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Judiciary Committee
February 21, 2007

[LB65 LB450 LB457 LB606 LB672 LB673]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, February 21, 2007, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB65, LB457, LB672, LB673, LB450, and LB606. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Vickie McDonald; Amanda McGill; Dwite Pedersen; Pete Pirsch; and DiAnna Schimek. Senators absent: None.

SENATOR ASHFORD: Good afternoon. I'm sorry we're late. We had an executive session that carried on a little bit and we're still exuberant as a result of it. So in any event, thank you all for being here. We have...how many bills do we have? Six bills today. And we are going to take LB65, Senator Stuthman's bill, first, because Senator Hansen is introducing a bill in another committee. And most of you are probably aware of our light system. We ask that you confine your testimony to three minutes. The lights will tell you when you're...the yellow light will give you a minute left, and then the red light we'd ask you to sum up and complete your testimony. Let me introduce my colleagues. Senator Lathrop from Omaha is here; Senator McGill from Lincoln; Senator McDonald; and Senator Schimek. And with that Jonathan Bradford is our clerk and Stacey Trout is legal counsel. So with that, let's go to LB65, Senator Stuthman. [LB65]

SENATOR STUTHMAN: (Exhibit 1) Good afternoon. Chairman Ashford and members of the Judiciary Committee, my name is Arnie Stuthman, S-t-u-t-h-m-a-n, and I represent the 22nd Legislative District. I am here to introduce LB65. What LB65 changes, it changes the statute of repose on medical malpractice suits. It extends the period for which an injured patient can file suit from 10 years to 20 years when the alleged act has not been previously discovered. This bill does not affect the statute of limitations. The statute of limitations requires a patient to file suit within two years of the date of the alleged act, but if the act of malpractice is not discovered within that two-year period then the suit must be filed within one year of the discovery of the act. The statute of repose then says that a suit cannot be filed for any reason after ten years since the act was committed. We would like to see that changed to 20 years, or better yet removed from the statute altogether. I'm going to show you a short video of Yolanda Jacobsen. She is the reason I introduce this bill, and because of her condition she cannot be with us today. In the video they mention that former Senator Jim Jensen was considering introducing this bill last year but was...then he decided that he would not be able to. I want to make it clear that there are no hard feelings whatsoever and I think we can appreciate having a full plate this session. With that I'm going to present you with a video, and those are my opening comments and so right now we're going to have the video. [LB65]

SENATOR ASHFORD: Thank you, Senator Stuthman. Just a second. Before...do we consider the video as the first testifier, is that the way we'll...? I think we should do it

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

maybe. And are you done with your introduction, Senator Stuthman? [LB65]

SENATOR STUTHMAN: Chairman Ashford, I am done. I also have a letter that I would like to have entered into the testimony. It is a letter from Lisa Corley (phonetic) and she was unable to attend too, so I would like to have that letter entered in. [LB65]

SENATOR ASHFORD: Thank you, Senator Stuthman. What we'll do then is we will play the video and as the first witness so we can get that information. Why don't we do this: Do you have the name of the individual again and we can...? [LB65]

SENATOR STUTHMAN: Yolanda Jacobsen. [LB65]

SENATOR STUTHMAN: Yolanda Jacobsen. Okay. [LB65]

SENATOR STUTHMAN: And that's what the video is about. And when the video is over...it's a short video and then there will be testifiers right after her... [LB65]

SENATOR ASHFORD: Other testifiers. How many testifiers do we have on LB65? Okay, great. Senator Stuthman, let's go with the video then. Thanks. [LB65]

VIDEO PRESENTATION [LB65]

SENATOR ASHFORD: Senator, we're going to need a copy of that tape too. Can we get a copy of the tape or do you have another copy? All right, thank you very much. Do we...any other...? We'll go to the proponents to this bill, LB65. [LB65]

MARLENE JACOBSEN: I do have some handouts. Would you like those now? [LB65]

SENATOR ASHFORD: If you would state your name and spell your last name for the record please. [LB65]

MARLENE JACOBSEN: (Exhibits 4-7) Yes. Marlene Jacobsen, J-a-c-o-b-s-e-n. I am here on behalf of my mother, the victim of medical negligence. On October 26, 1999, my mother was diagnosed with an inoperable brain tumor. MRI scans revealed a large brainstem meningioma. Unfortunately this tumor was very much evident on a previous MRI in 1987, misdiagnosed by Omaha radiologist James Johnson. For 12 years following the misdiagnosis, my mother consulted with a number of physicians, all specializing in guesswork. When the correct diagnosis was finally determined in 1999, it was too late. Medical experts have confirmed treatment of this tumor in 1987 would have been highly successful and totally alleviated her symptoms. Several physicians, including the radiologist, were named in a malpractice lawsuit. Our attempt to seek justice in the court system failed with respect to the radiologist. The case against him was dismissed due to the ten-year statute of repose. Sadly, it took 12 years to uncover

