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Judiciary Committee  
February 01, 2013

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[LB103 LB232 LB277 LB289 LB345]

The Committee on Judiciary met at 1:30 p.m. on Friday, February 1, 2013, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB345, LB289, LB103, LB232, and LB277. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Colby Coash; Al Davis; and Amanda McGill. Senators absent: Mark Christensen; and Les Seiler.

SENATOR ASHFORD: Good afternoon, everyone. Senator Wightman is welcome. This must be another very technical and very difficult subject because Senator Wightman is here.

SENATOR COASH: Are we going to law school again?

SENATOR ASHFORD: And Lindsay is here, so it really must be difficult.

SENATOR MCGILL: I know. Well, we're getting a free law school education (laugh) (inaudible).

SENATOR ASHFORD: Yeah, whenever Lindsay and Wightman team up, we're in trouble. All right, welcome, everyone. Senator Wightman is here to introduce LB345. And with that, please proceed. [LB345]

SENATOR WIGHTMAN: (Exhibit 1) Thank you. Good afternoon, Chairman Ashford and members of the Judiciary Committee. For the record, my name is John Wightman, District 36. We brought this bill to try to clean up some things that were included in last year's bill, but seems not to be working out very well for members of the bar association, of which I am one. The Real Property Transfer on Death Act, as I said, passed a year ago, in 2012, and became effective January 1, 2013, so, you can see, it has not been in effect very long. In overview, this new law permits owners with interest in real estate to execute and record a transfer-on-death deed, called a TOD deed, which enables an owner of real estate to pass the property to a beneficiary on the owner's death without the cost and delays of probate. During the owner's lifetime, the beneficiaries have no interest in the property, and the owner retains full power to transfer or encumber the property or to revoke completely the TOD deed. The first change found in LB345 addresses a legal and logistical issue. On Select File last year, language was added that, upon further review, should be amended. Under the law as passed, a transfer-on-death deed must be signed by two disinterested witnesses. Unfortunately, simply creating the requirement without specifying what the requirement means and how the requirement can be complied with raises important legal and logistical issues. And the issues raised are, one, there is no way to confirm that the witnesses were disinterested when they signed the deed. So you have a deed that's taken over to the register of deeds. It's got two names there. At the register of deeds they're not going to

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know whether they're interested or disinterested. Second, "disinterested witness" is not defined. An unanswered question in the act is, is there a category of family member or others with a relationship to the transferor or his or her circumstances that should be considered interested? The recommended amendment that I bring to you today on behalf of the Nebraska State Bar Association would remove the requirement that the witnesses be disinterested. The requirement for disinterested witnesses is unique to the Nebraska law. Of the various states that have passed this legislation, not one of them has had that the witnesses would be disinterested. No other state, nor does the Uniform Law Commission's model law, have such a requirement. Under LB345, any transfer-on-death deed with two witnesses, whether or not they are interested, would be valid. A representative of the Nebraska Bar Association will follow me to further explain the rationale for this amendment. The second change found in LB345 addresses an administration issue. The second change contained in LB345 that I bring to you today is on behalf of the Nebraska Association of County Officials. In order to expedite the administration of Nebraska's real property title laws, the register of deeds are requesting that a document be filed to enlist them to connect death certificates with transfer-on-death deeds if the death of the transferor transfers as a result of the death of a joint tenant, transfers upon the death of a holder of a life estate. Now some of you that are attorneys in here may realize the fact that there have been quite a bit of questions with regard to death certificates and the register of deeds anyway because of the fact that we included something in last year's bill, and I can't even tell you what it is exactly. And all of a sudden they started to charge revenue stamps, but that was a different bill that we brought that up on, but...so the death certificates are generally filed many years after the deed creating these transfers occur. The information that will be contained on this new document will ease the administrative burden of the register of deeds by simplifying the connection of the death certificate with the instrument authorizing the transfer. It has come to our attention that LB345 should contain a technical amendment concerning the effective dates of the two provisions. The disinterested witnesses provision should be operative on the effective date of the TOD law. But cover sheet provisions requested by the register of deeds cannot be made operative on January 1, 2013, since we're already a few days past that or maybe a month. Conveyances of real estate, described under Section 1 of LB345, occurring between January 1, 2013, and the date the bill was passed would not comply with the new cover sheet filing requirements. I would offer AM109 for your consideration as a committee amendment to make this technical change. The disinterested witness provision would be retroactive and operative under an emergency clause. The cover sheet filing requirement would be effective, as provided, for laws without the emergency clause. In conclusion, sometimes amendments added to Select File have unintended consequences. LB345 addresses the unintended consequences caused by requiring a TOD to be witnessed by two disinterested witnesses. LB345 addresses the unforeseen practical logistical issue of matching death certificates with deeds and instruments that may have been filed many years ago. I would urge the committee to advance LB345 with AM109 as a committee amendment. Thank you. If you have any questions, I'll be more than happy to try to

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answer them. But you probably have people here even better at answering them than I would be. [LB345]

SENATOR ASHFORD: Thanks, John. I don't see any questions,... [LB345]

SENATOR WIGHTMAN: And I probably won't stay. [LB345]

SENATOR ASHFORD: ...not for that reason necessarily. (Laughter) [LB345]

SENATOR WIGHTMAN: I will not plan to stay for closing. [LB345]

SENATOR ASHFORD: Okay, thank you. Do we have any proponents? Bill is up. [LB345]

WILLIAM J. LINDSAY, JR.: Good afternoon, Chairman Ashford and members of the committee. My name is William J. Lindsay, Jr. I'm here to testify in support of LB345. I'm a member of the Nebraska State Bar Association. I'm here on behalf of the State Bar Association. I'm a practicing lawyer in Omaha. I've been practicing for about 35 years. I do a substantial amount of work in the estate planning area. I believe I was here to testify on the original bill last year. As Senator Wightman said, this is more of a cleanup bill. The first change is the cover sheet that was discussed by Senator Wightman. He went over that. That has been suggested by NACO. I believe they'll talk more in detail about that. I reviewed that. I think it's a good idea. The second change is to Section 76-3409, which is in the section...the chapter of the code involving real estate. It's not in the probate code. It doesn't use the probate code of disinterested witnesses. All it really does is remove the word "disinterested" in front of "witnesses." There will still be a requirement for two witnesses. There will still be a requirement for a notary. It still will be required to be filed within 30 days. So the only change is the "disinterested" being removed. I reviewed the amendment that Senator Wightman referred to. The amendment seems to be a good amendment, and I would recommend adoption of that. There is another provision in the bill, basically, I think to...on that part of a belt-and-suspenders approach that basically says, if you have recorded a deed and there is an interested witness on it, that that still counts because we are adopting this after January 1, 2013. If there are any questions, I'd be happy to try to answer them. [LB345]

SENATOR ASHFORD: I don't see any, Bill, thank you. [LB345]

WILLIAM J. LINDSAY, JR.: Thank you. [LB345]

SENATOR ASHFORD: Any other proponents? [LB345]

JANET REED: Good afternoon, Chairman Ashford and members of the Judiciary

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Committee. For the record, my name is Janet Reed, R-e-e-d, and I am the Otoe County Register of Deeds. And I am here today on behalf of the Register of Deeds and the clerks in Nebraska to express the support for the passing of LB345. And we would also like to thank Senator Wightman for introducing this bill. In Section 76-2136 of the bill, it requires a cover sheet be attached to a death certificate when being presented for filing. And we feel the requirements are specifically stated and include the pertinent information that we need regarding the property being transferred by either the transfer-on-death deed or joint tenancy deed or an interest in life estate. And by providing that specific...those specific requirements, it will be made...greater consistency among the register of deeds and the clerks, and everyone, so to speak, will be on the same page. And it will make our jobs easier also, with that cover sheet when presented, because it's not within our scope of authority, especially saying who the grantee and grantor are for indexing purposes, as there are many different circumstances involved when it comes to this type of transfer. And then, Section 76-3409 of that bill, it requires that officer's certificate be signed by the transferor and attached in writing or...and attested to in writing by two or more witnesses before filing a transfer-on-death deed. All signatures must be made before an officer authorized to administer oaths. And the form and the content of that certificate are included in the bill and, once again, make for greater consistency in our offices and, once again, be all on the same page. So, in conclusion, I would ask for your consideration and support of LB345. [LB345]

SENATOR ASHFORD: Yes, Senator Lathrop. [LB345]

SENATOR LATHROP: Yes. Ms. Reed, thank you for coming down here. I do have a question, just while I'm sitting here. I don't know that we've ever required a cover letter to come along with a filing before. And do we require that in any other statutes? [LB345]

JANET REED: No. [LB345]

SENATOR LATHROP: Okay. Would it be your intent or do we need to indicate whether that cover letter should be filed with a death certificate or...so that the information that we're requiring in the cover letter is recorded as well? [LB345]

JANET REED: Yes, that cover sheet should be recorded as well with that...with the information, and the cover sheet will need to be completed by the person filing the death certificate. [LB345]

SENATOR LATHROP: And do you expect this cover sheet to be lawyer stationery, or do you expect it to be a form provided by the register of deeds? [LB345]

JANET REED: It can be a form that the register of deeds has developed. In fact, we have gotten together and we do have one developed that we think would answer all of

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those questions and would be sufficient for that. [LB345]

SENATOR LATHROP: Okay. [LB345]

JANET REED: And it can just be on a legal-size letterhead or a plain paper. [LB345]

SENATOR LATHROP: Do we need to say that that should be recorded in the bill? Or, the fact that the requirement is in the bill, will it necessarily follow that the register of deeds will be recording that? [LB345]

JANET REED: I think all of the register of deeds and clerks realize that that will need to be recorded but, in my opinion, I guess it wouldn't...you know, it might make a difference and be the best way to state it, that it be a requirement. [LB345]

SENATOR LATHROP: Okay. Should we say that it will be a form prepared by the register of deeds, or can we leave it the way it is? [LB345]

JANET REED: Oh, I think it can probably be left the way it is, um-hum. [LB345]

SENATOR LATHROP: Okay, thank you. [LB345]

JANET REED: Um-hum. [LB345]

SENATOR ASHFORD: I don't see any other questions. Thanks, Janet, very much. [LB345]

JERRY STILMOCK: (Exhibit 2) Good afternoon, Senators. My name is Jerry Stilmock, J-e-r-r-y, Stilmock, S-t-i-l-m-o-c-k, appearing on behalf of my client, the Nebraska Bankers Association, in support of LB345. As you've heard, the part that I'm coming and speaking on is the...to remove the two disinterested witnesses. If something like that were to happen and you would have two witnesses that were not disinterested, in other words, they failed to qualify, we're concerned that, when that deed was made and the beneficiary didn't take, under that transfer-on-death deed, until 10, 15, 20 years out, then there was a challenge to that deed that one or both of the witnesses were not disinterested, that that deed would fail. And for the bankers, we're concerned that lending, you know, may have been made based upon that deed being accurate and accepted and legal. So we're in support of the bill. And we've had an opportunity to look at the amendment proposed by Senator Wightman, and we're supportive of that as well, Senators. [LB345]

SENATOR ASHFORD: Thank you, Jerry. [LB345]

JERRY STILMOCK: Thank you. [LB345]

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SENATOR ASHFORD: I don't see any questions. [LB345]

JERRY STILMOCK: Thank you, sir. [LB345]

SENATOR ASHFORD: Okay, no controversy in LB109 (sic). What is this bill number here? LB345. Unless you can add some... [LB345]

BETH BAZYN FERRELL: No. (Laughter) I'm thrilled to not have controversy. For the record, my name is Beth Bazyn, B-a-z-y-n, Ferrell, F-e-r-r-e-l-l. I'm with the Nebraska Association of County Officials. We would like to thank Senator Wightman for introducing this bill to help clarify the cover sheet issue and the disinterested witness issue. I'd be happy to try to answer questions. [LB345]

SENATOR ASHFORD: I don't see any, thank you. Any other proponents? Opponents? Neutral? Done. Roger, no closing? [LB345]

ROGER KEETLE: Nope, no closing here today,... [LB345]

SENATOR ASHFORD: Okay. [LB345]

ROGER KEETLE: ...not going to screw up a good thing. (Laughter) [LB345]

SENATOR ASHFORD: All right, all right. Senator Lathrop is next with LB289. [LB289]

SENATOR LATHROP: (Exhibit 3) Good afternoon, Chairman Ashford and members of the Judiciary Committee. My name is Steve Lathrop, L-a-t-h-r-o-p. I'm the state senator from District 12. I'm here today to introduce LB289. A Nebraska law has long recognized equitable liens to protect parties who improve or better the value of real or personal property. These were called mechanics or construction liens. In 1981, the construction lien laws were substantially rewritten into the Nebraska Construction Lien Act. It provides for an equitable lien against real estate for the goods or services unpaid which were tendered under the real estate improvement contract, which is a defined term under the act. Basically, "real estate improvement contract" is an activity which improves the value of property. However, one activity that improves the value of the property was left off the list, and that is commercial real estate brokerage services. The purpose of LB289 is to add commercial real estate agency contracts to the definition of real estate improvement contracts. It joins other professional services like architecture, engineering, and other activities, like construction of a building and demolition, repair, remodeling, or removal of a structure previously constructed or installed. It is clear that commercial real estate brokers create value for the owner of the property when they find tenants or buyers. A tenant in a property is the income for the property, and the income stream of the tenancy creates the value of the building. Real estate brokers need to be

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able to protect their services creating value, just as the lumberman or the concrete supplier. LB289 provides that the lien for the payment of commercial brokerage services only runs for two years from the time the payment was due under the brokerage service contract giving rise to the lien. LB289 does not change the fact that a lien must be filed within 120 days of performing the last services for which the claimant wants to be paid under the contract. It does not change the way liens attach to the real estate nor the process that lenders may use to assure themselves the liens would be subordinate to the financing. It's my understanding there are several people who will testify in favor and in opposition to this bill. I'm hopeful we can address the concerns of the opponents of LB289 so that it may advance to the floor for debate. I recognize that there are fair criticisms that you'll hear today from, I think, primarily, the bankers. And I think the commercial real estate brokers recognize their fair concerns, and we'll try to iron those out after the bill is heard. [LB289]

SENATOR ASHFORD: Thanks, Senator Lathrop. Yeah, Senator Chambers. [LB289]

SENATOR CHAMBERS: Are we going to hear from some real bankers or a lobbyist? [LB289]

SENATOR LATHROP: I think we're going to probably hear from a lobbyist, but I don't know the answer to that. [LB289]

SENATOR CHAMBERS: But here's what I would like to ask... [LB289]

SENATOR LATHROP: I will say this. I think the real estate guys you'll hear from today are commercial real estate guys and not residential real estate guys; it may be a relief for you. [LB289]

SENATOR CHAMBERS: Okay. [LB289]

SENATOR ASHFORD: But it is a challenge, Senator Chambers, sometimes, to get the real person. [LB289]

SENATOR MCGILL: Yeah. [LB289]

SENATOR CHAMBERS: Hmm. Well, I can understand why the bankers are laying low. They know things are still a little warm. (Laughter) But here's what I want to ask you. I'm really not sure exactly what the services of this broker are. Of what does the service consist? [LB289]

SENATOR LATHROP: Here's what I understand the problem to be. If a broker...and I'll take a typical strip mall. [LB289]

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SENATOR CHAMBERS: Okay. [LB289]

SENATOR LATHROP: If that broker finds a tenant, the contract usually provides for some percent of what the tenant is paying in rent, which is the fee for finding the tenant. So the broker is paid over a period of time. If the owner of that strip mall sells to a different person and the second owner says, well, I'm not paying the...I'm not paying for the broker, I didn't hire him, and they basically want the advantages of having the tenant there without paying for the commission for the real estate agent or broker who found the tenant, I think that's where our problem is. [LB289]

SENATOR CHAMBERS: So the broker's contract would just follow whoever...it would stay with that entity and, whoever got it, got the contract along with it? [LB289]

SENATOR LATHROP: It would stay with the strip mall,... [LB289]

SENATOR CHAMBERS: Okay. [LB289]

SENATOR LATHROP: ...right, on the real estate,... [LB289]

SENATOR CHAMBERS: Okay, I understand now. Thank you. [LB289]

SENATOR LATHROP: ...as I understand the issue. [LB289]

SENATOR CHAMBERS: Because, see, I know a contractor is a breaker, you know, that the brokers...I thought they were the ones who took from people so that when they got through they had nothing left. (Laugh) [LB289]

SENATOR LATHROP: I think we'll have three of them here. You can ask them how they make a living if you like. [LB289]

SENATOR CHAMBERS: Okay, thank you. [LB289]

SENATOR LATHROP: All right, thanks. [LB289]

SENATOR ASHFORD: Thank you, Senator Lathrop. All right, I think we have some live property-owner people here, commercial property-owner people. Mr. Lund. [LB289]

JOHN LUND: Good afternoon, Chairman Ashford and members of the Judiciary Committee. My name is John Lund, J-o-h-n L-u-n-d. I'm the founder and the CEO of The Lund Company, which is located in Omaha. I've been in commercial real estate and property management business for 40 years. The Lund Company started in 1981 and is one of the largest commercial real estate firms in the market. We've done thousands of transactions over the last 30-some years. I'm here to testify as a supporter of LB289.



