraska with 93 counties. There are 93 county courts; 93 district courts. There are 37 counties in the state where there is no elected clerk of the district court and the duties of that office are carried out by a county employee who also works in several other offices. In the county court system, we have 24 county court offices that are not open 40 hours a week, and that's because either the clerk magistrate in that court works in more than one county and travels, or they are a part-time person. There are a number of other county courts where we have just one full-time employee, so when that person takes sick or vacation leave, we have to bring someone in from another county to keep the court offices open. LB451 would do a couple of things. It would enable the county-paid clerks of the district court and the state-paid clerks of the county court to work together to provide court services a number of ways. The counties, if they wish, could contract with the Supreme Court and my office, and could agree that the county court employee and the district court employees would work together to back up each other's vacation or sick leave. If the county so chose, they would have the option under this bill to say, "We don't have a full-time clerk of district court. Rather than appoint someone from the county clerk or assessor's office, we're going to appoint the county court clerk magistrate to provide those services." And the idea for this came again from Judge McDermott's reengineering committee, and the conversation about it kind of went like this: People in the public come to the courthouse to access court services, whether it's paying a traffic ticket or checking on child support or getting a copy of a probate pleading. They don't care that the clerk of the district court works for the county and the clerk magistrate works for the state; they just want to have access to court services. So this bill would give the counties and the state the ability and, I guess, the encouragement to work together to provide service, at both level of court, using employees who already have knowledge of the court process. The district court county courts are on the same computer system. It just makes sense to give us that flexibility. Now I will say that this statute is very, very broad; very general. There are no specifics. It would be my intention, if this bill passes, to put together a group of clerks from both courts, of judges, of people from the counties, members of the bar, to sit down and say what makes sense and how will this work in the various counties, and perhaps have some pilot projects to see how it works in the very small counties, if it's something that could help in the medium-sized counties. It's just, again as Judge McDermott said, a tool and another part of the toolbox that we're asking you to give us. I'd be happy to answer any questions. [LB451]

SENATOR ASHFORD: Janice, I do think we need to get some outcomes on some of this stuff. You know, is...this is a major issue with my colleagues in the Legislature, obviously, as you noted from the debate the other day on LB302. So it would be helpful

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to have the court get us...you know, try to figure out a way to provide us with information on a fairly frequent basis on how this is working--you know, what courthouses are being staffed with this collaboration... [LB451]

JANICE WALKER: Um-hum. [LB451]

SENATOR ASHFORD: ...and by next...by the end of the year, to have some idea of, you know, who is doing what, where, and how these cases are being processed and so we have some basic information, because it is of deep concern to my colleagues. And I know Senator Larson has some courts that are in that map thing. [LB451]

JANICE WALKER: Right. Right. That map thing. [LB451]

SENATOR ASHFORD: Yeah. [LB451]

JANICE WALKER: And I think that would be very good to do. And again, it kind of fits in with having a pilot...a few pilot projects around the state where we're trying this. It ties in with the discussions we've had before on how much can we use technology, what is possible to make access better for people using technology, and what are the things that really need a live human being to do them? [LB451]

SENATOR ASHFORD: Well, we get aggregate information, which is fine. But it would be nice to get...drill down on some of that information. When we talk about the number of cases that are filed electronically, what does that really mean? I mean I know you've broken it down by whether it's a fine or a civil filing or whatever. But, you know, how does that break down county by county? What's going on in each...in those smaller counties that if they're using e-filing, you know, how many cases are filed that way? [LB451]

JANICE WALKER: We certainly have that information and can provide it. [LB451]

SENATOR ASHFORD: You do? And how much...and then how much flexibility...if this flexibility is starting to kick in, how does that look? What does it look like, county by county, so Senator Larson can know in his counties...when we were talking about...which county was the one with...you were talking about yesterday with the...? [LB451]

SENATOR LARSON: Knox County. [LB451]

SENATOR ASHFORD: Knox County. [LB451]

SENATOR LARSON: Center, Nebraska. [LB451]

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SENATOR ASHFORD: Yeah, that has...in Center that has, what, 200 and... [LB451]

SENATOR LARSON: Two hundred people on a good day. [LB451]

SENATOR ASHFORD: Two hundred people on one street or two streets or whatever. [LB451]

SENATOR LARSON: (Laugh) [LB451]

SENATOR ASHFORD: Well, I mean I think it's very important for our colleagues to understand, you know, how the court is adapting to the needs of those smaller counties. [LB451]

JANICE WALKER: Right. And I would say that the courts in the northern...central and northern part of the state are some of the courts that we are trying all kinds of way to provide access there. Counties with very small population and a lot of travel time, we're experimenting with everything that we can think of to keep those courts available and open. [LB451]

SENATOR ASHFORD: Right. No, I know you're doing that. I just...I think you are doing that. It's just it would be good to have as much information around that as possible. [LB451]

JANICE WALKER: Okay. [LB451]

SENATOR ASHFORD: Any other questions of Janice? Thanks. Thanks, Janice. Next proponent. Warren. [LB451]

WARREN WHITTED: My name is Warren Whitted. I'm here as president-elect of the Nebraska State Bar Association, speaking on behalf of the Bar Association, generally in support of this legislation. The NSBA supports those sections that were just discussed with regard to cooperation between the clerks of the county and district courts. We think that this provides efficiencies which will better allow some of the courts in the smaller counties to maintain access, and we think it's generally a good idea. The bar also supports the provisions allowing for entry of decrees of dissolution without the need for a hearing, assuming that all the i's have been dotted and the t's have been crossed and appropriate filings have been made. We think that this has a number of benefits, not the least of which is it prevents one further confrontation between spouses that are not so happy with one another. It also frees up court time and it reduces cost, because that's one fewer hearing where you've got to pay your lawyer to show up. So we think this is an excellent idea. Finally, we understand completely the need for postponing the implementation of the additional district judge in Lancaster County, but we do want to reaffirm our support for the position that this is an important position. It was based upon

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an analysis of need for judicial resources in Lancaster County and it should not be postponed beyond what we're talking about here. And we also think that it's important that the body recognize that providing adequate judicial resources throughout the state is an essential to the quality of our judiciary and the access of our population to justice. The Nebraska State Bar Association has also carefully considered the provisions regarding the judicial hearing officers. And while we appreciate the role that hearing officers have played, as has been explained previously, we have serious concerns and issues with regard to how this would actually be implemented, and I'll do it in the form of questions. First of all, how would the person who is adversely affected by the decision of a hearing officer appeal that decision? How would the judicial hearing officers affected in the (inaudible) of justice to defendants who are appearing pro se? How would the process properly address due process of misdemeanor defendants? Will the appointment of judicial hearing officers create a new subcounty court system and allow further postponement of the appointment of judicial resources and further allocation of judicial resources? And finally, how will we assure that these judicial hearing officers are, in fact, accountable? Appointed judges stand for retention. The judicial hearing officers are...there is no forum provided where the people affected can question the effectiveness of the judicial hearing officers in the performance of their duties. It's our feeling that one of the primary responsibilities of the government of the state of Nebraska is to make sure that our people have full and adequate access to the court system. Most people's interaction with the court begins at the county court level, and the impression that they gain there is the impression they gain of the entire judicial system. So we think it's extremely important that the Legislature consider that. [LB451]

SENATOR ASHFORD: Good points. Thanks, Warren. Senator Lautenbaugh. [LB451]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman. Thank you for coming today, sir. You mentioned a concern about the hearing officers not standing for retention. Rather than a full-fledged election, would you support something like them being, like, magistrates and have a term of a year, subject to reappointment, or two or four years, whatever, something that would just provide some finality and review at that point? [LB451]

WARREN WHITTED: Your suggestions, I think, are well taken, that there are ways that we could structure this so as to provide an effective mechanism both for providing a service, which these people could definitely provide, and for making sure that these people are accountable. And that we very carefully created the system of selection and retention of judges, allowing full public input and discharge of responsibilities of retaining or removing judges, and we don't want to create courts similar to our old justice of the peace courts or police courts where these people aren't accountable and yet they still are sentencing people, they still are discharging those responsibilities. But yes, Senator, I think there is a way that that could be accomplished. [LB451]

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SENATOR ASHFORD: Those are good points. Any other questions of Warren? Thanks, Warren, [LB451]

WARREN WHITTED: Thank you. [LB451]

SENATOR ASHFORD: Next proponent. Opponent? Neutral? (Laugh) I was wondering where Judge Merritt was going to land on this one. (Laugh) [LB451]