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

the truth. I then filed a complaint against the radiologist with the Nebraska Health and Human Services Board of Medicine and Surgery. After a lengthy two-year investigation, I was informed, without explanation, disciplinary action would not be taken against the radiologist. In addition to that disappointing news, I was also informed the films I provided to the state as evidence were lost after review by an independent radiologist retained by the state. Victims of medical negligence have no choice. The only option available is the legal system. The statute of repose is wrong. Denying victims their legal rights only victimizes them once again. If physician peer review protected patients instead of doctors, malpractice suits would be drastically reduced. Unfortunately, the medical code of silence is alive and well in the state of Nebraska. My mother's life has been shattered physically, emotionally, and financially because of the negligence of doctors. She has exhausted what little funds she received from the lawsuit. Her current out-of-pocket medical expenses have left her bankrupt. She has endured years of pain, suffering, various useless treatments. To date, she suffers from double-blurred and distorted vision, she has severe headaches, she has extreme unsteadiness and vertigo. She is a stroke risk given the size and location of this dangerous tumor. Incredibly, her cognitive function is intact. She is all too aware of the future disappointments to come. The one-year discovery statute is more than adequate to bring finality to lawsuits. The statute of repose needs to be eliminated. Not only did the medical community fail my mother miserably, the state did as well. Although I know it is too late to find justice in my mother's case, this should not be allowed to happen again. It is my sincere wish you support this bill and I thank you for your consideration. I would be happy to answer any question you may have. [LB65]

SENATOR ASHFORD: Do we have any questions? Senator McDonald. [LB65]

SENATOR McDONALD: Thank you for coming. Was this something that was an accident or just had some symptoms? [LB65]

MARLENE JACOBSEN: No. My mother, in the beginning, had symptoms of double vision, severe head pain, visual distortion--very obvious symptoms I discovered after the fact; it was a brain tumor. And a radiologist imaged her. And if you look in the handouts, the tumor on the initial MRI was very obvious, and he stated that there wasn't a tumor present on that initial MRI when indeed there was. And so she went to several doctors throughout the years and no one diagnosed it properly. So she was left with the impression that she may have had a small stroke or various other differential diagnoses. [LB65]

SENATOR McDONALD: Did any other doctor do an MRI? [LB65]

MARLENE JACOBSEN: You know, they didn't until 1999 when her current doctor was so alarmed. And she never mentioned anything to him because for ten years doctors said it was a minor problem so she didn't bother to tell her new doctor at the time until

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

she had another horrible episode of the visual disturbances, the bright lights. But she had these on and off throughout the years but this one was very severe. And... [LB65]

SENATOR McDONALD: Excuse me. Did she request an MRI from any of the other doctors? [LB65]

MARLENE JACOBSEN: No. The doctor immediately said that she needed an MRI, and so... [LB65]

SENATOR McDONALD: No, after she had the first one and they didn't detect the tumor and you said she went through several doctors through a period of years. Did she ever request from any of those other doctors a follow-up, second opinion MRI? [LB65]

MARLENE JACOBSEN: No. She just went to the doctors to find out why she was having these continual problems and they weren't resolved. So when she had her symptoms, she would do what any person should do, go to the doctor. And it was up to the doctor to order specialty imaging or specialty intervention, and no one ever thought to do that. And why I don't know. But her mistake was she listened to all the doctors. [LB65]

SENATOR McDONALD: And she didn't ask for an MRI. [LB65]

MARLENE JACOBSEN: But she shouldn't have to ask for an MRI; she's the patient. And so she did what any patient should do: when you have a problem go to the doctor. Thank you. [LB65]

SENATOR ASHFORD: Thank you, Senator. Any other questions? Senator Chambers. [LB65]

SENATOR CHAMBERS: Were there any complaints filed with the state because of any of these activities? [LB65]

MARLENE JACOBSEN: Yes. After the lawsuit against the radiologist was dismissed, we filed a claim or a complaint against the doctor with the Nebraska Health and Human Services Board of Medicine and Surgery. And after a two-year investigation, they decided not to do anything, with no explanation. And in the course of that, they discarded the films that I submitted as evidence. [LB65]

SENATOR CHAMBERS: And during this two-year period were they or was anybody representing them in contact with you to inform you of what they were doing or the progress of their investigation? [LB65]

MARLENE JACOBSEN: Initially, I met with the investigators from the state, and they did