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Throughout my years in the commercial real estate field, I've experienced, all too often, the unfortunate situation where a client refused to pay an agreed-upon commission and brokers were forced to attempt to collect the fees. This would often involve costly legal proceedings which frequently left them with larger legal bills than the amount they attempted to collect. By having the legal right to place a lien, brokers are in a stronger position to collect fees for services provided under a written agreement. LB289 is very important to our industry, and I thank Senator Lathrop for introducing this bill. I would ask that you please support LB289. [LB289]

SENATOR ASHFORD: Thank you, John. [LB289]

JOHN LUND: Thank you for your time. [LB289]

SENATOR ASHFORD: Thank you for coming down. Any questions? I don't see any. Questions? Okay, none. Anyone else wish to testify? [LB289]

TRENTON MAGID: Good afternoon, ladies and gentlemen. Mr. Chairman, members of the committee, appreciate your opportunity...the opportunity to speak here today. Thanks to Senator Lathrop for introducing this bill. What I want to provide is a real-life... [LB289]

SENATOR LATHROP: Can we start with your name? [LB289]

TRENTON MAGID: Yeah, I apologize. [LB289]

SENATOR LATHROP: We've got to have you spell your last for us. [LB289]

TRENTON MAGID: Right. Trenton Magid, M-a-g-i-d, World Group Commercial Real Estate. I've been practicing commercial real estate for 19 years, Nebraska primarily and some in Iowa. And I, too, have been involved in hundreds and hundreds of transactions. And one clarification, which Senator Lathrop said at the beginning: Generally, commissions on sales or leases are paid up front at the time that services...a lease is obtained. We have written exclusive listing agreements with our clients if we're selling or leasing a building. And there's been times, especially on leases, where...generally, at sales, when we close a building, we get paid by the title company, and everything is settled at the closing table. But when there's a lease, we send an invoice to our listing clients and, generally, it's a percentage of that lease and payment is due, you know, generally within 30 days. If that client does not pay, we have very little recourse. That commission can be anything from \$50 to hundreds of thousands of dollars, depending on the listing agreement, the size of the tenant, the length of the lease agreement. I've got a concrete example. About two years ago...we have a listing agreement with a large commercial property developer. We brought in McDonald's Corporation to sign a 20-year land lease, about \$1.4 million in value. The commission was relatively small in

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relationship to that amount, and we split...it was about a \$38,000 commission. We split that, when we receive it, if we ever receive it, with the selling...or with the procuring agent that represented McDonald's, we represent the landlord on a land lease, sent our bill. He said, I don't want to pay you. And the only...my only recourse...after my agent and my company, I pay him about 60 percent of the amount. So to the company it's \$8,000; to the agent it's about \$11,000. And for the last year and a half, the only way...my only recourse...I couldn't afford to hire an attorney and go after that small of an amount, but I was lucky, my attorney felt it was a strong enough case to take it on contingency. And here we are a year and a half later. We have not collected the amount. Had I...my attorney fees would probably be about \$30,000 to \$40,000 right now to collect \$19,000. And, luckily, it's on contingency and it's still pending. So that's a concrete example and why I'd ask you to support the LB289. [LB289]

SENATOR ASHFORD: Thanks, Trent. Any questions of Trent? Yes, Senator Davis. [LB289]

SENATOR DAVIS: I'm not an attorney, so I have to ask these kind of questions. But there's not a process already in which you can get some recourse from these people? [LB289]

TRENTON MAGID: My understanding is...and I know on residential side, even the real estate license law, I cannot file a lien on that property or I could lose my real estate license. So to my knowledge, other than begging, my only recourse is to hire an attorney, and there's just no way I could afford it if the attorney didn't take it on contingency. [LB289]

SENATOR DAVIS: You can't write contracts at first that specify that the payment will be made before anything gets done on it? [LB289]

TRENTON MAGID: Oh, the contract is very clear that they have to pay us, yes, but to enforce that contract we need this law. [LB289]

SENATOR DAVIS: I don't think you understand my question. You can't write a contract so that there's nothing...no contingency, I mean, that your payment has to be made up front? That can't be done? [LB289]

TRENTON MAGID: The contract says that they pay us up front when the lease is signed, but... [LB289]

SENATOR DAVIS: But, in fact, they didn't do so. [LB289]

TRENTON MAGID: But they didn't do so, and I'm trying to figure out how to collect. [LB289]

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SENATOR DAVIS: Okay. [LB289]

SENATOR ASHFORD: And I suppose the underlying philosophical argument here is you're improving the value of your client's property by bringing a tenant in of that magnitude. And so, obviously, with the tenant of, like, a McDonald's Corporation, you're obviously enhancing the value of the underlying... [LB289]

TRENTON MAGID: Mr. Chambers (sic), this development was done 15 years ago. This land sat there. [LB289]

SENATOR ASHFORD: I'm honored. (Laughter) [LB289]

TRENTON MAGID: The... [LB289]

SENATOR MCGILL: Mr. Chambers. [LB289]

SENATOR ASHFORD: I'm kidding. I think you were looking at Ernie's sign when you... [LB289]

TRENTON MAGID: Oh, you're not... [LB289]

SENATOR ASHFORD: I know I'm not... [LB289]

SENATOR MCGILL: He's Mr. Ashford. [LB289]

TRENTON MAGID: I thought I said, Mr. Chairman. [LB289]

SENATOR ASHFORD: I thought you said, Mr. Chambers. [LB289]

\_\_\_\_\_: (Inaudible.) [LB289]

TRENTON MAGID: Did I say, Chambers? [LB289]

SENATOR MCGILL: No, it's Mr. Chambers. He said, Chambers. (Laugh) [LB289]

TRENTON MAGID: Okay, it's...I apologize. [LB289]

SENATOR ASHFORD: No, but it's...when we're talking about land leases, anybody that says anything funny is... [LB289]

TRENTON MAGID: Yeah, but here's...yeah, here's the deal. Here's the straight truth. This developer has been sitting on this land for 15 years. All they've been doing is

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paying taxes, have no income. As a real estate community, we create the value. We market the property; spent two years trying to find tenants and things. We do the deal, we get the deal and, all of a sudden, they get...their property is worth infinitely more. If you have a McDonald's land lease, he could sell that for huge money, and we got nothing for our work. [LB289]

SENATOR ASHFORD: Yeah, and in...and as...those leases are long term, aren't they? Ten, 20 years of...? [LB289]

TRENTON MAGID: It's a 20-year land lease. Per our listing agreement, we only charge them for ten. [LB289]

SENATOR ASHFORD: Okay. [LB289]

TRENTON MAGID: We gave them a free ten years; they won't even pay for the ten years that we charged them for. [LB289]

SENATOR ASHFORD: Right, and then...and that...you know, obviously, the taxpayers benefit because there's an increased value in the property and... [LB289]

TRENTON MAGID: Oh, there's no question that, without the revenue stream that we create, there's no value on that property. [LB289]

SENATOR ASHFORD: Okay, makes sense. I don't see any other questions, Trent. Thanks very much. [LB289]

TRENTON MAGID: Thank you. [LB289]

SENATOR ASHFORD: Any other proponents? [LB289]

KENT THOMPSON: Good afternoon. My name is Kent Thompson, T-h-o-m-p-s-o-n. Thank you very much for hearing this bill today. I am a commercial real estate broker. I've been an owner of a business called Coldwell Banker Commercial Thompson Realty Group here in Lincoln, Nebraska, for over 24 years. Like the gentleman before me, I've had well over 1,000 transactions that I've handled, and I'm here to speak specifically about some of the issues that we're concerned with. And picking up on Trenton's live example, I thought I would use one also that maybe you could identify with. We have a major pharmacy coming through this market called CVS. I've represented them in a couple of locations. And one very well-heeled landlord has decided that, despite the fact that I do have a signed listing agreement, as called for by the state law, with terms of how to be paid--my name is physically in the lease itself that they signed and executed--they have decided that they would not pay me, and their ability to pay, out of pocket, for multiples of this is very easy. So the question becomes, do I go after this

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through legal pursuits? And the answer is yes. The attorney has told me that, basically, I'll lose somewhere around 35 to 40 percent of the value of my commission in the process of pursuing this. However, the bank has set aside the money for the commission and the total construction bills that it...you know, that they were looking to be submitted to them. So if I choose to pursue this, this landowner is not so unsophisticated. And to address, I think, maybe a further question that Senator Chambers asked earlier, he has said that he will move this from one company to the next. So, effectively, my agreement with that landlord runs with that landlord. So if he sells the property or transfers it, gift-wise or otherwise, my legal recourse is to a corporation that's essentially...becomes a shell. And that lays into our total issue that we have. The bankers are highly aware of how all of this is put together. They've asked all the questions about the construction detail. The title companies, of course, have checklists of which they go through every time they do a transaction. And so to add this to their checklist and to set this money aside so that we know that we're getting paid is certainly important to us. But then the ultimate question is if we can put a cloud on the title, then the landlords will step up and respect the contracts that we've signed with them. But I would ask that you would, please, support this LB289 and move it forward. Thank you. [LB289]

SENATOR ASHFORD: Thanks, Kent. I don't see any questions. I do see a question. Senator Davis. [LB289]

SENATOR DAVIS: Out of your thousand transactions, how many cases like this have you dealt with? [LB289]

KENT THOMPSON: You know, that's a great question, and I would say that I probably have one or two a year. And what winds up happening is that I know that my attorney is going to wind up eating well if I feed him, and I wind up compromising my position because I know I don't really have a leg to stand on. [LB289]

SENATOR DAVIS: Attorneys have to eat, too, you know. [LB289]

KENT THOMPSON: I'm sorry? [LB289]

SENATOR DAVIS: Attorneys have to eat, too, you know. [LB289]

KENT THOMPSON: We like to feed them, but we'd like to feed them when they write the contracts, not to enforce them. [LB289]

\_\_\_\_\_: (Inaudible.) [LB289]

SENATOR ASHFORD: Oh, boy. Okay, thank you very much, Kent. Fred. Mr. Hoppe. [LB289]

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FRED HOPPE: My name is Fred Hoppe, H-o-p-p-e. I'm the general counsel for the Nebraska Realtors Association, and I drafted the bill that you have in front of you. The context and the reason why, when drafting a bill for a lien bill for the commercial realtors: It seemed an obvious place to put the bill and make it a part of the real estate...Construction Lien Act because, really, what we're talking about is contracts that improve the value of the land. It fits right in. There's a structure within that bill, a mechanism in place, as it sits, to put priority...prioritize the liens. There's a structure within the bill, as it sits, to provide a means of cutting off the lien so it doesn't jump in front of the lenders. You may hear the lenders' objection at a later point in time that they're concerned that they don't have a process to protect their liens. But there is one built into the bill, and so keep it in mind as you're considering that. And we'll certainly work with them as well, but I wanted you to know where we came from, why we put it where we put it, what it means, and the fact that there is an existing structure that people have experience using makes some sense. What we're looking at...there are really two kinds of services that commercial realtors do. They do management services, and they find buyers and sellers and...or work for sellers to find buyers, work for owners to find tenants. This protects their services, and we'd ask you to support and approve that bill. It is only commercial, not on the residential context at all. So, yes, sir. [LB289]

SENATOR CHAMBERS: Mr. Hoppe, I'm sure that, on occasion, when you're discussing your area of expertise, you encounter people who don't know anything about it. Well, I'm one of those people. How does the service...first of all, the service that you're performing is finding a buyer, you said, or a tenant to move in? [LB289]

FRED HOPPE: That's correct. [LB289]

SENATOR CHAMBERS: How does that increase the value of the structure? [LB289]

FRED HOPPE: Well, the...for a seller, finding a buyer increases the value because they can get out, they can consummate a deal, and get out of a sale. For...as far as putting a tenant in the building, the tenant is an income stream. One of the three types of appraisals...I'm sure you're familiar with appraisals of real estate? [LB289]

SENATOR CHAMBERS: Um-hum. [LB289]

FRED HOPPE: One of the three types of appraisals is an income approach. You value property based on the income it makes. Income it makes is dependent on the tenants that are in that property. [LB289]

SENATOR CHAMBERS: But that could be called intangible, couldn't it? And that value could shift? It wouldn't be...that value would not be the same everywhere that it's performed. [LB289]

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FRED HOPPE: That's correct. [LB289]

SENATOR CHAMBERS: Here's what I'm getting at. If you add, say, a column to a structure that bears weight, then that is an essential part of that structure because, if it's not there, then it will fall. If you add one that presents esthetic value, then it may or may not add...well, a statute or something concrete or steel, but it's something tangible you can see, feel, weigh. And aside from what the artist or whoever produced it would charge, once you add that to the property, it conceivably could add to the value of the property. And maybe it won't, but at least it's something concrete. [LB289]

FRED HOPPE: Um-hum. [LB289]

SENATOR CHAMBERS: This, that we're talking about, would have a value depending on the one with whom you contract...ascribes to it. Maybe if I were the original owner of this strip mall, your finding a tenant wouldn't mean as much to me as it would to Senator Lathrop. So it's something that has a value that could shift depending on the individual with whom you're contracting, rather than something tangible that an objective, third-person evaluator could determine. And maybe I've lost you. [LB289]

FRED HOPPE: I think you've lost me, but I think I can answer your...if there was a question there, I think I can answer it. An appraiser could determine, from the valuation of leases, what value is in that building. [LB289]