PAUL MERRITT: Senator Ashford, members of the Judiciary Committee, my name is Paul Merritt. I am one of the district judges for the Third Judicial District which is Lancaster County. I'm here on behalf of the seven judges of the Third Judicial District. For those of you who have been on the committee for the last few years prior to last year, you saw me for a number of years requesting the creation of an eighth judgeship for Lancaster County. My appearances were always after the Judicial Resources Commission had voted the need for an additional district judge in Lancaster County. In 2009, you agreed and an eighth judgeship was created by LB35. For fiscal reasons, the effective date was set off for two years to start July 1 of this year. As Senator Ashford has noted, Section 2 of LB451 would amend the law to delay the creation of the eighth judgeship for the Third Judicial District for another year, from July 1 of this year to July 1 of next year, parenthetically, hopefully, closed parenthetically. Since 2009, our workload has not decreased. We are still in need of an additional judge as bad as we were when the Legislature created the eighth judgeship two years ago, if not more so. As an aside, although hopefully not the beginning of a trend, our new case filings for January of this year were up 20 percent from January of last year. I have no idea why. Notwithstanding the increase in our workload, we understand that the Legislature is facing severe fiscal issues and recognize the need for everyone to act fiscally responsible. With that in mind, I'm here to tell you that we do not oppose the deferment of our eighth judgeship until July 1, 2012. By saying that, we are not saying that we don't need the eighth judge. We're saying that we've been able to meet our responsibilities in the past and we will strive to continue to do so in the future. As some of you may know, Judge Cheuvront has informed the Governor of his resignation from the bench effective July 31 of this year. Upon his resignation, we will be down to six judges until a replacement is named and comes on board. We are confident that the Judicial Resources Commission and the Judicial Nominating Commission will act in a timely fashion to limit the amount of time that we only have six judges. As some of you may also be aware, in the fall of 2008 the Supreme Court authorized a visiting judge program for Lancaster County. As it finally worked out, three district judges from across the state were assigned a number of cases from our docket and handled those cases for us. For a number of reasons, and at the request of the visiting judges, the program was terminated in December 2009. Since that time, we have noticed an increase caused by no longer having the assistance of those three judges. Realistically, we acknowledge, as I'm sure each of you does, that budgetary constraints are followed by consequences. One of these consequences is the system is slowing down. Between January 31, 2010, and January 31, 2011, there has

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been an increase in opinion cases in our district of almost 7 percent. I have six lines to finish. Can I finish them? Okay. [LB451]

SENATOR ASHFORD: I think I better let you, I think. [LB451]

PAUL MERRITT: Pardon me? [LB451]

SENATOR ASHFORD: No, that's fine. Go ahead, Judge Merritt. [LB451]

PAUL MERRITT: Okay. Well, while we are battling as well as we can and have made changes in order to try and keep up, the data shows that we're losing the battle. Resources are being directed to those cases that have statutorily created time constraints. There will continue to be justice; it just may not be as accessible to all as quickly as we would like. Having said that, you may rest assured that we will continue to devote our time and energies to the citizens of Lancaster County as we have in the past. Any questions? [LB451]

SENATOR ASHFORD: Thanks, Judge Merritt. Any questions of Judge Merritt? You have two great advocates here with Senator McGill and Senator Coash, so rest assured that... [LB451]

PAUL MERRITT: Well, and I also noticed... [LB451]

SENATOR ASHFORD: ...we're going to do our very best to... [LB451]

PAUL MERRITT: And I also noticed that Senator Council and I had the same lunch today... [LB451]

SENATOR ASHFORD: And Senator Council, as well. (Laugh) [LB451]

PAUL MERRITT: ...had the same lunch today, so. [LB451]

SENATOR COUNCIL: Yes. (Laugh) [LB451]

SENATOR ASHFORD: No, rest assured that we are very, very hopeful that we can just stop this and get this done next year, so. [LB451]

PAUL MERRITT: Are there any questions? [LB451]

SENATOR ASHFORD: Yes, Senator Coash. [LB451]

SENATOR COASH: Thank you, Chairman. Judge Merritt, can you go back to the part of your testimony where there was a visiting judge program that ended in '09? [LB451]

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PAUL MERRITT: Back in, I think, August of 2008, we were trying to come up, with a Supreme Court, with a way to try and alleviate some of the...distribute more cases among judges. And we had a group of judges from across the state who came to us and volunteered to do some of the work. The Supreme Court agreed with that, and they appointed some of them to be judges for the Third Judicial District so they could come in and take some of those cases. Number one, those people traveled from other districts. They did not have...couldn't bring their court reporters with them, couldn't bring their bailiffs with them, and although they did yeoman's work and did those cases, we ended basically with three of them who stayed on board for about a year. At the end of the time period, they said--and rightly so--they couldn't see where it was making a difference. And in that one-year period, it's hard to see whether something is making a difference, particularly when you are 200 miles away. And quite frankly, we didn't know in that short of a period time whether it was making a difference. But now that we've come a year since they've been gone, we can tell it was making a difference, because we can see what it's doing to our schedules not to have the benefit of those. [LB451]

SENATOR COASH: So whose decision was it to end that? Was it the three judges? [LB451]

PAUL MERRITT: The judges basically said that they evaluated the situation and they just weren't sure that it was working. And we appreciated what they were volunteering for us, and so when they weren't sure and they said they'd like to terminate the program, we said, "Fine. We appreciate what you've done for us for 18 months." [LB451]

SENATOR COASH: Okay. Thanks for a little more information on that. [LB451]

SENATOR ASHFORD: Senator Lautenbaugh. [LB451]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman. Your Honor, more of a comment than anything else. Well, thank you for coming today and understand we do take this seriously. And without elaborating, I worked very hard yesterday to free up two weeks of one of your colleague's time this June, so I hope that helps a little. We successfully did that, so. [LB451]

PAUL MERRITT: Well, that must be the e-mail I got this morning that says something does work and, in fact, there were...something got resolved that was going to free up at least two weeks of time. [LB451]

SENATOR LAUTENBAUGH: Without elaboration, yes, (inaudible). [LB451]

PAUL MERRITT: Yes, sir. I got that e-mail, so. [LB451]

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SENATOR ASHFORD: Thank you, Senator Lautenbaugh, for that help. (Laughter)
Thank you, Judge Merritt. [LB451]

PAUL MERRITT: Okay. Thank you all. [LB451]

SENATOR MCGILL: He's taking one for the team. [LB451]

SENATOR ASHFORD: Any other neutral testifiers? [LB451]

ELAINE MENZEL: Chairman Ashford and members of the Judiciary Committee, for the record my name is Elaine Menzel, M-e-n-z-e-l. I'm here on behalf of the Nebraska Association of County Officials, and I'm just appearing here in a neutral capacity to address the issues associated with the clerk of the district court in agreements. I'm not sure that that provision needs to be added to statute, because that...they are already allowed to create interlocal agreements under Statute 13-800 series of statutes. However, I just want to express and reiterate our desire to be part of the process and continue discussions. I know that we've expressed it in both Senator Ashford and Senator Council's bills and other proposals that have been before your committee. Any questions? And I'd gladly attempt to answer them. [LB451]

SENATOR ASHFORD: I don't see any. Thanks, Elaine. [LB451]

ELAINE MENZEL: Thank you. [LB451]

SENATOR ASHFORD: Any other neutral testifiers? [LB451]

JANET WIECHELMAN: (Exhibit 2) Good afternoon, Senator Ashford and committee members. I am Janet Wiechelman. Wiechelman is W-i-e-c-h-e-l-m-a-n, and I'm the clerk of the district court for Cedar County and also the legislative liaison for the Clerks of District Court. I am here in a neutral position to LB451, as the legislation does not effectively provide a plan for the clerks of district court and clerk magistrates and their staff, but it does create other avenues available for the Supreme Court to improve and expand the services of the court. The position taken by our association is based on several reasons. The first is that many county clerks ex officio clerks of the district court, have for years had a cooperative agreement with the Court Administrator's Office in providing minimal services for the county court offices in the smaller counties. With the county court clerk ex officio clerk of district court assisting the county court, the services then are being provided five days a week when the county court office is open on a less available basis. If this legislation would pass, it would terminate that agreement and the district court office would also be less available on a daily basis. As you can see from the data I have provided, the counties that already have an ex officio position are also the counties that have been identified on the map provided by the Court Administrator's

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Office as being closed or staff reduced. And the issue we always have is access to the court. If the district court office was also closed, where would access be? Further, our association is in a neutral position to the legislative bill that identifies that agreement between the State Court Administrator and the county board but does not require the agreement. Nuckolls County currently has an agreement between the county board and the Court Administrator's Office which is included in this testimony. And I understand that, now recently, discussion has occurred in Morrill County. The capability for an interlocal agreement is already provided in 13-803. The Clerks of District Court have concern about the language in the Nuckolls County agreement, as it does not give specific duties should the clerk of district court assist the county court, only the "duties of the deputy clerk of the county court." Again, how much will be requested from the clerk of district court in providing the duties of the county court? Finally, our association has concern about the language that is being included on page 13, lines 17 and 18. If it is to identify the county clerks ex officio clerk of district court's office, whose services as clerk of district court would then be provided by the clerk magistrate and their staff, it is already included in the statute of 32-524. We are concerned that the inclusion of this language would affect other clerks of district court. In many other counties already, you will find an informal agreement between the county clerk magistrate and the clerk of district court. We would request that this legislation not be brought out of committee. If the Court Administrator's Office, due to budget constraints, is forced to close or reduce staff, we would ask that they make contact with the county boards and find if an agreement could be entered in each county, because each county was going to have to be looked at on an individual basis for any type of agreement. By entering into this agreement, it would still leave in place the statutory county clerks ex officio clerks of district court and the elected clerks of district court, as this legislative bill does not adequately address all statutory issues. Our association will continue to work with the Court Administrator's Office about the provisions of this bill and the interlocal agreement. Thank you for your time. [LB451]

SENATOR LATHROP: Thank you very much for the testimony. Any questions from the committee? I see none. [LB451]

JANET WIECHELMAN: Thank you. [LB451]