SENATOR CHAMBERS: That's... [LB289]

FRED HOPPE: An appraiser would be an independent third party. I mean, one could come in, you could analyze the leases in a building, to determine value of that building by using a cap rate. [LB289]

SENATOR CHAMBERS: This is... [LB289]

FRED HOPPE: That may change, building to building, obviously. And, of course, the services that are measured may change, depending on how the real estate licensee changed...charged for their services, and that would be spelled out in that real estate improvement contract, their agency agreement. [LB289]

SENATOR CHAMBERS: But if... [LB289]

FRED HOPPE: Does that answer your question? [LB289]

SENATOR CHAMBERS: If the successor owner doesn't think what you did had that much value, then, under this bill, that couldn't be questioned or challenged because he

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wouldn't be, or she, in a position to alter the terms of a contract. [LB289]

FRED HOPPE: Let's look at how the structure of how that lien falls in place. [LB289]

SENATOR CHAMBERS: Okay. [LB289]

FRED HOPPE: A seller or an owner would go out and contract with a real estate licensee to perform the services, to go get a tenant. [LB289]

SENATOR CHAMBERS: Okay. [LB289]

FRED HOPPE: Okay, so the contract is with the owner. Let's say the property is going to transfer. The lien would be in place. The lien is still against the owner's property, prior to the transfer. It doesn't matter what the subsequent buyer thinks of it because the lien would be in place, coming into the transfer, to protect that real estate licensee's commission. [LB289]

SENATOR CHAMBERS: Okay, now I can ask you the question. [LB289]

FRED HOPPE: Yes, sir. [LB289]

SENATOR CHAMBERS: Is that the way this operates now? Can such a lien be placed now? [LB289]

FRED HOPPE: Not for real estate licensees. It can be for an engineer, which would be an intangible concept, as you've indicated. It would be for an architect that provides services to a property, even if those services aren't translated into creation of bricks and sticks. [LB289]

SENATOR CHAMBERS: With all due respect to what real estate people, these brokers, do--I'll preface the question that I'm going to put to you with those words. [LB289]

FRED HOPPE: Okay. [LB289]

SENATOR CHAMBERS: In the profession of architecture or engineering,... [LB289]

FRED HOPPE: Um-hum. [LB289]

SENATOR CHAMBERS: ...would there be a way to come to a consensus as to what certain services provided by an architect would be worth and certain services provided by an engineer would be worth? Or is each job independent of any and everything and it's just a matter of the architect getting as much from a person as he or she could get and there would be no way for the one who's receiving these services to judge whether



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what is being obtained is worth what the architect is going to charge? In other words, there is no standard for judging the value of architectural work because it's creative, is that what you're telling me? [LB289]

FRED HOPPE: My experience with architectural contracts are twofold: one, ones that are based on an hourly rate for services rendered... [LB289]

SENATOR CHAMBERS: Um-hum. [LB289]

FRED HOPPE: ...or based on a percentage of the ultimate cost of the activity on which they're working. [LB289]

SENATOR CHAMBERS: Okay. [LB289]

FRED HOPPE: So if they...if it's a percentage-basis contract, if you have it...like, a 5 percent architect's fee and you build a \$2 million property, you've got a \$400,000 fee... [LB289]

SENATOR CHAMBERS: So with that having been stated by you,... [LB289]

FRED HOPPE: ...or \$40,000. [LB289]

SENATOR CHAMBERS: ...maybe you can answer this question based on what you told me. [LB289]

FRED HOPPE: Um-hum. [LB289]

SENATOR CHAMBERS: When you talk about this kind of contracting that we're discussing in the bill, it's not based on an hourly rate, in terms of how much time you spend trying to find a tenant, is it? [LB289]

FRED HOPPE: Not normally, sir. [LB289]

SENATOR CHAMBERS: So what is it based on? [LB289]

FRED HOPPE: Normally, it's based on a percentage of either the sale price, if it's a sale, or the occupancy value, the valuation of the rental stream for a period of time, usually five years. [LB289]

SENATOR CHAMBERS: Okay. [LB289]

FRED HOPPE: Yeah, and sometimes, if there's options to renew, then it would have another rate for...upon that option to renew, potentially. [LB289]

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SENATOR CHAMBERS: If it's... [LB289]

FRED HOPPE: In other words, it might be like a 5 percent for the first five years, 2 percent for any renewal terms. [LB289]

SENATOR CHAMBERS: If a subsequent buyer was going to make a purchase, he or she would be aware of this lien as he or she is aware of any other lien that's against that property. [LB289]

FRED HOPPE: That's correct. It would be filed in the register of deeds office, just as a mortgage. [LB289]

SENATOR CHAMBERS: And if the person did not want to buy the property with that lien, he or she either would not buy the property or the seller will say, well, I will take care of the lien so it will not be a part of any expense to you. [LB289]

FRED HOPPE: Rarely are liens existing on a property transferred to a new owner, unless there's particularly good financing, first-mortgage financing or something, that might be assumed. But, normally, secondary financing or liens of this nature would be taken care of at the closing of the transaction. [LB289]

SENATOR CHAMBERS: But you want it to follow and go to the subsequent... [LB289]

FRED HOPPE: No, it is not intended to follow, sir. [LB289]

SENATOR CHAMBERS: Okay. [LB289]

FRED HOPPE: It's intended just to operate as any other lien on the property. [LB289]

SENATOR CHAMBERS: Then my questioning ain't got us nowhere. Your answers were correct. I just...I'm lost. I'll wait and talk to Senator Lathrop later. [LB289]

FRED HOPPE: Okay. [LB289]

SENATOR ASHFORD: Fred, if you have a lien on the...I'm sorry, Senator Davis, go ahead. [LB289]

SENATOR DAVIS: Go ahead. [LB289]

SENATOR ASHFORD: No, go ahead. [LB289]

SENATOR DAVIS: Well, I'm just playing devil's advocate here. But let's just say that

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there's a signed agreement, but you really don't do any work on your part. And the landlord goes out and, essentially, finds his own client. [LB289]

FRED HOPPE: Um-hum. [LB289]

SENATOR DAVIS: But you have the contract, so you can still impose a lien, even though you've done any work...no work. Is that...would that be right, if I read this correctly? [LB289]

FRED HOPPE: Well, the lien would be based on the agency agreement that's in place with the licensee, the real estate licensee. It would be a defense to the lien, if the lien were foreclosed, that the real estate licensee did not perform under the contract. [LB289]

SENATOR DAVIS: Well, but doesn't that shift... [LB289]

FRED HOPPE: So while it might be possible that the lien be filed, there would be a defense to the foreclosure of the lien at the time that was done. [LB289]

SENATOR DAVIS: But isn't that shifting a great more...a lot more of the power into your hands as to the negotiating? You know, if somebody... [LB289]

FRED HOPPE: I... [LB289]

SENATOR DAVIS: If somebody fails to perform the service, there is a legitimate reason to say, I'm not going to pay for the services that I didn't get. [LB289]

FRED HOPPE: That's correct. [LB289]

SENATOR DAVIS: And so I guess that would be my concern, you know, that you're taking something away from the property owner's right to contest a claim by the leasing agent. [LB289]

FRED HOPPE: But it does not take anybody's right to contest the adequacy of the services. To enforce the lien you have to take it through a foreclosure process, much like a mortgage foreclosure. In that process, the adequacy of the services can be explored. It...the failure of the services would be a defense to a foreclosure of the lien. It...the...in the times where there is no defense, those are the ones where having that lien is an assurance that you get paid. [LB289]

SENATOR DAVIS: Um-hum. [LB289]

FRED HOPPE: If there is a dispute over adequacy, then it's legitimate for the lienholder

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to force a foreclosure. And actually, under the Construction Lien Act, there is a process to...if you doubt or are concerned about the adequacy of the lien, there is a process in it to force a foreclosure or release the lien, to take it to dispute resolution. [LB289]

SENATOR DAVIS: Okay. [LB289]

SENATOR ASHFORD: Fred, do they have the...with this statute, does it...would it change the closing process? Would it put the payment of the real estate fee at the...would it put it into the... [LB289]

FRED HOPPE: More than likely it would put it at the closing. [LB289]

SENATOR ASHFORD: It would put it at the closing. [LB289]

FRED HOPPE: Yes, sir. [LB289]

SENATOR ASHFORD: So that's really what happens here, in most cases, is it's a... [LB289]

FRED HOPPE: Most of the time, in cases of real estate services for sales, they occur at the closing. [LB289]

SENATOR ASHFORD: Because you're going to be clearing...okay, for sales, no so much leases, but...so much, but on... [LB289]

FRED HOPPE: Right. The normal listing agreement for leases would provide, when the tenant takes possession, the entire fee would be due. [LB289]

SENATOR ASHFORD: But on sales, clearly, you'd go through the checklist and... [LB289]

FRED HOPPE: Yes, that's correct. [LB289]

SENATOR ASHFORD: Okay, okay. Thanks, Fred. Any other proponents? Opponents? [LB289]

SENATOR MCGILL: This bill makes my head hurt. [LB289]

SENATOR CHAMBERS: It's making me tired. [LB289]

JERRY STILMOCK: (Exhibit 4) Please. Thank you. Good afternoon, Senators. Jerry Stilmock, J-e-r-r-y, Stilmock, S-t-i-l-m-o-c-k, testifying on behalf of my client, the Nebraska Bankers Association, in opposition to the legislation, LB289. We've visited

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with the realtors, Senator Lathrop, and we're nothing against trying to allow some type of framework for a lien to be established for the brokers, as you've heard. It's just a matter of using the construction lien to do it. So if we start with a framework of how the construction lien works, from the time that the services are ended, whenever that could be defined in a broker situation, a party has 120 days to file that lien and, at 120 days, then actually could relate it back in time to when those services commenced. So that is a backdrop. We're talking about a completed building being sold to a new buyer, not talking about construction at all. The building itself, the bank would look to the record, and what would they, the lender, see? It would see, perhaps, a bank already making a loan. So the new bank knows, I have to take care of that existing bank lien in order to have that new buyer come in with a clean bill of sale, so I know there's a lien out there. The broker goes about his business, and the broker could file his lien...excuse me. The closing takes place. The new buyer is in possession. The new bank has made financing, and it has filed its deed of trust. My notebook represents the deed of trust in the time that it was filed. The broker, conceivably...I didn't get paid at closing. I haven't filed my lien. I've completed my work now. I've completed my contract as a broker. The 120-day clock starts. The 120 days is part of the construction lien law. It doesn't have anything to do with Senator Lathrop's bill. One-hundred twenty days after I complete my broker's work, I can file my lien. And what does the construction lien law say? It says that that lien, filed after closing, after my...after the broker has done his work, 120 days after that he can file his lien, and that lien relates back to when he commenced his services, back before the closing occurred. So the situation I'm trying to illustrate in my example, please, is the broker could possibly jump back behind...in front of the bank's deed that was established as security for that new buyer. We don't want a situation where we have a lien that relates back in time. That's why, in 1981, in the construction lien law...my red light has appeared. I've submitted...I don't want to ignore that. It's Friday afternoon. [LB289]

SENATOR ASHFORD: No, no, you've acknowledged the red light is on. What does the red light mean? [LB289]

JERRY STILMOCK: Thank you, Senators, I oppose the bill. (Laughter) If I may have additional time, I'd be glad to continue. [LB289]

SENATOR ASHFORD: You may. Would you like to ask a question? Or maybe Senator Chambers? [LB289]

SENATOR LATHROP: No, no, I think I get it. (Laughter) It's my bill. Why would I ask a question? (Laughter) [LB289]

SENATOR ASHFORD: No, what...I mean... [LB289]

SENATOR CHAMBERS: Here's...oh, go ahead, since you're going. [LB289]

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SENATOR ASHFORD: Go ahead, Senator Chambers, if you'd like to. [LB289]

SENATOR CHAMBERS: Oh. Here's the question that I would ask, based on what you've told us. That notebook would...if that notebook took care of the lien--I meant whatever was outstanding at the time this deal was going to be made--that notebook would be the first one in line to get something from that building if it had to be foreclosed on or liquidated. [LB289]

JERRY STILMOCK: Yes, sir. [LB289]

SENATOR CHAMBERS: Because of the way this bill would work, the person who filed after would, nevertheless, take a position in front of that notebook. [LB289]

JERRY STILMOCK: Yes, sir. [LB289]

SENATOR CHAMBERS: And that's what you are objecting to. [LB289]

JERRY STILMOCK: Yes, sir. [LB289]

SENATOR CHAMBERS: Okay, at least I kind of understand, but I still don't understand how this work by this broker has value that can attach to the real estate itself. Would you be aware of this broker's lien or, if it wasn't filed, you wouldn't have any way of knowing? [LB289]

JERRY STILMOCK: Exactly. That's where we lose. [LB289]

SENATOR CHAMBERS: Well, now I understand that. If you knew, what value would you place on that lien if you were going to take care of everything that was filed against that property? Would you determine the value based on a contract between that broker and the first owner and just take whatever the terms were as what you would have to accept as being added to the value of this structure, and that's the amount that you would have to take care of, one way or the other? [LB289]

JERRY STILMOCK: Yes, sir. [LB289]

SENATOR CHAMBERS: So you cannot alter the value of that lien,... [LB289]

JERRY STILMOCK: I... [LB289]

SENATOR CHAMBERS: ...no matter what you think it may or may not be worth? [LB289]

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JERRY STILMOCK: I agree with your statement, yes, sir. [LB289]

SENATOR CHAMBERS: Okay, now I'm kind of understanding. [LB289]

SENATOR ASHFORD: Yes, Senator Davis. [LB289]

SENATOR DAVIS: Jerry, isn't there a way to make this loan a junior loan? [LB289]

JERRY STILMOCK: There are 29...in our research, Senator Davis, there are, pardon me, there are 29 states that have some type of broker lien like this. Four come in and couple it with the construction lien, and I haven't looked at that in detail to find out how they make it work. Twenty-five other states have standalone liens that it doesn't couple up with, it doesn't meld, it doesn't become a part of what's in the construction lien that we're wrestling with. So, yes, there's a way. We'd like to work to get it that way because we understand what they're doing. We just...we're not in the position to have that risk of having that lien jump back, number one. [LB289]

SENATOR DAVIS: Right, I understand. I get it, yeah. [LB289]

JERRY STILMOCK: And number two is we've heard testifiers this afternoon that have talked about, maybe, it's a five year...now I'm going to go over to the tenant's side, maybe it's a five-year lease. Maybe it's a five-year lease with an option for another five years. But the other thing that concerns our bankers in the legislation is that the clock does not begin ticking. There's a two-year limitation period in the bill. The two-year limitation period does not begin to tick until the payment is due. So if the payment is due--I mean, some of the testifiers said, well, the payment is due upon closing; it was a very good question; Mr. Hoppe answered the question--typically, it would happen at the time of closing. But there are times, because maybe the fee is based upon as those rents come in, that the way it's set up is I could be ten years down the road with a lien that had been filed back in 2013. In 2023, they didn't pay me. That's my due date, and I have two years in which to enforce it. So it really prolongs... [LB289]

SENATOR ASHFORD: Well,...go ahead. [LB289]

JERRY STILMOCK: Sir? [LB289]

SENATOR ASHFORD: No, but couldn't you have a default? I mean, aren't there other ways the bank could protect itself in that case, if...I understand? The...here's the...go ahead, Senator, I'm sorry. [LB289]

SENATOR DAVIS: I'm... [LB289]

SENATOR ASHFORD: No, but here's the problem. The nature... [LB289]

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JERRY STILMOCK: Sir. [LB289]

SENATOR ASHFORD: What I'm sympathetic to...and I get your point, absolutely, on the filing. [LB289]

JERRY STILMOCK: Thank you. All right. [LB289]

SENATOR ASHFORD: But the nature of these transactions is such...I mean, we're not...where maybe 50, 30, 40 years ago, leases used to be commonplace, 30, 40 years. In fact, I have personal knowledge of that. [LB289]

JERRY STILMOCK: Uh-huh. [LB289]

SENATOR ASHFORD: Now these are almost, you know, five-, ten-year leases to make large transactions with major, major tenants. And so...and it used to almost be that the leasehold interest was like an ownership interest, but now these transactions move very quickly, in shorter durations. I mean, and the nature of how they're structured is...don't we have to recognize, somehow, in the law? I mean, this is...times have changed. [LB289]

JERRY STILMOCK: Um-hum. [LB289]

SENATOR ASHFORD: So a developer or an owner makes a significant investment that improves, you know, the value of the land, not only that land but the land around it. And if they didn't perform that function, it would be difficult to assemble. Let's say you're doing a shopping center. [LB289]

JERRY STILMOCK: Yes, sir. [LB289]

SENATOR ASHFORD: And there's TIF, there's all sorts of public money involved, and...but they can't find...they can't assemble this deal. They have to go out and get major tenants. So you go to somebody with this kind of experience that can bring those major tenants in. And to make...the public purpose here is that you're improving a significant (inaudible) of land with, you know, top-grade tenants. That's hard to do, that's my sense, and so those...and it's to the benefit of the bank because their underlying security...or the land that they're...that they are...have loaned the money on improves in value. So that's happening, there's a public purpose going on here, and the nature of these transactions is to have these leases be in the future and the fees be in the future, based on the rent paid. So isn't there a way to accommodate that? [LB289]

JERRY STILMOCK: I think there is, and that would be a notice of a preclosing lien, preclosing. So it...we don't have this situation of the lender, the new lender, looks and



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sees only one bank out there withholding the lien. We want...maybe the answer is, back before this closing takes place, the broker files a notice of lien before the closing, placed so everybody knows that that broker... [LB289]

SENATOR ASHFORD: And it could be that the fee that's paid is two or three years into the future. [LB289]

JERRY STILMOCK: Yes, sir, but at least we know going into it...we know that... [LB289]

SENATOR ASHFORD: And that that lien could then be foreclosed two or three years in the future. [LB289]

JERRY STILMOCK: Well, I...that's...I think you're right in stopping me, in the sense that that's probably beyond what the banking industry interest is, as long as we know what the heck that puppy is before we close. [LB289]

SENATOR ASHFORD: Yeah, okay. I understand. It just seems to me that the kinds of people that came to testify today do big projects... [LB289]

JERRY STILMOCK: I... [LB289]

SENATOR ASHFORD: ...that enhance the value of everything around it. So banks should be very happy about that because, it would seem,... [LB289]

JERRY STILMOCK: And that's the flavor or the tenor I hope to present is that we want to work to get there with Senator Lathrop and those proponents, sir. [LB289]

SENATOR ASHFORD: Okay, okay, thanks very much. [LB289]

JERRY STILMOCK: Thank you, sir. Thank you, Senators. [LB289]

SENATOR ASHFORD: I'm not sure I've convinced Senator Chambers, but I've convinced myself, so. [LB289]

SENATOR CHAMBERS: Well, I at least understand. [LB289]

SENATOR ASHFORD: Yes, Senator Lathrop, yeah. [LB289]

SENATOR LATHROP: Anybody else? [LB289]

SENATOR ASHFORD: I think...is there anyone else that wishes to testify on this bill? Senator Lathrop, and then you have the next two bills. [LB289]

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SENATOR LATHROP: Yes, I do. Just briefly, on closing,... [LB289]

SENATOR CHAMBERS: That was a good closing right there. Oh, you...that wasn't the close. (Laughter) Oh, okay, okay. [LB289]

SENATOR LATHROP: Listen,... [LB289]

SENATOR ASHFORD: "I close" is a good closing. [LB289]

SENATOR LATHROP: Great questions, and I think you can see the dilemma between the real estate agent or the broker who procures the tenant and the interests of the bank. I get the bank. If the bank loaned 100 percent of the value,... [LB289]

SENATOR ASHFORD: Right. [LB289]

SENATOR LATHROP: ...and somebody comes in with a contract that says, I'm supposed to be paid \$20,000, now the bank's security has been diminished by...to the extent that somebody has jumped ahead of them. And I think that's what Mr. Stilmock was trying to say and what...and he proposed a solution. I don't know how that works because I'm not a real estate lawyer. But we're going to try to get to someplace where we can make it all work, hopefully. I will say, about the value of the improvement to the real estate, the contract is a contract that's been entered into between the owner and a broker, so the terms of that were negotiated. This isn't something where, like, somebody brings out some concrete and I didn't have any idea how much concrete you were bringing or what it was going to cost and there's the lien. [LB289]

SENATOR CHAMBERS: But to spare you, Senator Lathrop, once I got an understanding of what the issues are,... [LB289]

SENATOR LATHROP: Okay. [LB289]

SENATOR CHAMBERS: ...then this question I was raising about value just all goes away. [LB289]

SENATOR LATHROP: Okay, good. [LB289]

SENATOR CHAMBERS: So it is clear to me now. [LB289]

SENATOR LATHROP: (Exhibit 5) Then I will spare you any further discussion and ask that you support LB289 as we move it to the floor, with some work that we have to do between now and then. And with that said, I'll open on LB103. Again, Mr. Chairman and members of the Judiciary Committee, my name is Steve Lathrop, L-a-t-h-r-o-p. I am the state senator for District 12. I'm here today to introduce LB103. LB103 is a bill that I was

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asked to introduce on behalf of the county judges, and it makes two changes to existing law. However, due to concerns raised since the bill was introduced, I've provided AM86 to each of you for your consideration. If accepted by the committee, it strikes the original contents of LB103 and would become the bill. The first change in the bill is to clarify that judges have the authority to digitally sign court orders, using the JUSTICE system, wherever the judge is physically located. Currently, there is a question regarding whether or not the judge can digitally sign orders when they are located outside of Nebraska. By making this change, Nebraska is reacting to the changing technology of the court, and it would also eliminate jurisdictional uncertainty. The second change would amend state law so that a judge, with the consent of the parties, could permit any witness who's to be examined by oral examination to appear telephonically, by videoconferencing, or some similar method. This is also in reaction to the changing technology and could be used by judges throughout the state. As a practicing trial lawyer, I'll just say that if we can get to a place where the parties can agree that somebody who lives in Massachusetts can testify by videoconferencing, we're saving litigants a good deal of money and probably making it easier to schedule trials and hearings. And with that, I'd ask for your support of LB103 and its amendment, AM86. [LB289 LB103]

SENATOR ASHFORD: Senator Chambers. [LB103]

SENATOR CHAMBERS: Senator Lathrop, I'm very serious in what I'm asking you. I've seen orders signed by judges. Some will have a stamp below the name; others, there is no stamp, there is no printing, and I don't know who signed the order. I wasn't a party to it, but somebody will ask me to look at something. And I say, well, who was the judge? You can't read the signature. I will support this bill if we can put into it somewhere that the signature on an order will either carry a legible...no, because they probably are too arrogant to think their signature is not legible, but a stamp that would legibly present the name of the judge. And I'm not saying it for a trifling reason. I even had gone to the courthouse with a document, and nobody knew who the judge was. And I had thought that there would have to be something in the document that would make it clear who the person was. I forget how we found out who it was. But I don't think that would be unreasonable. And some years ago I had asked a court administrator, couldn't the Supreme Court just do that by order? And he had said that they'd rather not do that because it might be...I don't know if he said impinging on the judges or whatever. But would you see if that could be done? [LB103]

SENATOR LATHROP: I'd be happy to. I'd be happy to look into that. [LB103]

SENATOR CHAMBERS: And if you can, I'll support the bill. [LB103]

SENATOR LATHROP: I know I've prepared for the court's signature thousands of orders and generally will say, by the district court, or, by the county court, and then the

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judge just signs their name to it. But I can certainly...well, Judge McDermott will be here, and you can ask him what the process is for... [LB103]

SENATOR CHAMBERS: Who will? [LB103]

SENATOR LATHROP: Judge McDermott is going to testify. [LB103]

SENATOR CHAMBERS: Oh, a judge, a live judge. [LB103]

SENATOR LATHROP: You're going to have a live judge. Unlike the bankers, I bring judges to this hearing. (Laughter) [LB103]

SENATOR CHAMBERS: Why do you continue to encumber that chair? (Laughter) [LB103]

SENATOR LATHROP: I'll get out of the way and let the court speak if there are no other questions. [LB103]

SENATOR CHAMBERS: Okay. [LB103]

SENATOR ASHFORD: I think there are not. [LB103]

SENATOR LATHROP: Good, thanks. [LB103]

SENATOR ASHFORD: Judge McDermott, Pat. [LB103]

PATRICK McDERMOTT: Good afternoon, Mr. Chairman, members of the committee. My name is Patrick McDermott, last name spelled M-c-D-e-r-m-o-t-t. I am a county judge in the 5th Judicial District of the state of Nebraska. My chambers are in Schuyler. I am the cochair of the legislative committee of the county judges. First, we would thank Senator Lathrop for introducing the bill and, particularly, the amendment. I take responsibility for the inartful crafting of the original bill. I had an idea in my head, but it...by the time it went through the Bill Drafter, that idea was skewed, and Senator Lathrop was patient and fixed it for us. This bill does three things, and then I'll get to your signature thing, Senator. First of all, it preserves the Nebraska tradition that the use of these enhanced technologies is consensual. We do not want to force this on anyone. Those of you who were in the body in 2008 will remember that you enacted legislation as a result of the bar's major study on court restructuring that, very, very liberally, gave us powers to do things, with consent, through videoconferencing. In fact, our statute says we can do anything but a jury trial, as long as the parties agree. So it maintains that you have to do this by consent. Secondly, and this is most particularly for county judges, we're uniquely tethered to our courts in the fact that we review warrantless arrest affidavits within 48 hours of arrest so that we can set a bond, make a

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probable cause finding. By being able to use technology, we are far more available, so it's an access to justice. We used fax machines for years. And they would be at the courthouse, and we would try to go in there, either Saturday morning or go in there Sunday, to check and see. The way we're set up now, those same officers just e-mail me their stuff, so I get it throughout the weekend. It doesn't make any difference where I am. Whether I'm here in Nebraska or I could be in Texas or Arizona, I can sign on, check those things, and set bonds for people in a very timely fashion. The third thing it does, through the use of videoconferencing to examine witnesses on oral examination...for those of us who serve rural districts, scheduling physicians, psychologists, and psychiatrists, particularly in juvenile cases where you also have to schedule about a dozen attorneys in some cases, is nigh unto impossible. By using these methods, we're able to gather those needed experts all over the state without them ever leaving their offices. So it's a lot less expensive for litigants. Cases go forward. Those are the general things that this bill accomplishes. Senator Chambers, the signature thing actually was addressed by a court rule. I can't give you the number of the rule. But when Chief Justice Hendry was in office, he came down on the judges very strictly and said, look, if you can't write your name, print it underneath it, because I want to know who signed the order. In the JUSTICE system today, each of us had to create a very legible signature which was then scanned into the JUSTICE system. And that is the signature that's going to appear upon these orders so that, when you go into the courthouse and look at one of these electronic signatures, it's going to be abundantly clear who the judge was that signed the order. When you sign a stack of orders this high by hand, the top signature is good and the bottom signature probably has two lines and something at the end that's supposed to be your name. JUSTICE will put the same signature on every document. It will be legible. When I respond by e-mail, I use a software product in Adobe that actually verifies, through a password, that that signature is me. [LB103]

SENATOR CHAMBERS: But here's what I'm looking at: the orders that are actually signed by the judge himself or herself. Those are required to be legible by court rule? [LB103]

PATRICK McDERMOTT: They are. [LB103]

SENATOR CHAMBERS: Okay, thank you. [LB103]

PATRICK McDERMOTT: Or you should print your name underneath it, so that it is assured who signed the order. [LB103]

SENATOR CHAMBERS: Okay. [LB103]

PATRICK McDERMOTT: I agree that that's a problem. When you're looking at older cases, in particular, it's a problem. [LB103]

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SENATOR CHAMBERS: Um-hum. [LB103]

PATRICK McDERMOTT: But JUSTICE does uniform the signature. [LB103]

SENATOR CHAMBERS: Okay. [LB103]

SENATOR ASHFORD: Thanks, Pat. [LB103]

PATRICK McDERMOTT: Thank you. Thank you, Senators. [LB103]

SENATOR CHAMBERS: Judge, excuse me. [LB103]

PATRICK McDERMOTT: Oh, excuse me. [LB103]

SENATOR CHAMBERS: Judge McDermott, do you have a sense of humor? [LB103]

PATRICK McDERMOTT: There are some that say I have too much of one, Senator. [LB103]

SENATOR CHAMBERS: Okay, about me too. Do you have a thick skin? [LB103]

PATRICK McDERMOTT: Very, I'm Irish. [LB103]

SENATOR CHAMBERS: And here's what I was going to say when...it jumped into my head right away. You said the inartful way that you had drafted this legislation. And I was just going to say, I've read many court opinions which are more inartfully drawn than the way you drafted that legislation. And if they came up to that standard, I'd have no criticism of them at all. [LB103]

PATRICK McDERMOTT: Well, Senator, I take great pride in writing the English language very specifically, and I just messed this one up. There's no way to say anything else. [LB103]

SENATOR ASHFORD: This is an awful admission. (Laughter) I mean, I think you're...do you feel better that you've been able to...? [LB103]

PATRICK McDERMOTT: I'd rather make it...I would rather make it than have someone else make it on my behalf. [LB103]

SENATOR ASHFORD: I know. I mean, of all these years that I've known you, Patrick, I've never heard such a tearful, sort of...but in a jovial way. [LB103]

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PATRICK McDERMOTT: Senator Ashford, you should come to my court, because I shock people constantly by saying, you know, that probably wasn't a very good idea, it was mine, and I'm vacating that one, let's try this over again. [LB103]

SENATOR CHAMBERS: (Inaudible) okay. [LB103]

SENATOR ASHFORD: All right, thank you. Anyone else want to talk about this bill? Okay. Opposition? Neutral? Senator Lathrop. [LB103]

SENATOR LATHROP: I think I'll waive close on that last one. [LB103]

SENATOR ASHFORD: Yeah. (Laugh) [LB103]

SENATOR LATHROP: It's Friday afternoon. I think that was a... [LB103]

SENATOR ASHFORD: Well, that was very good though. [LB103]