SENATOR LATHROP: Thank you for your information too. Anyone else here to testify in a neutral capacity? Senator Ashford had to leave, so that would be the equivalent of waiving his close, so that will close our hearing on LB451 and bring us to LB351 and Senator Lautenbaugh, who's...looks like the rest of the afternoon is his. [LB451]

SENATOR LAUTENBAUGH: This must be your dream day. [LB351]

SENATOR LATHROP: It's my dream day. Stick around. Good afternoon, Senator. [LB351]

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SENATOR LAUTENBAUGH: Good afternoon, Mr. Vice Chairman. My name is Scott Lautenbaugh. I'm the senator from District 18. You said LB351, correct? [LB351]

SENATOR LATHROP: LB351. Yes, sir. [LB351]

SENATOR LAUTENBAUGH: LB351 is a very simple bill. I brought this at no one's suggestion. I asked no one to come testify about this, but it does address something that I encountered that I thought was...well, first, it was surprising; then it seemed fairly unjust. In a scenario which is common in my practice, I usually represent personally insureds at the behest of insurance carriers. Unbeknownst to me--I discovered this over the last couple of years--in a case where the insured files bankruptcy, my understanding was the recovery was just limited to the policy amount. There's no possibility of an excess judgment because that person was bankrupt. What I was unaware of is that existing law as interpreted allows the plaintiff to simply substitute the insurance company for the named insured defendant. So, suddenly, instead of having an individual as a defendant, which is proper, we have a direct action naming the insurance company. I have been advised by attorneys who were able to do this, substitute the insurance carrier--simply put: Well, it's going to take more to sell this now, because now that the insurance company is the named defendant we're going to get more money from a jury. Nothing in this scenario is the result of an action by the insurance carrier, but I think the prejudice to the insurance carrier is very clear and it's recognized by all parties involved and yet current law seems to allow it. What this bill simply does is to say you still keep the named insured as the named defendant, if you will. As in existing law, recovery would be limited against that bankrupt defendant to the amount of his policy coverage but life would go on pretty much as it had otherwise. And that is, in a nutshell, what this bill does. [LB351]

SENATOR LATHROP: Very good. Any questions for Senator Lautenbaugh? I see none. Are there...before you get up, is anyone here to testify on this bill, for or against? Are there any proponents? I see none. There are opponents so I guess you do have to get out of the chair. (Laugh) Thank you, Senator. Welcome to the Judiciary Committee. [LB351]

GREG COFFEY: I'm getting old. [LB351]

SENATOR LATHROP: You're at that age. [LB351]

GREG COFFEY: Senator Lathrop, members of the committee, my name is Greg Coffey. The last name is spelled C-o-f-f-e-y. I'm an attorney with Friedman Law Offices in Lincoln, Nebraska, and I'm here on behalf of the Nebraska Association of Trial Attorneys. I've read Senator Lautenbaugh's bill and it only makes one small sentence of a change to Nebraska statutes, but if it's the goal of LB351 to protect out-of-state

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insurance companies at the expense of Nebraskans who have been injured by the negligent acts of others, it may well achieve that purpose. If it is the goal of LB351 to allow someone who is at fault in causing an accident to prevent those injured by their conduct from ever recovering for their injuries or having their day in court, LB351 may well achieve that purpose. Federal bankruptcy law imposes an automatic stay on any proceedings against a debtor who files bankruptcy. This means that if there's a lawsuit pending against a driver who caused an accident, and that driver declares bankruptcy, then proceedings in that injury lawsuit are automatically stopped by the filing of the bankruptcy. The automatic stay would also prevent any new suits from going forward for anything that happened before the bankruptcy was filed. At the conclusion of the bankruptcy proceedings, the debtor is discharged and so are his debts, which means you can't sue by name a discharged debtor for something that happened before the filing of the bankruptcy. If John Doe causes a horrific accident by running a red light while text messaging, and later on declares bankruptcy, the people injured by John Doe's negligence would be prevented by the automatic stay and the discharge provisions of the federal Bankruptcy Code from maintaining an action against John Doe in his name. The way to get around the automatic stay and the discharge provisions of the federal Bankruptcy Code is to allow the injured party to maintain an action directly against the insurance carrier which has been paid to assume that risk. We have long required drivers in this state to maintain liability coverage of at least \$25,000 per person and \$50,000 per accident in order to legally drive a car. That law was established not for the protection of the driver carrying that insurance but for the protection of the rest of the public who might be harmed by someone who lacks financial responsibility. This bill would negate that protection in any case where the at-fault driver declares bankruptcy. I would welcome any questions. [LB351]

SENATOR LATHROP: Senator Council, you are recognized. [LB351]

SENATOR COUNCIL: Yes. And thank you, Mr. Coffey, and I was going to ask this question to Senator Lautenbaugh, and I'll still invite opportunity to respond on his closing, but Senator Lautenbaugh in his opening indicated that in cases where there is insurance coverage, that oftentimes the limitation on recovery are the policy limits. Would the same hold true in the case where the insurance carrier is substituted for the now discharged bankrupt insured? [LB351]

GREG COFFEY: Yes, Senator. Under current law the bankrupt at-fault driver's insurance policy limits would be the maximum available. There would be no real opportunity for an excess judgment. [LB351]

SENATOR COUNCIL: Okay. And I'm saying that's even if the...even in the case where the insurance company now is... [LB351]

GREG COFFEY: Correct. [LB351]

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SENATOR COUNCIL: ...substituted and if the insured had not been discharged from bankruptcy, those same limits apply, the policy limits, or as much as could be recovered? [LB351]

GREG COFFEY: Yeah. If...under current law, if the at-fault driver declares bankruptcy, the plaintiff would be limited by the amount of insurance coverage that the at-fault driver had purchased before the accident. [LB351]

SENATOR COUNCIL: Okay. So it's only in the case of a bankruptcy that the insurance company could be substituted for the defendant. Under current law, there's no other...even when there's no bankruptcy involved, the insurance company may be added as a party, but wouldn't be substituted, would they? [LB351]

GREG COFFEY: Yeah. The insurance company wouldn't be a named party in other kinds of circumstances. There's a contractual arrangement between the insurance company and the at-fault driver where the insurance company covers up to the amount of coverage that's purchased, whatever harms that at-fault driver is determined to have caused, and there's no substitution of parties. And in the circumstance of a bankruptcy, though, federal law supersedes any contradictive state law. So, you know, even if the Legislature were to create some statutory scheme by which you would say, well, you could go after them in their name, the federal Bankruptcy Code would say no. There's an automatic stay that's imposed. You can't maintain a lawsuit against that person. Once discharged, you can't maintain an action against them because their debts have been discharged. And so the only way to allow people who have been hurt and sustained harm to maintain their cause of action to recover for the harms that they've sustained, is by allowing them to substitute the insurance company for the driver, and then only to the extent of the limits of the policy that were already in place. [LB351]

SENATOR COUNCIL: Okay. And that was the final question then. If the insurance company is substituted, the plaintiff can recover no more than he or she could have recovered if the named insured had not been discharged in a bankruptcy. [LB351]

GREG COFFEY: And maybe even less, Senator. Because once the at-fault driver declares bankruptcy, the maximum that a plaintiff could recover is the face value limit of the policy. If that at-fault driver does not declare bankruptcy, let's say they have unlimited resources of their own, the insurance is going to cover up to the face value of the policy. But if there's an excess judgment, that at-fault driver could theoretically be hit for the excess. But in the case of a bankruptcy, the limit... [LB351]

SENATOR COUNCIL: It's limited to the policy. [LB351]

GREG COFFEY: Yeah. They're just limited to the policy when it's... [LB351]

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SENATOR COUNCIL: Thank you. [LB351]

SENATOR LATHROP: Very good. I see no other questions. Thanks, Greg. Any other opponents here to testify today? Anyone here on LB351 in a neutral capacity? Senator Lautenbaugh to close. [LB351]

SENATOR LAUTENBAUGH: If you were closely paying attention, you just saw why I brought this bill. What this bill does is protects those evil out-of-state insurance companies. That's what happens when the insurance companies are substituted as a defendant through no fault of their own in this scenario. And apparently the gentleman who just testified is unaware of a very simple procedure called motion for relief from the automatic stay, which is what happens more often, because most people don't even know you can substitute the insurance company. So I think this committee did not receive what I would call accurate information when you were just told there's nothing the plaintiff can do if we change this law. That's not correct. You file a motion for relief from the automatic stay and you proceed against that defendant. And that's not novel and that's not unknown and I don't know why you weren't told it, but you weren't. But again, you heard the opening here. This bill would allow out-of-state insurance companies...I don't see anywhere in here where it says that we just focus on the out-of-state ones, but apparently that's who we're talking about, to get away with something here. That's not the case. The insurance companies are being penalized through something that is no fault of theirs. Their insured filed bankruptcy. This bill is brought to address that. [LB351]

SENATOR LATHROP: Senator Council. [LB351]

SENATOR COUNCIL: And I guess that's what I'm trying to get at, Senator Lautenbaugh: the insurance being penalized. If their insured had not filed bankruptcy--which the insurance company has nothing to do with... [LB351]

SENATOR LAUTENBAUGH: Right. [LB351]

SENATOR COUNCIL: If their insured had not filed bankruptcy, the insurance company would be subject to being liable to whatever the jury returned as a damage award, up to the limits of the policy. [LB351]

SENATOR LAUTENBAUGH: Yes. [LB351]