SENATOR LATHROP: The wisdom of that idea is self-evident. So I'll go on to another great idea and begin by acknowledging the Chair, Mr. Chairman and members of the Judiciary Committee. My name is Steve Lathrop, L-a-t-h-r-o-p. I'm the state senator from District 12, and today I'm here to introduce LB232. This is the judges' salary bill. The salary of the Chief Justice and the judges of the Supreme Court are established in state law. As a result, a bill is typically introduced every couple of years to consider changes in these salaries. Currently, the salary of the Chief Justice of the Supreme Court is set at \$145,614.74. This salary went into effect on July 1, 2012. The salaries of the other judges in Nebraska are based on this salary in the statute for the Supreme Court judge, so they are also impacted by any changes made in LB232. For example, the Court of Appeals receives 95 percent of the salary for a member of the Supreme Court; and the district court receives 92.5 percent, and I think you get the idea. LB232 provides the Judiciary Committee with an opportunity to make a change in these salaries during the next two years. The bill did not include a salary amount. Instead it included X's so the committee can place whatever amount it would like, in our discretion, in the bill that moves forward this session. Following me today to talk about the bill will be the Chief Justice, Judge McDermott, Judge Otte, and Marsha Fangmeyer from the State Bar Association. And I would appreciate your support and look forward to visiting with you about how we fill in the X's to be fair to the other branch of government that we're responsible for on this committee. Thank you. [LB232]

SENATOR CHAMBERS: One question. [LB232]

SENATOR LATHROP: Yes, sir. [LB232]

SENATOR CHAMBERS: Can we only go upward when we put a salary in? I know we

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can't reduce during a term anybody's salary. [LB232]

SENATOR LATHROP: Actually I don't know that we're prohibited from going down. [LB232]

SENATOR CHAMBERS: I was just curious. Okay, that's all I have. [LB232]

SENATOR LATHROP: No, I think the Legislature sets their salary. [LB232]

SENATOR CHAMBERS: Thank you. [LB232]

SENATOR LATHROP: Okay. [LB232]

SENATOR ASHFORD: Your Honor. [LB232]

MIKE HEAVICAN: Mr. Chairman. I'm Mike Heavican and I'm the...I will get you one. [LB232]

KYLE McCARVILLE: Thank you. [LB232]

MIKE HEAVICAN: I'm Mike Heavican and I'm the Chief Justice of the Nebraska Supreme Court. And Heavican is spelled H-e-a-v-i-c-a-n. [LB232]

SENATOR ASHFORD: Yeah. Yeah, we'll let him...we...thank you though, Kyle. [LB232]

MIKE HEAVICAN: I appreciate that. [LB232]

SENATOR ASHFORD: No, good job actually. You did exactly as you were supposed to do, and the Chief just didn't fill it out. (Laugh) [LB232]

MIKE HEAVICAN: He gets a raise. [LB232]

SENATOR ASHFORD: Please proceed... [LB232]

MIKE HEAVICAN: Thank you very much. [LB232]

SENATOR ASHFORD: ...after you fill it out. (Laughter) [LB232]

SENATOR LATHROP: And that green light is running too. (Laugh) [LB232]

MIKE HEAVICAN: Right. [LB232]

SENATOR LATHROP: You know how that works. I've always wanted to do that to you,



you know that? [LB232]

MIKE HEAVICAN: Thanks. [LB232]

SENATOR LATHROP: You give me ten minutes over there and that's it. [LB232]

MIKE HEAVICAN: You may proceed. (Laughter) Thank you very much for your time. As Senator Lathrop said, this is the bill where we ask for raises for our judges. During the state's last fiscal budget crisis that you are all very aware of, our judges, like the rest of the state employees, came forward and did their part to help with the crisis in the fiscal year 2011; 2012 the judges did not get a raise at all; and during the last fiscal year they got only a small raise. We have an excellent group of judges in our state and we need to continue to attract good people to the judiciary. Many of our judges could make more money in private practice, and judicial salaries do not compare favorably to a number of other public employee positions in the state. Please remember that our judges make some of the most difficult decisions that need to be performed in any community. When someone is...when the question is whether someone will be found guilty or not guilty of a crime, or whether someone's children will be removed from their home and their parents, or whether a vulnerable adult will be protected as a ward of the state, and many, many other issues, complex and less complex, contract issues, tort issues, and so forth, Nebraskans come to judges to solve or participate in all of those kinds of questions. No community will thrive and no state will thrive without good courts and good judges. Our response to the budget crisis of the last few years will leave us with approximately \$1.9 million in the judges' salary fund at the end of this fiscal year. That is enough money to pay for raises for the judges in each of the next two fiscal years of 5 percent; and that is the number that we would request that you as a committee agree to and hopefully that the Legislature would ultimately agree to: a 5 percent raise for each of our judges in each of the next two fiscal years. I would be happy to answer any questions anyone might have. [LB232]

SENATOR LATHROP: Very good. Thank you, Chief. Senator Chambers. [LB232]

SENATOR CHAMBERS: Mr. Chief Justice, I'm not going to say anything in the nature of an argument but I'm going to make a comment in the nature of a condemnation. And I don't think it's inappropriate for me to make it while you're sitting here, because I've made the statement publicly and maybe I've got to take some other action. But I get so many complaints about this Judge Crnkovich in Douglas County that I'm going to have to do something. People have no place they can go for redress. I've got stacks of stuff coming to me because now that I'm back, they say, Senator, you can do something about these judges. I'm not one who will say, although I feel the temptation, I'm not going to give anybody a salary increase or vote for it as long as that woman stays on the bench. That's how bitter I feel. And whereas I respect your position, you are really just a man as I am a man too. And when that young man brought you that piece of

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paper to sign, it's a requirement for everybody who testifies. And when you became aware of it, you did not say, I'm the Chief Justice and therefore I'm not going to do it. You went ahead and signed it. There was a bit of humor from the most humorless person in the Legislature. (Laughter) (Inaudible.) And what I'm saying may catch you by surprise that I would say it. But everything we say is transcribed, and I am going to send that woman a copy. The most recent thing I got was where a person...and now I'm speaking to my colleagues, because I'm going to have a question for you afterward. A person is entitled to go into a courtroom--you can't take a recorder--and write notes about what's happening. If you have technological means of doing that--I don't use these things--but you can write notes on this device. And the judge is going to call me up there and say, Chambers, what are you doing back there? I'll say, well, Your Honor, I'm writing notes. I want to know what you're writing. Now I'm intimidated by--not me--but I'm a citizen, so I feel I've got to take it to the Judge. Give me that. And then after the proceedings are over, if she did this, (sound of tearing paper) then we'd know that's wrong. But to order a person to present something that is being used to take notes--not recording--ordering that person to come up there and let her see what is being written, then taking it and saying, erase everything that you've wrote. So then the next day the person goes there to purchase a transcript. Then, you can't have a transcript. That's the kind of stuff I'm talking about. And you...if you were the captain of a, say, an aircraft carrier, whatever happens on there is ultimately your responsibility. But you don't know everything happening; you cannot know. So I'm not presenting this as though you know, but I want to make it a matter of our record and I'm going to make a copy and I'm going to send it to that woman, and I hope she tries to do something and say, you're in contempt of court. I'll say, whenever your court is in session, it's worthy of nothing but contempt, and I'll definitely have it, and I'm not a party to any proceeding, and you can't do anything to me; now you try to. I wouldn't go in her courtroom and do that. I wouldn't visit somebody's home and behave in that fashion. But I wish...I wish there was some way I could go there and she not know who I am and she would do to me what she does to these ordinary citizens. It is totally unacceptable. And I don't want to say anything that might make you disqualify yourself from a position that you have, but you know that there are times that people file complaints, and if they don't say anything about it specifically, then that wouldn't necessarily require you to disqualify yourself, in my opinion; but you'd make that judgment. I may say things on the floor when this bill comes up, but rarely have I tried to use withholding somebody's salary that they're entitled to as a way to make a point. I think salary earned should be paid. If a person is not doing the job, the person should be removed. But as long as they are there doing that job, even if I don't agree with how they do it, they get the pay. But when they do something that I think is outside of what ought to be done, then I'm going to do something. As critical as I am of the judiciary, I'm more defensive toward the judiciary and protective of the judiciary than even lawyers that I know of. I know that in a democracy, I always have to say even though it doesn't work for us as black people, it is the machinery that offers the possibility of working that has to be kept intact. Its integrity must be maintained. I cannot be the one to destroy the confidence and faith of the

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people in that institution. But when those who operate it seem unable to police it, they have to come to somebody like me with the reputation I have. And Judge, then I'm going to stop using you for a sounding board. My reputation goes before me. I'm not my reputation; I'm worse. Thank you. [LB232]

MIKE HEAVICAN: Thank you very much. If I might respond just briefly to that. Senator, we very much appreciate that over the years you have been ultimately a stalwart in protecting the judiciary, and we appreciate that. You've obviously made reference to the process that we have in Nebraska to discipline judges and so forth, and I can assure you that we try very hard to do that. One of the comments you made about the openness of our courts and the record that is made in our courts, I would be very happy to talk with you about some changes in that area that would be very beneficial to us in the process of making sure that our courts are open and accessible to all, and that the record is open and accessible to all. I'd be very happy to talk with you about that. And I would simply say again that we try very hard to handle the complaints that come in about all of our judges and to do that as well as we can. It's not an easy job. But we would again request that you support raises for our judges. We have about 120 of them, and if sometimes some of them could perform better or you don't agree with something that they may have done, it seems to me it would not be fair to penalize all the others for those events. I appreciate it. Thanks. [LB232]

SENATOR CHAMBERS: And my final comment. People are aware of a person who will complain like I do, and they say, do you think there's any judge who's any good? I'll say, if the vast majority of judges were not good, the system would have collapsed under its own weight; it would have imploded. So I have to pick those that I think are so extraordinarily out of line as I view their duty that I will take action. But it's not pleasant to file the kind of complaints that I do. And if you've read any of them, you know that I put a lot of time in trying to do the research and writing. So it's not recreation for me. It's not something that I'll just say, I'm going to have fun today; I think I'll complain against a judge. I'd rather not. And maybe we can have a conversation, as you suggested, and come up with something as an alternative. But I still will keep open my ability, which you would not try to take away, to file something formal if I thought it was necessary still. [LB232]

MIKE HEAVICAN: Absolutely not. [LB232]

SENATOR CHAMBERS: Thank you. [LB232]

SENATOR ASHFORD: Thanks, Judge. [LB232]

MIKE HEAVICAN: Um-hum. Thank you. [LB232]

SENATOR ASHFORD: I don't think we have any other questions. Okay. Any other

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proponents? I guess there are a few, yes? [LB232]

MARSHA FANGMEYER: Chairman Ashford, members of the committee, good afternoon. My name is Marsha Fangmeyer, M-a-r-s-h-a F-a-n-g-m-e-y-e-r. I'm a practicing attorney in Kearney, Nebraska. I am a trial attorney and I practice in front of a number of judges in the middle of the state, and generally, across the state. I see lots of judges. I am the president of the Nebraska State Bar Association and I appear today in support of LB232 and the Chief's request of an increase of 5 percent in the judicial salaries over the next two years. We believe that is reasonable and a warranted request. I represent the lawyers who practice in the state courts, and this request for an increase in salary will assist us in attracting and keeping the most qualified judges in the state--although we do get it wrong sometimes. We usually refer to the judiciary as the third branch of government. I prefer to refer to it as one of the three coequal branches of government. And we need to support a strong, fair, and impartial judiciary. The Chief talked...Chief Heavican spoke about the many difficult decisions that judges have to make that affect people's lives. And as a trial attorney, I find myself sometimes saying, I'm glad I don't have to make that decision. Some of them are very tough. I want to point out that lawyers working in the public sector in Nebraska...many lawyers working in the public sector earn more than the judges of our Supreme Court, our highest level of the court system. For instance, the general counsel of the University of Nebraska and public power districts earn more than the Supreme Court judges. So does the Omaha city attorney. The Douglas County attorney and the public defender currently earn about what the Supreme Court judges earn, and more than every other state court judge. The Lancaster County attorney and the public defender earn more than the county court judge. The dean, the professors, and the associate professors of the UNL Law College are paid more than the judges of our Supreme Court. Appellate courts and trial court judges at every level of the federal judiciary, as well as federal magistrates, bankruptcy judges, and administrative law judges are paid more than the judges of the Supreme Court. And I haven't even mentioned football coaches. [LB232]

SENATOR CHAMBERS: Amen. I was waiting for that. (Laughter) [LB232]

MARSHA FANGMEYER: Couldn't resist. In 2005...and this is old. This is dated figures, but it's the last time we did this kind of survey amongst the practicing attorneys. An independent survey determined that 34 percent of partners in law firms earned over \$150,000 per year. There are many types of practices and practice situations, but this is a representative salary figure for those most experienced attorneys who are the ones that we want to apply for the judicial position. I would hate to see well-qualified...I'm...red light. I'm sorry, red light. [LB232]

SENATOR CHAMBERS: We may have a question or two. But before that, I want to make a comment about my attitude toward salaries. There is not a person in a constitutional office, like the Attorney General, the Governor, the Secretary of State,

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with whom I haven't had some conflict. Yet I was the senator that, in the same way Nixon could break down some of the ice between America and China which maybe nobody else could do, I was able to finally get a significant increase in the salary for all of the constitutional officers. [LB232]

MARSHA FANGMEYER: Yes, I remember that. [LB232]

SENATOR CHAMBERS: And when people asked me why I did that, I said, we have to look beyond the individual in the office, and if there is an office that has substantial and substantive duties being performed for society, we should attach or annex to that office a salary commensurate with the work we look for from whomever is in the office, the dignity we want the office to command so that the public will respect what comes out of that office. So forget who's in the office; this is the salary I think ought to be there. And we got it. The branch that I feel has paramountcy, and not just because I'm a part of it, is the Legislature. There are three but we control the purse strings. [LB232]

MARSH FANGMEYER: Uh-huh. [LB232]

SENATOR CHAMBERS: So the ones who provide the balance by writing the checks is the...has paramountcy. But with all due respect to my colleagues in the work we do, because of the fact that the judiciary does have an impact on society that the Legislature doesn't, as politicians we're everybody's whipping boy, whipping girl, and we have to expect that. [LB232]

MARSHA FANGMEYER: Um-hum. [LB232]

SENATOR CHAMBERS: There's generally a low opinion of politicians wherever we find ourselves. I don't think that the judiciary holds that low a level of esteem in the public's mind; but some people might feel that way. I think judges should not have to come to the Legislature as beggars with tin cups. Somebody might say the salary they're getting is a lot of money and they knew the salary when they went there. But with all the criticisms I've given...and I know we have some venal judges, we have venal politicians. Whenever you have a large number of people doing anything, you have a problem. One of the...in fact, the archangel got thrown out of heaven. And he was...and here's the question I asked: If there can't be peace in heaven, then where can it be? But if even the angels couldn't have perfection, we shouldn't look for it down here. So I have wanted to see salary increases for judges without them having to even take on the appearance of begging. If we don't respect the judiciary, then the public is not going to. And that's why I try to be selective in the judges I file complaints against, not just because a judge gave a decision I didn't like. And while you were mentioning that there are decisions that have to be made, one side is going to think the judiciary is great; the other side that lost is going to be upset. So we have to look past all of that. And when we discuss this salary increase, and since Senator Lathrop brought the bill, I think he