SENATOR COUNCIL: Correct? So what it kind of...what is appears to me is that the benefit kind of rests with the plaintiff to the extent that they still have someone that they can recover against. I guess the downside...and I'm not getting into whether it's an out-of-state insurance company or an in-state insurance company. If for whatever

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reason...and bankruptcy courts occasionally deny motions to lift the stay, so my concern about it is an injured victim being left without a remedy, and that's the concern I have. [LB351]

SENATOR LAUTENBAUGH: I have...I used to actually do bankruptcy work a million years ago. There were scenarios when creditors were denied relief from the stay to...you know, if they wanted to go pick up their collateral, the judge says, no, it's necessary for reorganization or whatnot. I will warrant to you that I'm unfamiliar with any circumstance where someone said, look, I've got a tort action; I need relief from the state (inaudible) let that proceed, where the bankruptcy court said, no, that's not permitted. Because they don't have a dog in the fight at that point. The recovery is just limited to the policy, so the bankruptcy court doesn't care. If the defendant does care, the plaintiff kind of likes it because...well, not when you get relief from the stay, because the defendant still stays the named defendant. But to correct something else, there's not a scenario really barring this where normally the insurance company would be a named defendant in just a personal injury lawsuit. It's the two parties that are the named. [LB351]

SENATOR COUNCIL: Well, needless to say, I do absolutely no personal injury work; don't want to do any personal injury work. And so that's why my ignorance about the subject revealed itself. Thank you. [LB351]

SENATOR LATHROP: I wouldn't argue with you about the fact that you can go to the bankruptcy court and get relief from the stay and proceed to...against the bankrupt. I'm not sure if the person goes through bankruptcy before you file suit and the, discharge the debt if that isn't a reason to do this. And here's the other thing. I mean just...I'm not trying to take a side, but the other thing that strikes me in this situation is if you have a guy that goes through bankruptcy, and let's say he's got a \$25,000 policy, and he causes \$40,000 worth of damage--hits somebody and their bills are \$40,000. He goes through bankruptcy and now has no...there's no way the plaintiff can ever get to anything beyond the policy limits. The insurance company that previously had a duty to resolve the case and avoid an excess liability judgment now has no reason to settle the case, and they can go to trial because they're never going to be...their insured is never going to be hit with an excess liability judgment. And so there really is two sides to this. I appreciate what you're saying, Scott, and I would acknowledge that before you brought this bill I would have been getting relief from the bankruptcy court, probably. [LB351]

SENATOR LAUTENBAUGH: Yeah. [LB351]

SENATOR LATHROP: But I can also see the other side of it, which is, well, you know, ACME Insurance Company now has no incentive whatsoever to settle a case because they'll...whatever duty they owe to their insured has simply been absolved by the bankruptcy proceeding because their insured can never be hit for an excess liability.

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[LB351]

SENATOR LAUTENBAUGH: But that would really be true regardless of whether or not you change the name of the defendant. The person is just as bankrupt and the coverage is just as limited. [LB351]

SENATOR LATHROP: Yeah, but you're talking about kind of the balance of equities there and the insurance company now can say, well, I'm going to hide behind the bankrupt. Normally I'd resolve this case for \$25,000, but because you'll never get hit for excess liability judgment and I'll never get hit for bad faith, I'll go ahead and defend it and make the plaintiff go to trial. [LB351]

SENATOR LAUTENBAUGH: Well, that's correct, but that would be true regardless of what you did with the parties. [LB351]

SENATOR LATHROP: Right. Well, to the extent there's some advantage in having ACME Insurance Company as the named defendant, maybe it's fair because you no longer have a duty to your insured to resolve it within the policy limits if you can. Just an academic conversation perhaps. But that's...that will be the close on LB351, and bring us to Senator Lautenbaugh on LB475. [LB351]

SENATOR LAUTENBAUGH: Oh, okay. LB475. I apologize, I have them in a different order here. [LB475]

SENATOR LATHROP: Relates to civil procedure. [LB475]

SENATOR LAUTENBAUGH: It does indeed. And my name is Senator Lautenbaugh, from District 18, introducing this bill. There are others who can explain this scenario, following me, but I will give or make an attempt at explaining what I think resulted in me bringing this bill. You can garnish employees of the state and get their wages or sums due them, just like you would an employee of your law firm or the county or anybody else. For several years, it's my understanding, that was also applied to contractors that are doing business with the state--independent contractors could still be garnished. Within the last year that has been interpreted away to say that the law does not apply to allow creditors to garnish independent contractors who are receiving funds from the state. This bill would very simply clarify that you can garnish independent contractors. [LB475]

SENATOR LATHROP: And have an ongoing garnishment. [LB475]

SENATOR LAUTENBAUGH: Yes. [LB475]

SENATOR LATHROP: That's the difference. You can always garnish somebody, but

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this would allow you an ongoing garnishment? [LB475]

SENATOR LAUTENBAUGH: As I understand it, this was interpreted as saying there was no ability to garnish limited contractors, whether ongoing or (inaudible) off, but you just could not do it. [LB475]

SENATOR LATHROP: Okay. I see we have somebody from the collection folks here, so. All right. Any questions for Senator Lautenbaugh? I see none. We'll get to the proponents in that case. Proponents of LB475. [LB475]

TESSA HERMANSON: Good afternoon, Senator Lathrop, members of the committee. My name is Tessa Hermanson, T-e-s-s-a H-e-r-m-a-n-s-o-n. I am general counsel for Credit Management Services, but I'm here today on behalf of the Nebraska Collectors Association to testify in support of LB475. I'll give you a little history on it of why it came up. You know, the general rule is that the state is not subject to lawsuits due to the doctrine of sovereign immunity. And currently, Nebraska statutes provide a specific exception to that for employees and officers. The statutes do not specifically say independent contractors. Now that being said, for the last decade my client and others in the industry have garnished, the state, have garnished independent contractors who worked for the state, specifically those who worked for the Department of Health and Human Services. So we would issue them. They would not raise the issue of sovereign immunity and answer the garnishment summons. About nine months ago their policy changed and they began to raise this as a bar to the garnishment, which they have won through the court system. After they began objecting to these...we as a group got together and said: Look, they've been doing this; there's no reason that we can see in the statutes why they would have intended to exclude independent contractors from this exception. And so we just simply brought this bill to reinstate the former practices that we've had with the state and to clarify the issue. I did speak with Shannon Anderson yesterday from the Department of Administrative Services, and her concern was that there would be a lot of additional paperwork and cost to the state for bringing this bill. She shared with me that there are 16,000 independent contractors employed by the state. What she didn't realize is that the Department of Health and Human Services has 12,000 of those and have already been doing it. I did look at the fiscal note, but just prior to this hearing, and I don't see how those numbers are reached. I mean I can't imagine that there would take more staff to do this when they've been doing it already. And I would ask you to keep in mind, while there's 16,000 independent contractors and 12,000 for Health and Human Services, very few of those would actually be individuals who have garnishment proceedings brought against them. The only other point I'd like to make is that, you know, private companies are required to comply with garnishment orders for independent contractors. We see no reason why the state should be any different. It seems actually unfair that because I work for the state, you know, I don't get garnished, but if I worked for a private company I would be subject to those garnishments. I have nothing further. Questions? [LB475]

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SENATOR LATHROP: Okay. Senator Council. [LB475]

SENATOR COUNCIL: Question: In your remarks were you suggesting that the Department of Health and Human Services should already be bearing the cost associated with garnishing independent contractors and the amount set forth in the fiscal note could be inflated? [LB475]

TESSA HERMANSON: Could be. Well, I am saying, Senator, they have been doing it. They've been doing it for a long time. [LB475]

SENATOR COUNCIL: Yeah, well... [LB475]

SENATOR LATHROP: Is that inflating fiscal notes or answering (inaudible)? [LB475]

TESSA HERMANSON: (Laugh) [LB475]

SENATOR MCGILL: We don't disagree with you. [LB475]

SENATOR COUNCIL: And the other thing, I mean it's just...maybe it's serendipitous that the change in policy is about nine months ago, about the same time that a number of the private contractors under foster care... [LB475]

SENATOR MCGILL: Families Matter. [LB475]

SENATOR COUNCIL: ...were having problems and they weren't paying their providers, and their providers were taking action and then trying to enforce their recovery through garnishment. [LB475]

TESSA HERMANSON: Very well could be. [LB475]

SENATOR COUNCIL: Did the credit collection industry receive any kind of blanket notification from the Department of Health and Human Services that, effective X day, you shall no longer be...that you just were made aware of it after the lawsuit? [LB475]

TESSA HERMANSON: Correct. Well, we were made aware of it when they filed 12(b)(6) motions to dismiss our garnishment proceedings. [LB475]

SENATOR COUNCIL: Okay, so they... [LB475]

TESSA HERMANSON: They did not give us notice beforehand, no. So we had filed the garnishment. I mean we have the judgment against the individual. Filed the garnishment against the state, which they've, you know, constantly been answering. And now they've

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objected to it, and we went to several hearings on it but they did not tell us before.
[LB475]

SENATOR COUNCIL: Hmm...12(b)(6) motions require the appearance of counsel?
[LB475]

TESSA HERMANSON: For Health and Human Services? [LB475]

SENATOR COUNCIL: Yes. [LB475]

TESSA HERMANSON: Yes. [LB475]

SENATOR COUNCIL: Thank you. [LB475]

TESSA HERMANSON: Yes. [LB475]

SENATOR LATHROP: I think we get it. But it's really hard, though, and Senator Lautenbaugh has probably told you, with the fiscal note we've got to account for that in the budget. We can't just say: Nonsense, we're ignoring it and we don't believe it. It shows up on the green sheet, is what we call it, and if we don't appropriate money for it then we don't balance the budget. So it does make passing a bill with a fiscal note like that very difficult. [LB475]

SENATOR COUNCIL: Senator. Just one correction, Senator Lathrop. If we don't appropriate or reduce their budget to account for it. You mean, you could... [LB475]

SENATOR LATHROP: I suppose we could stack these all up and then... [LB475]

SENATOR MCGILL: Subtract. [LB475]

SENATOR COUNCIL: And then subtract. [LB475]

SENATOR MCGILL: Subtract \$115,000 from their other...the rest of the budget. [LB475]

SENATOR LATHROP: And there might be a day and a time and a bill for that fight. I'm not sure this is it but we'll see. Thank you for coming. We know you came all the way from Grand Island, am I right? [LB475]

TESSA HERMANSON: Yes. Yes, you're right. Thank you. [LB475]

SENATOR LATHROP: Thank you. Anyone else here in support of LB475? Anyone here in opposition? Anyone here in a neutral capacity? Seeing none, Senator Lautenbaugh to close on LB475. You may not need to oppose a bill if you put a fiscal note on it like

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this. (Laughter) [LB475]

SENATOR LAUTENBAUGH: Understood. And I don't remember bringing a bill that Senator Council has enjoyed more, so this is...(laughter)...or at all--so this is quite the day. And I did talk to people from DAS, HHS, and somebody else today, and I said I would try to work with them, which also is remarkable. So, you know, we're all doing new things here. But I don't think... [LB475]

SENATOR LATHROP: Let us know how that goes, Senator Lautenbaugh. [LB475]

SENATOR LAUTENBAUGH: I don't think the fiscal note is realistic, considering it's something they were already doing. I know we have to get that addressed and we will. I mean, I wouldn't have thrown this in the hopper if I didn't want it to go. [LB475]

SENATOR LATHROP: Okay. [LB475]

SENATOR LAUTENBAUGH: So hopefully we can. [LB475]

SENATOR LATHROP: All right. On to LB476, which also apparently deals with civil procedure. [LB475]

SENATOR LAUTENBAUGH: Yes, it does. Another one of my passions. And thank you, Senator. [LB476]

SENATOR LATHROP: I assume you got straight A's in law school in civ pro. [LB476]

SENATOR LAUTENBAUGH: Oh yeah, undoubtedly. My name is Scott Lautenbaugh, representing District 18. LB476. Careful observers of the Judiciary Committee, you may recall this bill from last year, and subsequent discussions where we tried to provide a new method of service of process. We were swiftly denounced by one law school professor who said we did it all wrong, and supported by another one who said it was just fine. So I guess this is the "dueling professors" act of 2011. We've brought some changes that just are meant to clarify what we did a year ago, and I won't belabor the point. I believe there's someone else here to testify as to what we're doing today and I will let her do just that unless you have any questions for me. [LB476]

SENATOR LATHROP: Can you give me the short version of what this does though? We just allow private people to do the service process. [LB476]

SENATOR LAUTENBAUGH: Carriers like FedEx and whatnot... [LB476]

SENATOR COUNCIL: FedEx and UPS. [LB476]

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SENATOR LAUTENBAUGH: ...instead of just certified mail. There was some question as to whether or not we had said "and you can do that in these circumstances," like we provided a method but no place you could use it. The other professor said, "Oh, no; it's clear you can use it or they wouldn't have provided it," you know, I mean, so. [LB476]

SENATOR LATHROP: And tell me why if you can serve by certified mail or a constable, why this is a good idea? Remind me. I don't remember the discussion. [LB476]

SENATOR LAUTENBAUGH: Probably cheaper than a constable and maybe swifter than certified mail would be my guess. [LB476]

SENATOR LATHROP: Okay. [LB476]

SENATOR LAUTENBAUGH: I haven't used it yet but. [LB476]

SENATOR LATHROP: Good. Senator Council. [LB476]

SENATOR COUNCIL: I mean just one question on that. When you are served by certified mail, some very astute defendants, you know, choose not to accept the certified mail, and they're not home; they don't go to the post office and pick it up. How is that accounted for? Because FedEx or UPS will leave, and that's, quite frankly, no different than diligent efforts. [LB476]

SENATOR LAUTENBAUGH: Yes. And this bill also provides that proof of delivery by a designated delivery service must be shown by a signed delivery receipt filed with the court. [LB476]

SENATOR COUNCIL: Okay. So it has to be...okay. Okay. [LB476]

SENATOR LAUTENBAUGH: And I think we had a testifier on a different bill, earlier this year, saying that nothing good ever comes by certified mail. So people... [LB476]

SENATOR COUNCIL: Exactly. Exactly. [LB476]

SENATOR LAUTENBAUGH: But FedEx is...you know, maybe it's your Publishers Clearinghouse or something. I mean who knows? [LB476]

SENATOR COUNCIL: So you'd get to have a signature receipt. It couldn't be one of those leave it at the...how does FedEx and UPS know that? [LB476]

SENATOR LAUTENBAUGH: Well, you can request that from them. [LB476]

SENATOR COUNCIL: Oh, okay. [LB476]

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SENATOR LAUTENBAUGH: That's a method of service or delivery under them. You can request a signature of the addressee. [LB476]

SENATOR COUNCIL: You can request a signature. Okay. [LB476]

SENATOR LAUTENBAUGH: Yes. [LB476]

SENATOR COUNCIL: And a little more costly. [LB476]

SENATOR LAUTENBAUGH: Perhaps. [LB476]

SENATOR LATHROP: Okay. [LB476]

SENATOR LAUTENBAUGH: Thank you. [LB476]

SENATOR LATHROP: I see no other questions. Thank you, Senator. Those in support. [LB476]

KATIE ZULKOSKI: Good afternoon, Senator Lathrop, members of the Judiciary Committee. My name is Katie Zulkoski, Z-u-l-k-o-s-k-i, and I'm testifying today on behalf of the Nebraska State Bar Association. And Senator Lautenbaugh indicated in 2009 he introduced LB352 on behalf of the Bar Association to allow for a designated delivery service. At that time it was not called designated delivery service. As the bill was amended into another bill, it got a new definition and this then would take that definition and authorize that in the specific places where it was recommended it be authorized, as he indicated, by a law professor interested in this area. And so this is the clarification of that. This, beyond putting that designated delivery service in specific areas, it also does change that. It now would require a signed delivery receipt, and then that receipt would need to be filed with the court. And there also is a specification that a list of those that qualify, those providers that would qualify as designated delivery services would be listed on the Supreme Court's Web site. [LB476]

SENATOR LATHROP: Terrific. Any questions for Katie? Senator Council. [LB476]

SENATOR COUNCIL: Are one of those places you can use designated delivery service, eviction? [LB476]

KATIE ZULKOSKI: I would assume so. [LB476]

SENATOR COUNCIL: Restitution? Particularly since the Douglas County Court now insisted upon compliance with the due diligence requirements. Thank you. [LB476]

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SENATOR LATHROP: Okay. I think that's it. Thanks, Katie. Always good to hear from the State Bar Association. (Laughter) [LB476]

SENATOR COUNCIL: Oh wait, right before Lautenbaugh's next bill? [LB476]

SENATOR LATHROP: Anyone else here on LB476? [LB476]

TESSA HERMANSON: Senator Lathrop, members of the committee, my name is Tessa Hermanson, and I am testifying today in my capacity as general counsel for Credit Management Services, and we do support LB476. It's not a method of service that we've used before, and I think that these changes will make it a method of service that could be possible to be used. It will...having, you know, a restricted delivery signature or having the certificate of service returned to the court, it will give the judges the level of comfort that I think they need to be comfortable with this type of service. I also think it benefits defendants, you know, rather than sending a sheriff or a constable out to their house. This is a little more private method. At the same time, they can't not go pick up their certified mail like you've discussed before. So, you know, that's not to say that we would quit using sheriffs or constables. Clearly they play an important role. But oftentimes, especially in rural Nebraska, where mileage charges add up to a significant, you know, amount, it can cost a lot to serve process in that way. So we support LB476 and I ask that the committee advance it. [LB476]

SENATOR LATHROP: I have a question for you, and that is: Are we talking about the FedEx's and the UPS's of the world? [LB476]

TESSA HERMANSON: Yes. [LB476]

SENATOR LATHROP: And I don't do a lot of overnight mail, but that's kind of...that's a little pricey, isn't it, like 25 bucks? [LB476]

TESSA HERMANSON: It would be more pricey than certified mail, and... [LB476]

SENATOR LATHROP: And so what happens to the...if we're evicting somebody and, you know, our thinking...I'm sitting in my office going to evict somebody from their house or their apartment, and my thought is they're not going to pick up certified mail and they work days so the constable can't catch them; I'll just send something FedEx and they're likely to think it's they've won something and they'll go and get the FedEx envelope. And now it may make things simpler for you, but have I just gone from what would otherwise be a cost to these people of a buck or two, now to \$25, if they're going to pay on their judgment? [LB476]

TESSA HERMANSON: Well, certified mail in counties, especially the counties that require restricted service, is about \$10 or \$11. And they won't let anyone else sign for it,