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will be willing to talk to me about it, sometimes I'm in favor of an increase greater than that which is asked for. I don't determine the value of those services performed for society based on how many dollars might be in the treasury. I determine in my mind what I think it's worth and then I try to come as close to that as I can. And I'm not going to say it will be an increase like this; but if a 12 percent increase was what it would take to bring it to where it should be, that's what I would go for. [LB232]

MARSHA FANGMEYER: I think we'd accept that. [LB232]

SENATOR CHAMBERS: Oh, you said that's not enough? So what do you think it should be? No, but I want you to understand and I want to say it here publicly so when I do it, it's not blindsiding anybody, and I want my colleagues who might be new to the Legislature to know that talk of tight economic times have...those things don't have any impact on me at all in forming my judgment on something like this. One hundred twenty judges--that's not a lot of people when you look at the work that is being done is very, very important. And it's crucial that people believe, even though I can't persuade them, that this is to be a nation of laws, not of men. That in order for there to be respect for the judiciary, the judges have to comport themselves in such a way and render decisions that are not only just but that appear to be just in the minds of not those who are scholars but ordinary people who understand that there is such a thing as fairness. And if they can see that what's happening is fair, even if it doesn't go their way, they'll allow for mistakes. What they do not want is what looks blatantly like a certain class of persons get fairer treatment than the ordinary riffraff or the ones I call the downtrodden. So the expression that I use, and I wish some of the judges would see it, don't let the law be like a spider web where it catches the small insects and lets the big ones fly through. The small insects are the people like me who wear no collar, the ones who might be a little better off who wear a blue collar, the ones who are always discriminated against who wear a frilly collar. There cannot be in the courthouse a recognition of those distinctions that exist on the street. But whether it's Little Orphan Annie or Daddy Warbucks, the court has to be open to each of them equally. And if there's any place where the dignity of every person weighs the same in the scale, it has to be in the courthouse. So the judges are going to have to police their profession so that people like me don't sound like naive, blind, disconnected fools when I speak in favor of the judiciary. I do respect the system. I respect the judges, even though the ones that I don't respect I really don't respect. So when you go back to the bar association, you tell them that you provoked me from the way you made your presentation to make statements that you had never heard said in behalf of the judges before. Then they'll say, maybe we need to put women in more positions where they can be seen to do something that is of consequence on issues that have some importance. I do respond more favorably to women than I do to men. See, my mother was a woman. And everybody in here is an adult. It shouldn't surprise anybody that I love women, because I was actually born in bed with a woman. [LB232]

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MARSHA FANGMEYER: Do I get to respond? [LB232]

SENATOR ASHFORD: Why don't we do this? I think...no. [LB232]

MARSHA FANGMEYER: Oh. I just had one... [LB232]

SENATOR ASHFORD: No, of course you can proceed. [LB232]

MARSHA FANGMEYER: I just have one more thing to say. [LB232]

SENATOR ASHFORD: No, I...(laugh). [LB232]

MARSHA FANGMEYER: One more thing if I may. I practiced...I've been practicing for over 30 years, and for the most part the practice, the judges, not every time...not everyone, not every time, but for the most part I practice in front of judges who are smarter than I am and who are respectful and who treat everybody in their courtroom with dignity. We don't always get it right. But I would like to...I would like to keep it that way and I don't want judges, people who are qualified, who are smart, and who have the appropriate judicial temperament in terms of respect for everybody in their courtroom, I would like them not to have to make a decision to not serve in this capacity because of not enough money and at a big reduction in their family income. [LB232]

SENATOR ASHFORD: I would agree with that, but...and I agree with Senator Chambers about the salaries. I would say, though, my experience is that...and there are exceptions. But the vast majority of people in the judiciary that I've worked with, especially down here, are...have two things going for them that I admire. One is the idea of public service beyond salary. [LB232]

MARSHA FANGMEYER: Absolutely. [LB232]

SENATOR ASHFORD: And I...so though salary...obviously, you have to consider those issues in making a decision on what you're going to do. But I would say that the...you know, that that is an overriding factor for many of the people in the judiciary, or most if not almost all that I've worked with, is just a passion for not only their job but for...but for people. So, I mean, that's what always drives me. And then despite my brother, who's a judge, who's constantly grouchy...that was the second thing--only to me though; not to other people. But anyway, I appreciate the point. But I would say there's an element in all these jobs that are so important and are so respected that it cannot be remunerated in money. [LB232]

MARSHA FANGMEYER: Absolutely. [LB232]

SENATOR ASHFORD: And that's sort of been my sense, but thank you. [LB232]

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SENATOR CHAMBERS: Well then, I don't believe most of the judges you've spoken before are smarter than you. You're being diplomatic. But I will say somebody from the bar association was very smart to send you here rather than anybody else. [LB232]

MARSHA FANGMEYER: Thank you, Senator. [LB232]

SENATOR CHAMBERS: Okay. [LB232]

SENATOR ASHFORD: All right. Thank you. [LB232]

MARSHA FANGMEYER: Oh, sorry. Was I excused? [LB232]

SENATOR ASHFORD: Yes, you were. Does anybody else...I mean, we've sort of covered it. Oh, the Judge. Bad. [LB232]

PATRICK McDERMOTT: Good afternoon, Mr. Chairman and members of the committee. I'm still Patrick McDermott. I'm still a county judge in the 5th Judicial District. And when it comes to salaries, the primary interest of judges is to ensure that the new folks coming in to join us are of the highest quality. Most of us who get the opportunity and the honor of putting on the black robe and going into that courtroom, being paid is a bonus. I mean, that is an extraordinary thing to get to experience, and it's a humbling thing. What I try to remember every day is that there's no routine case for the litigant. They may be routine for me; it may be something I've done 200 times. But for that person--and many times, who doesn't speak English--this is a terrifying one-time-only experience, and I always have to remember that. Address them with dignity even if you're, you know, outraged at what they've done. They're still human beings. Our system recognizes that they have dignity. If you treat people with honor, they will accept your decision even if it's against them. So that's the credo and I think that's the credo of almost all judges. We talk among ourselves of how to improve the way we do business. That's a big conversation at every judges meeting. We sit together and say, I think I messed this one up; what would one of you have done in these circumstances? So there's a constant desire of judges to do their job better. I will tell you, I have complete confidence in the Legislature. I've been a judge for 15 years. The Legislature has taken very, very good care of me. I have no complaints on the living that I have made as a judge. I'd answer any questions that anybody has. [LB232]

SENATOR CHAMBERS: Judge, did you kiss the Blarney stone before you came here today? [LB232]

PATRICK McDERMOTT: Senator, that's interesting. I was there prepared. My wife prohibited it. [LB232]



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SENATOR CHAMBERS: Oh, okay. [LB232]

PATRICK McDERMOTT: She said, he's full of it enough. Do not allow him. [LB232]

SENATOR ASHFORD: You know, but to get to the Blarney stone, you've got to go all the way down over that fence. [LB232]

PATRICK McDERMOTT: I walked all the way up where you have to lean over and about fall out of the castle. [LB232]

SENATOR ASHFORD: I mean, you could fall on your head very easily kissing the Blarney stone. [LB232]

PATRICK McDERMOTT: Jill was insistent. She would not allow it. She just moved me along. [LB232]

SENATOR ASHFORD: Well, you're an example of one of the judges who does go beyond the judging. So thank you, Patrick. [LB232]

PATRICK McDERMOTT: I think all of my colleagues do. You just may not see them as often. [LB232]

SENATOR ASHFORD: No, we see you a lot, but that's good. Judge Otte. [LB232]

ROB OTTE: Good afternoon, Chairman, members of the committee. My name is Rob Otte. I'm one of the eight district court judges here in Lancaster County. A lot has been said and I'm not going to duplicate that. I'm going to talk about three things. I'm going to talk about the value of having a quality judiciary; I'm going to talk about alternatives for judges; and I'm going to quote a little bit of Shakespeare, which I really don't know very much about. First, as our state grows and we're trying to look at economic development, things like that, the state is enhanced by a solid, dependable, efficient, and influence-free judiciary. When businesses come, when people approach the courts, when the Legislature has laws that they intend to be interpreted in a certain way, it's the judges that make those decisions. It's judges that make decisions on pipelines. I know Stephanie Stacy is working on that pretty hard. It's judges that make decisions about elections. When "Doctor" John wanted to run for office, I had that case. We've determined gas rate cases and construction cases and malpractice and child custody. And I think the Chief Justice talked about some of the really important stuff: child custody and removal of children and displacement of children--those are complex cases; all the way down sometimes to traffic cases. Your constituents want a fair judiciary. They want a judiciary that balances the law and is prompt and can get their work done. So that's value. I'm going to talk about alternatives. I came from about 38 years...28 years of private practice. I've been a judge about four years, almost five. I'll

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tell you, every judge that I know, and I know a lot of them, could earn more money than we're making by being a judge. And so they have lots of options. And we want to keep quality judges, especially coming out of private practice, not to diminish anybody else coming. The third thing I wanted to do is quote Shakespeare. In Henry VI, Dick the Barber (sic--Butcher) said, the first thing we do is kill all the lawyers. Okay? That's generally taken out of context. What he really meant was...when Dick the Butcher said that, he meant, in order to allow anarchy to reign so that somebody else could be king, you get rid of the lawyers and the judges because those are the people that install justice and insist on justice and make sure that you have justice in your community. We want judges that are smart and fair and self-motivated. And I'm not talking about the drama to overthrow a king; what I really am talking about is you get to make the decisions as to whether it is prudent and responsible to shape the judiciary for the future, because when you look at salaries and things like that, it makes a difference. I wanted to add, thank you, Colby Coash, for sponsoring this bill a couple years ago; and thank you to Senator Lathrop for sponsoring this bill this year. I'll stand for questions. [LB232]

SENATOR CHAMBERS: A comment: Judge, I am so pleased that a judge made clear what that comment meant by placing it in context. But here's...I often do that. I did some research, and there's a statement that says curiosity killed the cat. That didn't make sense to me because I've been around cats and they're very curious and it takes them everywhere. So I like language too, but I don't know a lot. I know that Egyptians venerate cats almost, so I learned a little bit about hieroglyphics, just enough to read something about cats. And what I came up with, that statement was in ancient Egypt. Curiosity killed the cat, but then there was what would amount to an apostrophe and S, that made it possessive. Curiosity killed the cat's ignorance, for curiosity is the first step along the path toward knowledge and wisdom. So it's not curiosity killed the cat. Curiosity killed the cat's ignorance, if they want to stop there; but it's the first step on the path toward knowledge and wisdom. You're a person who I think might appreciate that context in which that statement fell. [LB232]

ROB OTTE: Sounds like we should both read a little more Egyptian and Shakespeare. All right. Any other questions that you have of me? [LB232]

SENATOR ASHFORD: Any other questions that anybody has of the Judge? [LB232]

PATRICK McDERMOTT: All right. Thank you for your time. [LB232]

SENATOR ASHFORD: All right. Any other proponents? [LB232]

LAURA McCORMICK: My name is Laura McCormick. I'm from Omaha, Nebraska. I hadn't planned on speaking, but in light of Senator Chambers' comments I felt like I should. I was sitting in Judge Crnkovich's courtroom on Tuesday of this week. I do not

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know Judge Crnkovich. I've never had a case in front of Judge Crnkovich. I was there observing on behalf of a parent. As I frequently do, I like electronics. I brought my iPad. This is it. In fact, I want to make a point of when I touch my screen it makes no sound. I was sitting quietly in the back of the courtroom. I was taking notes during the proceeding. Judge Crnkovich called me out by name. She doesn't know me. The way she knew my name was every citizen is required to sign in when they go into juvenile court. So I said: Yes. It's quite intimidating to be called to the front of a courtroom. And she asked that I bring my iPad, my legal pad, up to the front of the courtroom. And I did so and I told her...she asked me what I was doing. Only the court reporter is allowed to make a record of the proceedings. And I said, yes, ma'am; I'm taking notes. And I said I can prove I am taking notes; I will read what is on here. And I began to read it. She was quite rude. She told me that she was confiscating my iPad. And it would be as though, Senator Ashford, you asked me to give this to you and you kept it during the hearing. I gave it to her. I returned to my seat. I sat quietly. At the conclusion of the hearing she made me go up to the front where her bench is and she made me show her that I put the notes that I was taking in the trash can. I have been a law-abiding citizen, a taxpaying citizen my entire life. I have never been charged with a crime. I am not a criminal. I think that if we expect citizens to value the judiciary--and I do, and I teach my children to do so--then I think judges need to treat the people that come before them with respect. It is disrespectful to confiscate my iPad. It is disrespectful to call me out in a hearing simply for the mere fact that I am taking notes. [LB232]

SENATOR ASHFORD: Thank you. [LB232]

SENATOR CHAMBERS: May I ask you a question? [LB232]

LAURA McCORMICK: Yes. [LB232]

SENATOR CHAMBERS: Would you like me to work with you to bring about some kind of appropriate resolution to what happened to you? [LB232]

LAURA McCORMICK: Yes. [LB232]

SENATOR CHAMBERS: My room number is 1114; so after this is all over I'll talk to you, if you're still around. [LB232]

LAURA McCORMICK: Yes, I would appreciate that. My other comment would be, I also did immediately go to Judge Daniels. I contacted him because he is the presiding judge in juvenile court, and I told him that I wanted to get a transcript. I was told I have to file a motion to get a transcript, which should be a public record. I have had enormous difficulties obtaining public records from Nebraska courts, something that I think is not appropriate. I think many commonsense Nebraskans would support the idea that the documents in court processes are public record and they should be available. People

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should be able to come and go in the courtrooms; and when I have challenged the necessity for signing in, in a family court, they tell me it's because they're afraid. With all due respect, if we expect citizens to come into these areas and not be afraid, what message are we communicating--in a family court? A common individual, I probably could fill out a motion. I think I probably...I'm not a lawyer. I'm not a lawyer. I think I could probably do it. Lots of people can't. And if you are the mom, the mom that I was there advocating for, the mom who risks loss of her kid, termination of parental rights, it is hugely intimidating to be before a person being rude, disrespectful, and treating you as though you cannot...it's a crime to take notes? Where do I live? This is wrong. [LB232]

SENATOR ASHFORD: Okay. Senator Lathrop, do you wish to...do we have any opponents? I'm sorry. [LB232]

LORAN SCHMIT: Chairman Ashford and members of the committee, my name is Loran Schmit, L-o-r-a-n S-c-h-m-i-t. To be very brief, I appreciate the fact that I was able to hear Senator Chambers again. I was educated again, as I have been for many years, listening to you, Senator. Once in a while we had a fair exchange and most of the time you led, and I appreciate that. I appreciate the members of this committee who I think do an excellent job. I think the previous witness has indicated why it's important that the judicial system be well compensated and that competent people be in that position. It's a frightening experience. And I remember many years ago before the judiciary had the status it has today, it could be a scary experience to appear in court before an incompetent member of the judicial system. We had some and we suffered for it, and we should...the general public, whom I like to think I represent, should not have to suffer the consequences of an unprincipled, unqualified individual. I marvel at the fact that attorneys will take that position for the kind of money they earn today because we know they could earn much more money outside this. I remember when the county judges were paid \$500 a month and were expected to somehow or another survive on that. And some of them did, much to the chagrin of those of us who had to put up with it. So today I agree with Senator Chambers. I used to tell people if you need something from me, tell me what you need; don't tell me what you think I'll give you. And I think Senator Chambers makes a good point: The raises we've been giving the judicial system the last few years have been very minor. I want to say mediocre, but that's a more appropriate remark. The raises need to be sufficient so that the members of the judiciary all the way down to the county court are compensated sufficiently so they can be completely independent; and I hope that this committee will advance that kind of a bill, and I hope that the Legislature will advance it. I said this before, I'll say it again: No law that's passed by the Legislature is of any consequence if you do not have an adequate, educated, intelligent judicial system, because eventually the Legislature passes laws which must be interpreted by the courts. And if you don't have qualified judges and adequately representing the people, it's not going to happen and you're not going to have a good judicial system that we should have that. Thank you very much. Good to