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so oftentimes that sits there. Then you send the sheriff out, which is going to be \$30 to I've seen over \$100 in sheriff's cost to have them served. Twenty-five dollars falling more in the middle. I know my client would not use it without knowing that this particular individual has previously refused to pick up certified mail. But, you know, I take your point that maybe you're skipping the cheapest version to go to the next. I still think it's a nice... [LB476]

SENATOR LATHROP: But the short answer, I guess, is that it will increase their costs versus certified mail? [LB476]

TESSA HERMANSON: Yes. [LB476]

SENATOR LATHROP: Okay. And that really becomes the plaintiff's option to say: Well, what do I care? I want to get the money out of them. Why don't I send it by FedEx and increase the cost? [LB476]

TESSA HERMANSON: The plaintiff also has the option now to send everything by sheriff. They could skip certified mail too, which would be more costly. [LB476]

SENATOR LATHROP: Good. Any other questions? I see none. Thank you once again for your help. Anyone else here in support of LB476? Anyone here in opposition? Anyone here...yes, come on up, sir. [LB476]

WILLIAM GREINER: Well, I started out neutral but I think I changed my mind. Can I change it here? [LB476]

SENATOR LATHROP: Yes, you can. [LB476]

WILLIAM GREINER: Thank you. [LB476]

SENATOR LATHROP: We're flexible. It's Friday afternoon. [LB476]

WILLIAM GREINER: My name is William C. Greiner, G-r-e-i-n-e-r. Chairman, committee members, I am a constable out of Lancaster County Court and I guess I object to the service by a designated delivery service for several reasons. First of all, as a constable or a sheriff, when we go out to serve papers, we identify the fact that we're giving them court documents. We never ask them to sign for anything unless it's a replevin action and there's a waiver of the continued service. Okay? The constables are always in civilian clothes. I've talked to Tony Malony (phonetic) up in the Omaha; we're on the same page on this. As far as being cheaper, I see the FedEx guys and UPS. They have a route; they run a route. We run a route. And they're going to be at the...but we change our times. They're going to be at that same place approximately the same time every day. We're out 24/7. If we find somebody working a third shift, we're out when they go to

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work. I found that they always usually go to work. They might leave early, so I don't go out when they're getting off. I'm out there when they're going to work, and that's a better deal. I think that...first of all, I've been doing this for 50-some years and I'm proud of what I do. I don't like giving bad news, but somebody has got to do it. And we try to do as nice as we can. We never walk up and give somebody a paper and say, "You're being sued; pay your bills." We don't do that. We're very limited as to what...you know, we don't try to give any legal advice. We tell them the first page gives them instructions and the rest of it tells them what the suit is about, and just to read the instructions. And we didn't...I think I testified before you folks, a year ago I think it was, when you raised...or two, whatever it's been. We didn't raise our fees. That didn't make a whole big difference. We didn't see a land load of papers coming our way, so. But we're still down at the \$15 plus mileage. Anyway I think you're going to have a lesser quality of service because, you know, if the FedEx guy said: I am giving you a summons out of county court or district court. He's going to get a lot less reception and a lot less nice reception than what if he just hands them a package. They don't know what's in that package. And you're delivering a court document and they're going to scribble a signature on there that the judge is not going to be able to read. When we serve somebody, we get their name and, where necessary, we'll get a date of birth. Our judges are asking for when people are having a court hearing that could result in a warrant, they want a date of birth. FedEx, UPS, not going to do that. And they're not going to ask the person that they're serving what their relationship is to the person that is being served. In other words, fiance, roommate, or I just stopped for a beer, or whatever. Where we get that information, that all goes on our return. I just think that by doing this that you're cutting down the quality of service that I think the sheriffs and constables are now delivering. And in regards to the papers going out and being cheaper, certain papers, like the evictions, have to be served within three and returned to the court within five. So there's some guidelines that have to be met. I don't know what all they want the UPS and FedEx to do, but if they're going to serve a hearing...or a paper that involves a court hearing, that has to be at least 72 hours prior to the hearing. So I don't know. I just have objections to the...you know. [LB476]

SENATOR LATHROP: Okay. [LB476]

WILLIAM GREINER: Okay. [LB476]

SENATOR LATHROP: Those may be reasons why somebody is going to elect not to use them, right? [LB476]

WILLIAM GREINER: That...in my opinion. [LB476]

SENATOR LATHROP: If they physically can't do it in a timely way, then the lawyers that are responsible for making sure the service happens timely will say: It's an eviction; I can't get it done with FedEx. And I suspect, just listening to you, I suspect that in time

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people will treat FedEx like they do the certified mail, and say: You know what? No good news ever comes from a FedEx (inaudible). [LB476]

WILLIAM GREINER: Don't answer the door. (Laugh) Brown or blue, don't answer the door. [LB476]

SENATOR LATHROP: Yeah. That's exactly right. But we'll, I guess, take all that into consideration when we take the bill up in Exec Session. But thanks for coming down. [LB476]

WILLIAM GREINER: Okay. [LB476]

SENATOR LATHROP: We appreciate hearing from you. I think that's it. Thank you. [LB476]

WILLIAM GREINER: Thank you much. [LB476]

SENATOR LATHROP: Anyone else here in opposition or in a neutral capacity? Okay. Senator Lautenbaugh to close on LB476. [LB476]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman. And I respect the constable who just testified. He is probably the best at what he does. I wish he was in Douglas County rather than Lancaster County, to be honest, although there are good ones up there too certainly. But what's important to note is that everything he said that would be a problem with these designated delivery services is worse with certified mail. So this is just sort of a midpoint, if you will, stopping point along the way--another option to be used. But what's doubly important is, and maybe I didn't make this clear in my opening, we've already taken some steps to do this and it's arguably available now. This bill is necessary to add the signature requirement and improve what we have done. So it's not as if we'll address any of the concerns voiced by not acting on this bill. We'll just leave an imperfect, arguably, product out there, statute out there. So it's important. [LB476]

SENATOR LATHROP: Very good. Any questions on LB476? Seeing none, we'll close the hearing on LB476 and move to our last bill of the day which is LB644, and that once again, Senator Lautenbaugh. [LB476]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman, members of the committee. My name is Scott Lautenbaugh. I'm the senator from District 18 and I introduced LB644. And this has been a very difficult one for me. I drafted this bill I think three years ago, and every year we change the number and every year I don't throw it in. And this year I threw it in, finally. It's a very simple bill and I think a very logical bill. Doctors are not required to be members of the AMA. Engineers are not required to be members of the League of Extraordinary Engineers or whatever it is they have. (Laugh) In Iowa and

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many other states, you're not required to be a member of the bar association to practice law. I'm licensed in Iowa; I know this. And they have a very active bar that exists over there, a bar association. Does wonderful work. But you're not required to be a member of it. You can choose to but you're not required to. And I've looked into the history of this some, and I believe my numbers might be off, but I think 10 or 15 years ago the Supreme Court took over licensing and regulation. I think that was the reason why it was necessary for the bar to be mandatory. And that reason has passed. I believe this should be a voluntary association. And this has been sort of a remarkable journey with this bill. I've heard people from the defense attorneys say the bar is too plaintiff-oriented. I've heard people from the plaintiff's side say, oh, the bar only listens to the defense attorneys. And they do come in and lobby on various bills, some of which I've agreed with, some of which I have not agreed with their position on. But the reason that the defense attorneys have reason to complain, or that the plaintiffs attorneys have reason to complain if they feel that way, it's because they're are forced to pay for this. And it's not an inconsequential sum. Rounding numbers, there's a level for new attorneys, but generally for practicing attorneys we're talking \$400 or \$500 a year. And this is not something that I just pay and so I'm complaining about it. We have 60 attorneys in the Attorney General's Office, give or take. That's \$400 or \$500 a year times 60 attorneys. I think Don Kleine has about 60 attorneys in the Douglas County Attorney's Office. The county has to pay for all of them. Public defender: I don't know, 30-40 attorneys I believe; I think I have the number. The county has to pay for those. Legal counsel for committee: I believe we pay for that. There's over 30 attorneys in HHS traveling around doing those hearings you were talking about, Senator Council, I assume. Thirty attorneys in Lancaster County Attorney's Office. This is an expense that government is bearing, and I think it's very fair and long overdue to ask the question: Why? And I've taken what's admittedly an unscientific sample, just people come up to me and say things, which is about as unscientific as you can get. But if you're not active in the bar, you don't seem to be terribly put out by this bill. Actually the reaction is kind of enthusiasm about this bill. And I think people have a right to say...you know, maybe they're doing everything perfect. I'm not going to sit here and go through the bar's budget or say they have too many people on staff or they send too many people to the committee hearings or anything like that. What I am saying is, I don't want them doing things in my name or on my nickel without my consent. And that's what's happening. And this bill would address that, and that was the reason I brought the bill. [LB644]

SENATOR LATHROP: Very good. Senator Council. [LB644]

SENATOR COUNCIL: Senator Lautenbaugh, since part of your rationale for LB644 was the cost to government for paying for a bar association membership, do you have any data to show how much it would cost the state just for licensing? [LB644]

SENATOR LAUTENBAUGH: Well, they are already paying that too. So it's a... [LB644]

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SENATOR COUNCIL: But that's included in your...you know, to maintain your license to practice law we pay an annual fee. [LB644]