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see you back again, Senator; and good to see all of you. Thank you. [LB232]

SENATOR ASHFORD: It's good to see you, Loran. Thank you. [LB232]

SENATOR CHAMBERS: And I just want to say, Senator Schmit, it's good to see you again, and we're, as usual, on the same wavelength. [LB232]

SENATOR LATHROP: The record should reflect he was actually a supporter. I think you said, is anybody here to oppose it? And he testified... [LB232]

SENATOR ASHFORD: Right. And thank you. He is a supporter and I know he always even carried all the bills, didn't you, Senator Schmit, on these...some of these bills? I think he did. [LB232]

SENATOR CHAMBERS: Yes, he did. [LB232]

SENATOR ASHFORD: Okay. Any other supporters? Opponents? Neutral? Senator Harr. I'm sorry, Senator Lathrop. [LB232]

SENATOR LATHROP: Just very briefly. You know, the one thing that occurs to me every time we take up whether we're going to have a new judge or where we're going to place them or whether we take up their salary is the fact that while there are three branches of government, this is the one that's forbidden from playing politics. And we select them in as fair a way as you can select judges. Thankfully, they don't campaign. Thankfully, they're not involved in politics. But they don't get to contribute to anybody's account, which means that we have to be...we have to have a special relationship with the judiciary. And I think we have, for the most part, held up our end of that deal, and I think it's time for them. They did cooperate when things were difficult and that isn't easy for them. They have expenses that go up as well. And for all the reasons you heard today here, I hope you'll move the bill with an appropriate salary increase. Thank you. [LB232]

SENATOR ASHFORD: Thank you, Senator Lathrop. Senator Harr. What's the bill number? [LB232 LB277]

SENATOR MCGILL: LB277. [LB277]

SENATOR HARR: Thank you, Senator Ashford and members... [LB277]

SENATOR ASHFORD: LB277, sorry. [LB277]

SENATOR HARR: LB...yeah. Thank you, Senator Ashford and members of the Judiciary. My name is Burke Harr, H-a-r-r, and I am a senator from the Legislative

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District 8. I am here today on LB277. First, I want to thank Senators Nordquist and Seiler for cosponsoring this bill. LB277 revises the Nebraska False Medicaid Claims Act to expand liability to include subcontractors who file claims with intermediaries, who then file claims with the state. The Nebraska False Medicaid Claims Act was originally modeled after the federal False Claims Act. After enactment of the federal Claims Act and the Nebraska False Medicaid Claims Act, the United States Supreme Court, in Allison Engine Company v. the United States, 553 U.S. 662, handed down an opinion in which it held that subcontractors who submitted false claims to intermediaries which were, thereafter, included in the intermediaries' claims filed with the government, were not liable under the False Claims Act. This was because the offending party did not file the false claim directly with the government. In response, the government amended the federal Claims Act to expand liability to cover subcontractors who cause others to file claims with the federal government. We are here today. I am asking you to do the same. Nebraska's False Medicaid Claims Act needs to be amended. As currently written, the false...the Nebraska False Medicaid Claims Act would not allow the state to pursue claims against an offending provider who submit false claims to an intermediary, such as a managed care organization. This bill would provide for such liability. I would be open to entertain any questions anyone might have. [LB277]

SENATOR ASHFORD: Any questions? Senator Chambers. [LB277]

SENATOR CHAMBERS: Senator Harr, would you turn to page 3, in line 11? [LB277]

SENATOR HARR: Oops. Just a second. [LB277]

SENATOR CHAMBERS: There is a...oh, do you see it? "Acts in deliberate ignorance of the truth or falsity of information..." [LB277]

SENATOR HARR: Yes. [LB277]

SENATOR CHAMBERS: Okay. There is a term in the law, willful blindness, and it's where a person refuses to take note of what is available to bring the knowledge needed to place a proper decision. So if it's determined that a person was willfully blind in a situation where the standard for culpability is "knows" or "should know",... [LB277]

SENATOR HARR: Um-hum. [LB277]

SENATOR CHAMBERS: ...if it can be shown that the person is willfully blind, then culpability is attached. For example, if you know that Senator Ashford is a drug dealer and he gives you a package and tells you to deliver it and you know he's a drug dealer, and then when they catch you, you say, well, I didn't look in the package, I don't know what was there, well, you were willfully blind. I said all that to say this: Rather than use the word "deliberate" ignorance...the Attorney General's Chief Deputy talked to me. I

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didn't bring this up because I hadn't looked at it yet, the bill. I would substitute "willful" for the word "deliberate," and it would say, "Acts in willful ignorance," because that is a term known to the law. And then I would...by the way, I'm not against the law, the changes. On page 4--I will get to what I was going to ask the question--no changes necessary here. But the language says, "knowingly delivers, or causes to be delivered, less than all of the money or property." [LB277]

SENATOR HARR: Yeah. [LB277]

SENATOR CHAMBERS: There is no need for an intent to defraud involved here. That was stricken. So it would say, "Has possession, custody, or control of property or money used," this person, "knowingly delivers, or causes to be delivered, less than all of the money or property." Well, that now is the basis for a criminal charge. But it doesn't say that there has to be any intent to do anything that's wrong. [LB277]

SENATOR HARR: Yeah. [LB277]

SENATOR CHAMBERS: The person may not have all of the money on hand but delivers what the person has. So maybe you could discuss that with the Attorney General, or whoever he has working on the bill, and find out if they want to put something in relative to fraud because the language they struck in lines 20 and 21 are the following: intending to defraud the state or willfully concealing property. And that's why less than the amount is given than what is...what should be. That's the question. Then, on page 5,... [LB277]

SENATOR HARR: If I may respond to that quickly? [LB277]

SENATOR CHAMBERS: Oh, uh-huh. [LB277]

SENATOR HARR: And I forgot to...in my introduction. I am bringing this on behalf of the Attorney General, so I will talk to them. I appreciate it, and I...when I did speak to them I know the intent was to take this from a specific to a general intent. But I think this may be, as you state, overly broad, so I will work with that. [LB277]

SENATOR CHAMBERS: And I'm just asking, remember,... [LB277]

SENATOR HARR: Yeah. [LB277]

SENATOR CHAMBERS: ...because there may be an explanation. When we get...let's start at line 25 on page 4, "Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the state and, intending to defraud the state, makes or delivers the receipt without completely knowing that the information on the receipt is true." To not know that information is true should not even be a basis for attributing an

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intent to defraud,... [LB277]

SENATOR HARR: Um-hum. [LB277]

SENATOR CHAMBERS: ...because somebody could give you this and you don't know anything other than what is there. So if this is tying into that notion that responsibility or culpability is going to be assumed under circumstances where it wouldn't ordinarily be the case and it fits into a broader context, then I can have that explained to me. But that is something I'm interested in. [LB277]

SENATOR HARR: Yeah. [LB277]

SENATOR CHAMBERS: "Without completely knowing that the information on the receipt is true," that's not saying the person is willfully blind or willfully ignorant but just doesn't know that the information on the receipt is true. [LB277]

SENATOR HARR: Um-hum. [LB277]

SENATOR CHAMBERS: And it doesn't make sense to me. If the information...are they saying the information is true but I don't really know that it's true and that I'm intending to defraud? [LB277]

SENATOR HARR: Yeah, I understand. [LB277]

SENATOR CHAMBERS: In other words, what's on this document is true, and I give a true statement: My intent is to defraud. But If action is taken on the basis of that statement, which is true, no fraud is committed, despite my intent. [LB277]

SENATOR HARR: Um-hum. [LB277]

SENATOR CHAMBERS: Look, I intend to kill Senator Lathrop. My intent was to kill him. [LB277]

SENATOR HARR: Um-hum. [LB277]

SENATOR CHAMBERS: But he looks in good health to me. He's even got a half-smile, so he's better off now than when I undertook it. [LB277]

SENATOR HARR: Yeah, yeah. [LB277]

SENATOR CHAMBERS: And I'm doing this to try to make it clear where my confusion is with this language. [LB277]



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SENATOR HARR: Yeah. [LB277]

SENATOR CHAMBERS: But if, even where maybe you don't know that something is completely true which might be true, there is mentioned intending to defraud, over on this previous page, where you deliver less than all the money or property that maybe should be delivered but they've removed the requirement that it be done with the intent to defraud,... [LB277]

SENATOR HARR: Yeah. [LB277]

SENATOR CHAMBERS: ...even if I know it's less than what I should give but I have no intent to defraud, it doesn't even say that you deceived by me giving you less. You might...that might be our arrangement. [LB277]

SENATOR HARR: Um-hum. [LB277]

SENATOR CHAMBERS: So that's the context in which I'm asking those questions. [LB277]

SENATOR HARR: Yep. [LB277]

SENATOR CHAMBERS: Then, if you can turn to page... [LB277]

SENATOR HARR: And let me ask you...and I think I'm going to try to...Jim Smith from the AG's Office is coming up after me. [LB277]

SENATOR CHAMBERS: Oh, is here now? [LB277]

SENATOR HARR: Yeah. Is he? Yes, right there, so. [LB277]

SENATOR CHAMBERS: Oh, I'm sorry. [LB277]

SENATOR HARR: But what I would say is that I believe, in response to criminal, you're talking analogous to a situation where I'm a drug dealer--well, I guess Senator Ashford is the drug dealer today--and he's selling drugs. [LB277]

SENATOR CHAMBERS: Right, because you and I don't do that. (Laugh) [LB277]

SENATOR HARR: Yeah. But he has "gank," fake drugs, and so... [LB277]

SENATOR CHAMBERS: Uh-huh. [LB277]

SENATOR ASHFORD: I have what? [LB277]

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SENATOR HARR: "Gank," which is...let's say it's...you're representing it as...but it's not a real banned substance. [LB277]

SENATOR ASHFORD: Oh. [LB277]

SENATOR HARR: Baked... [LB277]

SENATOR ASHFORD: No, I got it. [LB277]

SENATOR HARR: Yeah, cooked baking powder. [LB277]

SENATOR CHAMBERS: I don't understand a word he said. [LB277]

SENATOR MCGILL: I don't know either. [LB277]

SENATOR ASHFORD: No, I don't either, but... [LB277]

SENATOR CHAMBERS: But he must be involved in something. [LB277]

SENATOR HARR: Yeah, so you have a...it's... [LB277]

SENATOR ASHFORD: I hope the transcriber gets that down. [LB277]

SENATOR HARR: As I understand it, you have a situation where you might have...he's selling "gank." He has the intent to sell me bad drugs or send drugs... [LB277]

SENATOR CHAMBERS: Now are we on page 4? The language on page...? [LB277]

SENATOR HARR: Yeah, we're on page 4. [LB277]

SENATOR CHAMBERS: Okay. [LB277]

SENATOR HARR: Well, the page 4 into page 5. [LB277]

SENATOR CHAMBERS: Okay. [LB277]

SENATOR HARR: He has the intent to sell me, as I call it, cocaine, but he has instead has "gank." That would...is that the situation you're implying right here, where he thinks he's committing a crime but he is not intentionally or he is not? [LB277]

SENATOR CHAMBERS: I want to know what they mean by their language. [LB277]

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SENATOR HARR: Okay, and I'll get back to it. I would also point out, on page 4, line 9, it applies to civil liability. So I'm not sure if criminal would apply in this situation, but I will...again, when we look at these, we only look at parts of the law, and I think it is important to look at the overall statute. [LB277]

SENATOR CHAMBERS: So then this question...in the beginning, at line 19, the intent is to decriminalize and not make it a matter of fraud? Or what lines are you talking about? [LB277]

SENATOR HARR: Well, I was looking at line...on page 4, line 9. And I probably shouldn't be speaking because we have an expert behind me. But it says, a person...starting on line 8, page 4, line 8. [LB277]

SENATOR CHAMBERS: Um-hum. [LB277]

SENATOR HARR: It says, a person presents false Medicaid claims and is subject to civil liability if such person,... [LB277]

SENATOR CHAMBERS: Um-hum. [LB277]

SENATOR HARR: ...and then it goes on to state, (a), (b), (c). And I think your issue is with (d). So I think this may apply only to civil liability but, again, there is someone coming up behind me who is much more well-educated in this area of the law than I am. [LB277]

SENATOR CHAMBERS: But, see, even if it's not criminal liability, there is nothing that indicates any culpable conduct in "knowingly delivered." [LB277]

SENATOR HARR: Um-hum. [LB277]

SENATOR CHAMBERS: We'll take the expert. [LB277]

SENATOR HARR: Yeah, and I think you're right, but I do agree with your point, yes. And then you had something else. [LB277]

SENATOR CHAMBERS: And then I'll ask... [LB277]

SENATOR HARR: Yes. [LB277]

SENATOR CHAMBERS: I'll put this other question because he may be making a notation. I'm not trying to ambush anybody today. [LB277]

SENATOR HARR: Fair. Nope. [LB277]

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SENATOR CHAMBERS: On page 6...not that I ever do (laughter). [LB277]

SENATOR MCGILL: Today. [LB277]

SENATOR CHAMBERS: I mean... [LB277]

SENATOR HARR: (Laughter) Today. [LB277]

SENATOR LATHROP: That did...that was what it sounded like. [LB277]

SENATOR CHAMBERS: But that's not what this is about. [LB277]

SENATOR HARR: Fair, yeah. [LB277]

SENATOR CHAMBERS: Touche. In line 14, it's beginning there where we strike the language about allowing non-Medicaid patients' records to be taken without the patient's written consent or a court order. Is this being done? And I'm still not sure whether I'd go for it, because the patient's information that has nothing to do with Medicaid is being taken. Is it being taken for the purpose of making comparisons between how Medicaid patients are billed and non-Medicaid patients are? And when the expert comes, maybe he can go through that, too, but I'm trying, since I started with you, to lay out all of the areas where I'd have a question. [LB277]

SENATOR HARR: Yeah, okay. [LB277]

SENATOR CHAMBERS: But that's all that I would have. [LB277]

SENATOR HARR: Well, thank you very much. [LB277]

SENATOR CHAMBERS: Thank you. [LB277]

SENATOR HARR: And I will try to get you answers to that if Senator...Mr. Smith cannot. [LB277]

SENATOR ASHFORD: Thanks, Burke. Proponents for the bill. [LB277]

JAMES SMITH: Good afternoon, Chairman Ashford and members of the Judiciary Committee. I am Jim Smith, S-m-i-t-h. I am the civil litigation bureau chief for the Nebraska Attorney General's Office. I am here in support of LB277. I hadn't spoken or compared notes with Senator Harr before he spoke, but I was struck by the fact that the comments that I wrote myself seem to be very similar to the things he's already said. But I will go ahead with my comments and then get into the specifics that Senator