SENATOR LAUTENBAUGH: Right. Right. [LB644]

SENATOR COUNCIL: My question is, do you know what that annual fee would be in the absence of a bar association? [LB644]

SENATOR LAUTENBAUGH: I believe the separate assessment for counsel for discipline and licensing and regulation--and I should know this and I apologize--it's \$75 to \$125, I believe. I may be confusing that with Iowa but I believe that's the number. But again, it's a cost we're already paying anyway. [LB644]

SENATOR COUNCIL: Well, it's a cost that would be, I presume on your argument, if it's \$375 a year for someone of my vintage--a few more years I'll get that reduced rate for being a senior member of the bar--but to continue to renew my license on an annual basis I pay \$375. Some portion of that I would have to pay regardless of whether it included my membership in the bar. [LB644]

SENATOR LAUTENBAUGH: And that's certainly knowable and I should know that and I don't. But it's in the \$75 to \$100 range. I know that from memory. I don't think you write a separate check for it anymore. I know you do in Iowa. I could be mistaken in Nebraska. [LB644]

SENATOR LATHROP: Senator Coash. [LB644]

SENATOR COASH: Thank you, Chairman Lathrop. Senator Lautenbaugh, if you're a practicing lawyer and you work for a political subdivision, county attorney--my legal counsel works for the state of Nebraska--is it up to the individual attorney, does that come out of their pocket or does it come out of the state or the county's budget? [LB644]

SENATOR LAUTENBAUGH: It is my understanding the practice is to pay it out of the state or county budget. [LB644]

SENATOR COASH: That's what I thought I understood from your opening, but then I got to the fiscal note and it's not reflected that anybody took a look at, well, if we didn't require this, this...you know, the state of Nebraska might, or the counties might save money because there wouldn't be this mandatory... [LB644]

SENATOR LAUTENBAUGH: You may be one of those rare individuals that found an inaccurate fiscal note. [LB644]

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SENATOR COASH: Just I find that curious. I mean I understand it would be...it would be hard to...I do appreciate it might be hard to calculate how many state lawyers might choose not to pay, or pay, but it doesn't even look like it was addressed by the fiscal note. [LB644]

SENATOR LAUTENBAUGH: It is not. It is not calculated in there and I don't know why they would not take the credit for that--at least list it. [LB644]

SENATOR COUNCIL: But they include it in their salary. I mean it's a part of their salary that you get...we'll pay your bar association dues. So when they reflect the salary, it reflects that. [LB644]

SENATOR LAUTENBAUGH: I don't know that that's correct. I don't know if they're taxed on it as income, so I (inaudible). [LB644]

SENATOR COASH: I'm just wondering if this would save the state money. [LB644]

SENATOR LAUTENBAUGH: I believe yes. [LB644]

SENATOR LATHROP: Very good. Well, I'm sure we're about to have an interesting discussion about this bill, if nothing else. Thank you, Senator, and we'll expect you to close probably. [LB644]

SENATOR LAUTENBAUGH: Oh, yeah. I'll be here. And I'll point out again, I did not solicit anyone to come testify on this bill. [LB644]

SENATOR LATHROP: That's fine. [LB644]

SENATOR LAUTENBAUGH: It'll be what it is. [LB644]

SENATOR LATHROP: You know what? I think it's probably healthy to question something like this, and let's have the...we'll look forward to hearing the bar come up and tell us why it's a good or a bad idea. Is there anybody here in support of the bill? Okay. How about in opposition to LB644? [LB644]

SENATOR COUNCIL: Well, that blows your consent calendar. (Laughter) [LB644]

WARREN WHITTED: Mr. Chairman and members of the committee, my name is Warren Whitted. I'm president-elect of the bar association and I am here to testify in opposition to LB644. First, by way of history, the Nebraska State Bar Association became an integrated bar in 1937 by the decision of the Supreme Court, which in the course of making that decision did a thorough analysis of the inherent power of the court to regulate the practice of law. It's not a power of the executive branch; it's not a

power of the legislative branch. It is a power of the judicial branch to be exclusively exercised there. The regulation of who is admitted to practice law in the state of Nebraska and what criteria they must meet to do so is within the province of the Supreme Court. The court has the power to determine whether someone is engaged in the unauthorized practice of law. They have the power to impose discipline on their members, and they have the power, among other things, to require that we participate in continuing education. The Nebraska State Bar Association, as constituted by the Supreme Court, has been constituted in such a way as to meet the constitutional challenge which has been faced by other integrated bars in other states. Put very plainly and simply, LB644 seeks to limit the inherent power of the Supreme Court to regulate and to manage the practice of law and those who practice before it, and it is not within the province of the Legislature to invade the court's inherent authority. There are 33 unified bars and 22 voluntary bars in the United States. The reason that adds up to more than 50 is because we talk about the District of Columbia, Puerto Rico, and some others like that, so we are aware that there are only 50 states. It's the mission of the Nebraska State Bar Association to improve the administration of and access to justice to educate our members and to provide them tools to help them better serve their clients. As a result of these efforts, the lawyers of the state of Nebraska are the equal of any one of our peers throughout the nation. While there are other voluntary bars, the bar association of the state of Nebraska is a unified voice for all the lawyers in the state of Nebraska, from Omaha to Sidney. It would be imprudent for the Legislature to attempt to invade the power of the court in this area. I have had the privilege of practicing law in the state of Nebraska for nearly 36 years. I have observed the manner in which my compatriots, such as Mr. Lautenbaugh, or Senator Lautenbaugh practice, and I am proud of the practice and I am proud to be a Nebraska lawyer. I believe that the continuation of the system, as it stands, is in the best interests of the lawyers of the state of Nebraska. But more importantly, it is in the best interest of the people of the state of Nebraska, and we urge the committee not to advance this bill. [LB644]

SENATOR LATHROP: Very good. Thanks, Warren. Senator Larson, you're recognized. [LB644]

SENATOR LARSON: And again, I'm showing my lack of knowledge of not being a lawyer. Who requires the continuing learning education course? Is that the Supreme Court or the state bar association? [LB644]

WARREN WHITTED: The state bar association provides programming. There is a mandatory Continuing Legal Education Commission of the Supreme Court, which implemented rules that were proposed by the bar association for the implementation of mandatory continuing education. [LB644]

SENATOR LARSON: So the Supreme Court mandates the continuing legal education and not the state bar association. [LB644]

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WARREN WHITTED: Right. Just so we're clear, all of what we do as lawyers is mandated by the Supreme Court. So the Supreme Court sets our dues at X. The Supreme Court says we have to attend continuing legal education courses. So, yes, it's mandated by the Supreme Court. [LB644]

SENATOR LARSON: Okay. Thank you. [LB644]

SENATOR LATHROP: I've got a few questions for you. [LB644]

WARREN WHITTED: Okay. [LB644]

SENATOR LATHROP: Listening to your testimony, you said we became an integrated bar in '37 and that came from a Supreme Court Opinion, and it sounded like you were telling us that it's a separate branch of government and you don't think we could legislate our way out of this. [LB644]

WARREN WHITTED: That's what I said, Senator. [LB644]

SENATOR LATHROP: Okay. Well, do you think that's true... [LB644]

WARREN WHITTED: Yes. [LB644]

SENATOR LATHROP: ...that we cannot...if we were determined, as a committee and a Legislature, to pass this, do you think it's unconstitutional because we're invading the province of a different branch of government? Did I get...is that sort of the idea? [LB644]

WARREN WHITTED: Well, that's the essence of what I'm saying. I have not researched the whole constitutional theory, but we are...the power to regulate the practice of law is not specifically allocated by the Constitution of the state of Nebraska. Where the powers are not specifically allocated, they are assigned to the branch of government most appropriate for that particular duty. In this case, the duty we're talking about is the regulation of the practice of law, which is most appropriately assigned to the judicial branch. And the Supreme Court, in this decision, in a very methodical way, analyzed the inherent power of the court to regulate the practice and came to the conclusion that that is exclusively within the province of the Supreme Court. [LB644]

SENATOR LATHROP: Okay. And I'm going to ask a question that I suspect Senator Lautenbaugh would ask if he were not the introducer, and that is how much of the...our dues are \$400 or whatever they are for a practicing bar member. Do you know what they are for, just the... [LB644]

WARREN WHITTED: Our dues are--I just wrote it down--are \$345. [LB644]

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SENATOR LATHROP: \$345? [LB644]

WARREN WHITTED: And if I might expand on that a second because there was certain things that Senator Lautenbaugh said that weren't exactly accurate. Of that \$345, \$80 is specifically allocated to the disciplinary fund, so that is to the Counsel for Discipline, which is under the direct auspices of the court. [LB644]

SENATOR LATHROP: Let me interrupt you there. If we took the total cost to run that office and divided it by the number of lawyers, would it come to \$80? [LB644]

WARREN WHITTED: That's the...that's appropriate. I mean that's what it should be. From year to year it varies, so you can't do that. [LB644]

SENATOR LATHROP: I can appreciate it depends on how busy they are. [LB644]

WARREN WHITTED : But yes, that would be...that's the intent, that that cover the cost of that service. [LB644]

SENATOR LATHROP: Okay. [LB644]

WARREN WHITTED: There are several others things that we do, though, which are mandated by the court but which are administered by and paid for through the dues of the attorneys. Included in those are the client assistance fund which provides a fund to compensate clients who are disserved by their lawyers. The... [LB644]