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Chambers raised. LB277 amends the Nebraska False Medicaid Claims Act to make subcontractors civilly liable to the state for submitting false Medicaid claims to prime government contractors. The reason for amending our False Medicaid Claims Act is in response to the United States Supreme Court decision in 2008 in a case called Allison Engine v. the United States. Our current False Medicaid Claims Act was modeled after the False Federal (sic) Claims Act that was in effect at the time of the Allison Engine decision. Under the Allison Engine decision, the Supreme Court interpreted the federal act to cover only those situations when false claims were submitted to an employee or official of the federal government, thus, subcontractors who submitted false claims to the prime government contractor and government contracts were insulated for liability to the government for payment of the false claims that the subcontractors had submitted to the prime contractor. After the Allison Engine decision, the federal False Claims Act was amended by Congress in 2009, which means both houses of our Congress agreed that quickly, in a year, so as to overrule the Allison Engine decision and make subcontractors liable to the government for false claims submitted to the primary government contractors. The Nebraska False Medicaid Claims Act has not yet been similarly amended. There are at least 17 states, including Iowa and Kansas, who have amended their false Medicaid claims statutes after the Allison Engine decision. There are at least 28 states that similarly provide for subcontractor liability for submitting false claims. The reason for the difference between the 17 and 28 is some states had already provided for subcontractor liability prior to the pre-Allison Engine decision. The numbers of states I gave you is just what we know so far, that we've been able to determine. LB277 proposes to similarly amend Nebraska's False Medicaid Claims Act to follow Congress' 2009 amendment of the federal act. The reason why...and I've hit the stop button. I don't know... [LB277]

SENATOR CHAMBERS: May I ask a question? [LB277]

SENATOR LATHROP: You certainly may. [LB277]

SENATOR CHAMBERS: Would you finish what you were going to say? [LB277]

JAMES SMITH: Sure. [LB277]

SENATOR CHAMBERS: Because you said you're going to let me ask some questions or you'll address me, and I'd like to hear you complete because it may answer some of them anyway. [LB277]

JAMES SMITH: Sure, sure. There's a reason why the timing, I would submit, of this bill is important. Nebraska's Medicaid program has been changing from a fee-for-service program to a managed-care program, thus, the managed-care director is or will be the one contracting with the government. The healthcare provider would not be the one contracting with the government for payment and would be the subcontractor. Thus, if

the healthcare provider of services submits false Medicaid claims to the managed-care-government contractor, the healthcare provider who submits those false claims could be insulated from liability to the government for the false claims under the Allison Engine decision. And this is simply because the false claim by the healthcare provider would have been submitted to the managed care contractor, not to the government. And I did look at the Web site on HHS this morning before I came here. They have a Web site, the...just go Nebraska Managed Care Medicaid Program. It lists the fact of we're going to a managed care system. All the counties in the state that now have such a managed care Medicaid system includes Dodge, Douglas, Lancaster, Sarpy, essentially, the large counties in the state of Nebraska. The comments that Senator Chambers was asking, or questions, what I did was review...I'm not the person in charge of our Medicaid fraud program. But what I did do was compare the federal act that was amended with this proposed amendment. And as far as the provisions that you were asking about, Senator, on page 4 and 5, comparing those... [LB277]

SENATOR CHAMBERS: Um-hum, um-hum. [LB277]

JAMES SMITH: ...that language with the federal act, it is the same language of the amended federal act. So I guess the first answer I would give is the proposed amendment is the same language that the federal government enacted in 2009 with changes to reference to the state rather than government. [LB277]

SENATOR CHAMBERS: So this is the...this will be the...will be precisely the same language that's now in the amended federal version. [LB277]

JAMES SMITH: And as far as what you were asking on pages 4 and 5,... [LB277]

SENATOR CHAMBERS: Then what I... [LB277]

JAMES SMITH: ...my assumption is there's going to be a significant legislative history explaining as to why they came up with the language. The question you have about the sub (d) on page 4, I had a similar question myself as to why they used that language, as far as the delivery of property. I don't know the answer, other than I know it's the same language that the federal government used. I assume there's a legislative history of why they used that. I didn't really have the time to go into the depth to go through that. [LB277]

SENATOR CHAMBERS: But just for the sake of our discussion, if you were presenting this to a court and were looking at sub (d), this person had possession, custody, or control of property or money used, or used by the state, and knowingly delivered, or causes to be delivered, less than all of the money or property, and I'm the court, well, would you say that that, in and of itself, should create any kind of liability, the mere delivery to somebody of less than all of the money or property this person had, just on

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the face of it? [LB277]

JAMES SMITH: Well, I guess what I would say to a court is, if I'm addressing a court and I've got a specific set of facts, I would say, Your Honor, on that language, I think I need to look at the legislative history of what...what was the problem Congress was trying to address with that language and trying to understand the problem and the concept and why this language goes to that. But on the face of it, I had a similar reaction as you did. [LB277]

SENATOR CHAMBERS: Okay, then if...would you be willing, if you can look at it, to let me know what you find out? I don't want wrongdoers to get away. [LB277]

JAMES SMITH: Yeah. [LB277]

SENATOR CHAMBERS: But I don't want somebody put in the position of a wrongdoer when I don't even see where the wrongdoing consists. So now, going away from that,... [LB277]

JAMES SMITH: And I would say, Senator, I appreciate...words make a difference in trying to get it right. I mean, it makes sense, yeah. [LB277]

SENATOR CHAMBERS: Okay. On page 6, where we're talking about the accounts or records of a non-Medicaid patient, this is when the Attorney General is entering upon the premises of one of these establishments pursuant to an investigation. And then we get down here and the language being stricken. [LB277]

JAMES SMITH: I can get right to that, if you want me to, because I... [LB277]

SENATOR CHAMBERS: Yes, okay. [LB277]

JAMES SMITH: When I was reading the bill, I had a similar question as to--because this isn't in the federal act--why are we striking that language that's being stricken. It was not in the federal act; it's not in the stricken act; it's just a Nebraska creation when this bill was passed that is now being stricken. I went to the individual who is in charge of our Medicaid Fraud Unit and said, what's this, what's the point, why is this being stricken? And the explanation I was given is that our Medicaid Fraud Unit, in addition to dealing with just the civil Medicaid fraud, is also responsible for investigating alleged abuse of vulnerable people in Medicaid facilities. So if you're in a facility and Medicaid pays for any of the people in the facility, it's considered a Medicaid facility. And if there is any abuse of the residents of that facility, our Medicaid unit also has a responsibility to get...investigate those cases of abuse, prosecute if there's a criminal case warranted. The concern was, for whatever reason, when this bill was originally enacted, that language that is now proposed to be stricken was put in there. So it essentially

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hampered our ability to investigate fraud and abuse of someone who was a non-Medicaid patient. So if there was someone who was a...if someone is abused in a Medicaid facility--in other words, they take Medicaid funds--our view was, or at least the person in charge of the unit was, if the person is being abused, it shouldn't make any difference, when we're investigating the abuse, whether that person is a Medicaid patient or a non-Medicaid patient. They're simply an abused patient or a resident, and our ability to investigate that should not be restricted by the facility not turning over to us the records they're...the records they have concerning this non-Medicaid patient. In other words, it's an equality thing. [LB277]

SENATOR CHAMBERS: But here's where I am. And I agree with looking out for any abused person. [LB277]

JAMES SMITH: Yeah, okay. [LB277]

SENATOR CHAMBERS: But if you're starting with observed abuse, then you can use that observed abuse as a basis for going further if you need to. But to go into a place where there might be an investigation of alleged misappropriation of patients' private funds, then I was wondering, since they're talking about funds being misappropriated rather than abuse of anybody, are they saying, we want the non-Medicaid patient funds, I mean records, to compare how private payers are billed, as opposed to how Medicaid patients are billed? [LB277]

JAMES SMITH: I... [LB277]

SENATOR CHAMBERS: Because the Medicaid patients, as you know, are billed to the government, and the private-pay people pay their own. [LB277]

JAMES SMITH: I took this as to the facility's records--going into the facility, looking at the facility's records. And it has...and the line being, when you see the...enter upon the premises of any provider and examine all accounts and records that are relevant. To me, that's talking about the accounts and records of the facility of the provider there, and that...in that last line is accounts or records of a non-Medicaid patient. That, to me, is so broad that records could include even the healthcare records, the care provided records. [LB277]

SENATOR CHAMBERS: But here, in subparagraph (b), to investigate alleged abuse or neglect of patients,... [LB277]

JAMES SMITH: Um-hum. [LB277]

SENATOR CHAMBERS: ...that would be something observable and established without looking at the records. [LB277]



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JAMES SMITH: Actually,... [LB277]

SENATOR CHAMBERS: You mean you...they would expect that, if they looked at a record, they'd say, this person is supposed to get three of these pills at 3:00, give the person one so that we save money by not giving the full dosage that's required. I don't see what the records of non-Medicaid patients would have to do with that. [LB277]

JAMES SMITH: Oh, I guess the...my answer would be...I used to do health professional discipline where we would discipline doctors and nurses for substandard care, and it's similar to almost, like, a malpractice case, in many cases, in which you want the entire picture of what was the care provided, which is going to be the nursing notes, the facility notes, all of the records. [LB277]

SENATOR CHAMBERS: Who would have access to these non-Medicaid persons' records? [LB277]

JAMES SMITH: Well, the facility is going to have records concerning the care they've provided. [LB277]

SENATOR CHAMBERS: No, I mean when you...when whoever investigates, whoever enters upon the premises to conduct this investigation, once those records are procured, who would, from that point on, would have access to these records, and what use would they be put to? [LB277]

JAMES SMITH: They would be used as what I would call, essentially, law enforcement record because our Medicaid Fraud Unit has investigators. They would go into the facility. They can investigate the allegations of the alleged abuse. Those would be records that would go to us as part of our investigation. If it was determined that there was, say, a crime committed that there could be a criminal charge against someone, then those records, potentially, could be introduced in court. They would still maintain a confidentiality as far as the patient is concerned. But at least as far as our ability to go in, see the facility's records, we could see them, but the patient is still going to be able to...like, if you wanted to, I guess, release them out to the general public, I'd say they're still subject to a privilege. [LB277]

SENATOR CHAMBERS: Okay, well, I'll chew on that for a while because we'll have time to... [LB277]

JAMES SMITH: Sure. [LB277]

SENATOR CHAMBERS: And I'm...I want to get from you as much as I can. And you are going to look up what was behind--on page 19, through line 23--this sub (d); you'll find

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out why they are going to have that language where there's no intent to defraud. It's not necessary to show anything inappropriate in giving less than all of the money or property that you (inaudible). [LB277]

JAMES SMITH: Okay, yes, you're talking...you said the page numbers. Page 4, 19 through 24, is what you're talking about, I think. [LB277]

SENATOR CHAMBERS: And also, sub (e), since you're looking at it, if you could give me some understanding of all those, that if... [LB277]

JAMES SMITH: Okay. I... [LB277]

SENATOR CHAMBERS: But I'm like you. If this language is reflecting the federal language, there must be some stated reason for it. So I will hold off until you can give Senator Harr or the committee whatever you find out as to the rationale for that language. [LB277]

JAMES SMITH: Yeah. I will tell the senator I was on a relatively short time frame, so my review...I did do some review after this law was enacted. Have federal cases been addressing or actions taken where they're...this is subject to interpretation? So I'm expecting...would not only would we have the federal legislative history, hopefully, we're going to have some federal court cases that have construed it. [LB277]

SENATOR CHAMBERS: Already? [LB277]

JAMES SMITH: I would think so because what...they have something...the federal government has something that we don't have is it gives a private right of action to go out and file suit. [LB277]

SENATOR CHAMBERS: But will you be able to get that and provide some light on this? [LB277]

JAMES SMITH: I... [LB277]

SENATOR CHAMBERS: Are you saying that you wouldn't have enough time? [LB277]

JAMES SMITH: No, I was saying before the hearing today. I think you've got very good questions. [LB277]

SENATOR CHAMBERS: Oh, be...yeah, right. [LB277]

JAMES SMITH: But, yeah. [LB277]

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SENATOR CHAMBERS: Right, I understand that. [LB277]

JAMES SMITH: No, no, that's all I'm saying. [LB277]

SENATOR CHAMBERS: I mean after. Okay. [LB277]

JAMES SMITH: Yeah. [LB277]

SENATOR CHAMBERS: Okay. [LB277]

JAMES SMITH: Yeah. We will get you a response, yes. [LB277]

SENATOR CHAMBERS: That's all that I have. [LB277]

JAMES SMITH: Okay, thank you. [LB277]

SENATOR CHAMBERS: Oh, and one other thing. You didn't mention it, so maybe you don't mind. But on page 3, in line 11, substitute the word "willful" for "deliberate." [LB277]

JAMES SMITH: I understood your point. I...all...I would just tell you that's the same language that came out of the federal act. [LB277]

SENATOR CHAMBERS: Deliberate? [LB277]

JAMES SMITH: Yeah. [LB277]

SENATOR CHAMBERS: Oh, then I would go with "willful," because they don't think nuance, in a nuanced way, and the only word they could think of was "deliberate." I'm surprised they didn't put "intentional." But "willful" is known to the law, and term is "willful ignorance." [LB277]

JAMES SMITH: Yeah, I... [LB277]

SENATOR CHAMBERS: And it originated in England because there were people who would willfully turn their eyes away from something and fail to take notice of it... [LB277]

JAMES SMITH: Yeah. [LB277]

SENATOR CHAMBERS: ...when it was their duty and responsibility. So I would prefer "willful." And as one of those who can vote on this, I'm going to vote for "willful" instead of "deliberate." [LB277]

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JAMES SMITH: Yeah, I think the concept is it's not just ignorance. You're making a concerted effort to be ignorant. [LB277]

SENATOR CHAMBERS: Well, should we put all that in it then? (Laugh) But anyway, that's all that I have. Thank you. [LB277]

JAMES SMITH: That's the concept, but I think it's a similar concept. [LB277]

SENATOR CHAMBERS: Right, okay. [LB277]

JAMES SMITH: Yeah, okay. [LB277]

SENATOR CHAMBERS: And that's all I would have. Oh. [LB277]

SENATOR ASHFORD: I don't see any other questions. [LB277]

SENATOR CHAMBERS: Mr. President, you're back. I'm... [LB277]

SENATOR ASHFORD: Oh, yeah. No, I've been here... [LB277]

SENATOR CHAMBERS: Okay. [LB277]

SENATOR ASHFORD: ...a little while, not a whole lot of time. [LB277]

SENATOR CHAMBERS: No, he had been controlling so much that my neck had habitually just turned in that direction. [LB277]

SENATOR ASHFORD: Thanks. [LB277]

JAMES SMITH: Thank you. [LB277]

SENATOR ASHFORD: All right, do we have any other opponents or proponents? Opponents? Neutral? Do you really...you want to come up? [LB277]

SENATOR HARR: I just want on the record that I will follow up with the AG's Office and get to Senator Chambers the language that he asked for regarding page 4, subsection (d) and (e), which carries on to page 5. And that is it, but I will get that. Thank you. [LB277]

SENATOR ASHFORD: Thank you, Senator Harr. That concludes the hearings. [LB277]