SENATOR LATHROP: Does that reimburse them for... [LB644]

WARREN WHITTED: Yeah, to an extent. It reimburses them... [LB644]

SENATOR LATHROP: I spend money out of my trust account and cheat somebody. [LB644]

WARREN WHITTED: Those kinds of issues, Senator. [LB644]

SENATOR LATHROP: How much of the fee is that? [LB644]

WARREN WHITTED: I don't have that broken down, but it all... [LB644]

SENATOR LATHROP: Okay. That's all right. [LB644]

WARREN WHITTED: But in addition to the client assistance fund, it includes the trust account administration; it includes the administration of the programs where we verify

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that lawyers have professional liability insurance. Those are all funded through the dues of the association. So when we talk about what portion of the dues might go for what you could call regulation or discipline or those kinds of things, to say \$80 is not to touch it. [LB644]

SENATOR LATHROP: I know that you're just the incoming president and you haven't served in that capacity, yet, right? [LB644]

WARREN WHITTED: I've still got time. [LB644]

SENATOR LATHROP: Yes. You get sworn in, in October, generally? [LB644]

WARREN WHITTED: Yes, sir. [LB644]

SENATOR LATHROP: Are you running into people who expressed concern about this? And is the root of it the fact that the bar engages in some lobbying activity? [LB644]

WARREN WHITTED: Well, let me explain that process. On your dues statement--and I'm sorry if I'm speaking only to the lawyers--there is a checkoff where you can say, do I or do I not want a portion of my dues to be used for lobbying. If you check off that you don't want any portion of your dues to be used for lobbying, then that sum is segregated and used for non-lobbying purposes. The manner in which we decide on our positions that we bring to this committee and others is through the work of a legislation committee which is reviewed then by the executive council and the house of delegates. Where we run into a situation...and generally, the guiding principle is whether the piece of legislation that we're considering is to further the...to advance the administration of justice. So if there's a bill on the death penalty or if there is a bill on abortion, you will not find the bar association taking a position on that. Our position is that if it affects the administration of justice, if it affects the number of judges, if it affects the manner in which our courts are administered, those are the kinds of issues that we will address. But issues which are very important, and very important to the members of the bar but which deal with issues outside that scope, we don't take positions on those. [LB644]

SENATOR LATHROP: What if there's a difference of opinion? Because sometimes Senator Lautenbaugh and I are on different sides of the issues when it comes to civil litigation. And if any of that stuff comes through the bar, do you take positions on those things? [LB644]

WARREN WHITTED: The... [LB644]

SENATOR LATHROP: Or how do you arrive at what... [LB644]

WARREN WHITTED: The constitution of our committee, the way our legislative

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committee is constituted is from the general membership of the bar, but we make certain that the constituencies that are affected are represented on the committee. So we have representatives from the plaintiffs bar; we have representatives from the defense bar; we have representatives from the family law bar; we have representatives from government lawyers. We do a lot of...there's a lot of discussion and debate in that group. But if it is a...we take a position in favor, opposed, or no position. And if...and we looked at...I believe we looked at 185 bills this year, or thereabouts. And of those, we took positions on... [LB644]

BILL MUELLER: Sixty. [LB644]

WARREN WHITTED: ...on 60. [LB644]

SENATOR LATHROP: 6-0? [LB644]

WARREN WHITTED: Six, zero. And that included some of the bills we've heard today. But...and we had a debate and a discussion about the immigration bill, and that...there was no position taken on that, and that was where this discussion came up. But generally, on administration of justice bills, we'll take a position, but otherwise we won't. [LB644]

SENATOR LATHROP: But are there differences of opinion,... [LB644]

WARREN WHITTED: Yes, there are differences. [LB644]

SENATOR LATHROP: ...even in that process? [LB644]

WARREN WHITTED: Yes. [LB644]

SENATOR LATHROP: So do you have to have full agreement of all people in the legislative committee to take a position? Or is it a majority? [LB644]

WARREN WHITTED: It's a democratic process. It is a majority. [LB644]

SENATOR LATHROP: Okay. Any other questions from anyone? Senator Larson. [LB644]

SENATOR LARSON: Thank you, Senator Lathrop. And again, I'll show my inexperience on the Judiciary Committee. I know oftentimes the Legislature hears a bill that comes over...comes back again and again from the unions that want to mandate membership in the union. And it...well, obviously, it hasn't got out of the Legislature. This kind of seems very similar to me, where right now they are mandatorily obliged to join you guys. Is that the case? Or what's the difference really? [LB644]

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WARREN WHITTED: Well, first of all, we're not a union. We're independent contractors. There is no...there is no collective bargaining. There are none of those kinds of things. We are governed by the Supreme Court of the state of Nebraska, which is the chief body of the third branch of government. [LB644]

SENATOR LARSON: I understand that. [LB644]

WARREN WHITTED: The suggestion was made that doctors aren't required to be members of the AMA and engineers aren't required to be members of the Extraordinary Engineers... [LB644]

SENATOR LARSON: And the teachers aren't required to be a member of the teachers' union, yet the teachers' union does a lot of...I mean... [LB644]

WARREN WHITTED: But this is different, and it's different because we as lawyers are not just members of the association; we are officers of the court. So we operate under a set of ethical rules and obligations that are implemented by the court and that we are required to abide by to continue to ply our profession, but also to serve the people of the state of Nebraska. So we're under a different set of rules. The analogy is not a good analogy. [LB644]

SENATOR LARSON: So you are saying that you kind of operate ethically under the court without joining your organization? [LB644]

WARREN WHITTED: That's not what I said. What I'm saying is that the way we are structured is that we are required by rule and order of the Supreme Court to be members, and that court also imposes upon us rules by which we conduct ourselves. And that differentiates us from a labor union. [LB644]

SENATOR LARSON: Thank you. I'm sorry. I'm just kind of...as a nonlawyer... [LB644]

SENATOR LATHROP: Senator Council. [LB644]

SENATOR COUNCIL: And, Warren, getting back to a question that was posed to you by Senator Lathrop and kind of following up on Senator Larson's line of questioning, even if we passed LB644, the Supreme Court could still mandate that attorneys who wish to practice law in Nebraska had to be a member of this organization and pay whatever dues are established to that organization. [LB644]

WARREN WHITTED: If I could restate that just a little bit. I think that it is within the province of the court's jurisdiction to require that we be members of the Nebraska State Bar Association. I think that if there were...if this legislation was passed and there was a

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challenge to the legislation, the challenge would initially be made in the court that makes the determination, which I have no idea how they would rule, but I'm pretty confident that they would support the...would reinforce the rule they already have adopted, and say, yes, we have to be members of the bar association. Now if you go on from there, but we are confident that we meet the tests necessary to pass constitutional muster. [LB644]

SENATOR COUNCIL: Okay. But I guess the point I'm making is you stressed the fact that the licensing and oversight of practicing lawyers in the state of Nebraska is within the sole province of the Supreme Court, correct? [LB644]

WARREN WHITTED: Yes, ma'am. [LB644]

SENATOR COUNCIL: And if the Supreme Court chose tomorrow that they no longer wanted to have the licensing and oversight of practicing attorneys be administered through the Nebraska State Bar Association, they would have every right to do so. [LB644]

WARREN WHITTED: They would have the same power to deintegrate us as they had to integrate us. [LB644]

SENATOR COUNCIL: And that's the point I'm getting to with...in trying to assist Senator Larson, as well, is that the judiciary has made a decision as to this is the method that the judiciary chooses to provide licensing and oversight for the practice of law in the state of Nebraska--and that is through membership in the Nebraska State Bar Association. [LB644]

WARREN WHITTED: That's correct. And could I add just one thing? Is that when we initially...in 1937, there was a vote of the membership of the state bar association. And it was overwhelmingly--and I'm not talking 55 or 60, I'm talking 80 percent--in favor of this approach. And it was done by a petition of the Supreme Court where the lawyers petitioned the court, asking the court to integrate the bar. [LB644]

SENATOR COUNCIL: Well, there you go, Senator Lautenbaugh. You have a...you can ask them to deintegrate. Well, thank you, Warren. [LB644]

SENATOR LATHROP: I think that's it. Thanks, Warren. [LB644]

WARREN WHITTED: Thank you. [LB644]

SENATOR LATHROP: Anyone else here in opposition to LB644? Is there anyone here in a neutral capacity? Seeing none, Senator Lautenbaugh to close. [LB644]

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SENATOR LAUTENBAUGH: Thank you, Mr. Chairman and members of the committee. I do want to stress that I believe it has already transpired that the state Supreme Court has said: Bar, we don't want you to handle licensing and regulation. The Counsel for Discipline, several years, moved over to the Supreme Court. They're handling this now. Now they did not go on to say, "and so you don't have to be members of the bar." But it was my understanding that that was always the rationale is that the bar handled our professional regulation, and that does not seem to be the case anymore. Again, I am licensed in other states. Iowa does not have a unified bar. Kansas does not have a unified bar. And I believe the constitutional regulatory authority that the Supreme Court has asserted for itself to govern lawyers, they've pulled that back into themselves already. And so I don't believe there's a basis to say this would not stand up to a court challenge, and I think it is certainly doable. [LB644]

SENATOR LATHROP: (See also Exhibit 3) Very good. I see no questions. That will close our hearing on LB644. And since that's our last bill of the day, that will end our hearings for today. [LB644]