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

say they stated that they could see by the films that there was obvious negligence. The state agreed to investigate it. Periodically I would hear from an investigator asking me for more evidence, more information, reports, etcetera, and that was maybe two or three times within that two-year period. And then I received the letter from the state, stating that no action would be taken and that the films were inadvertently discarded. [LB65]

SENATOR CHAMBERS: Did you ever have the assistance of a lawyer in any of this? [LB65]

MARLENE JACOBSEN: Not during the investigation, no. [LB65]

SENATOR CHAMBERS: And did you try to pursue their having discarded the films or other information? [LB65]

MARLENE JACOBSEN: That I did do. I was outraged that a matter of investigation would be so carelessly mishandled, so I did contact the Attorney General's Office and they investigated it. [LB65]

SENATOR CHAMBERS: And what did they conclude? [LB65]

MARLENE JACOBSEN: I know that Health and Human Services had an answer for why they discarded the films. They just said in the chain of events that they got lost somewhere in the film library. But when I investigated that I was told that after...if a film of unknown origin is sent to the film library, naturally they would ask the sender who sent it to the library. That never occurred. So I really don't know what happened other than they said they were lost. [LB65]

SENATOR CHAMBERS: So this investigative process, if that's what it can be called, could result in any part or all of the evidence submitted by a complainant being lost and nobody knows who lost it, how it was lost, nor did they give an accounting? [LB65]

MARLENE JACOBSEN: That's what happened in this case, yes. [LB65]

SENATOR CHAMBERS: And what was the agency or entity conducting this investigation? [LB65]

MARLENE JACOBSEN: The Nebraska Health and Human Services Board of Medicine and Surgery. [LB65]

SENATOR CHAMBERS: Board of Medicine and Surgery. [LB65]

MARLENE JACOBSEN: Right. It's investigated and then when the evidence is compiled it's reviewed by the Medical Board. [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR CHAMBERS: And are doctors on that board? [LB65]

MARLENE JACOBSEN: Yes. The majority are doctors. [LB65]

SENATOR CHAMBERS: Were any of the doctors, to your knowledge, who were on that board themselves the subject of complaints? [LB65]

MARLENE JACOBSEN: I do know that one doctor, the chairman of the Board of Medicine, had a lawsuit filed against him many years ago. He was named in a lawsuit that resulted in the death of a child, and I know that the family filed a complaint against that doctor prior to him being appointed to the Board of Medicine and Surgery, and no action was taken against him. But years later he was appointed to the Board of Medicine and Surgery is now the chairman. In fact, what I found even more disturbing is last year when there was a hearing on this very bill, the Board of Medicine and Surgery, the board that is supposedly designed to protect patients, opposed legislation that would benefit patients, and the chairman of the Board of Medicine submitted that letter opposing the bill. [LB65]

SENATOR CHAMBERS: Who is the...since he's the chairman of the board, what's his name? [LB65]

MARLENE JACOBSEN: His name is Michael Sitorius. [LB65]

SENATOR CHAMBERS: And he's still the chairman of that? [LB65]

MARLENE JACOBSEN: I do believe he is. [LB65]

SENATOR CHAMBERS: Okay. Thank you. [LB65]

MARLENE JACOBSEN: Thank you. [LB65]

SENATOR ASHFORD: Thank you, Senator Chambers. Any one have other questions of...? Thank you very much. [LB65]

MARLENE JACOBSEN: Thank you. [LB65]

SENATOR ASHFORD: Next proponent. [LB65]

NATALIE OSORIO: Good afternoon, Senator Ashford and the rest of the committee. My name is Natalie Osorio, O-s-o-r-i-o. I am here on behalf of the Nebraska Association of Trial Attorneys. I am also one of the attorneys that represented Yolanda Jacobsen in her malpractice suit that went after one of the decisions that perpetuated the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

misdiagnosis in her case. The statute of repose right now is quite unfair, especially in this day and age of technology when a patient comes to a physician, complains of symptomology that may be very small but a predicator to something larger. Tests can be done, tests should be done, and they should be able to be read adequately. In this case there was an obvious tumor present that was misdiagnosed. And as Senator McDonald had asked Ms. Jacobsen about why didn't she ask other physicians about MRIs, Ms. Jacobsen, Yolanda, is an older individual and she has complete faith in the authority of her physician. She relied on those physicians that they were going to make the best decisions for her. She was told that her MRI was clear. She did not know that she should go further. Many of the people in this society do not do that. They do not question their physicians and it's really not up to the individual to be able to do that. We should be able to rely on those who care for us to make adequate decisions and make them in a timely manner. With the statute of repose as it is, there's many individuals that may have gone in for a surgery and inadvertently maybe something was left in that they weren't symptomatic for the first ten years, but after 12-13 they have a severe episode and it becomes obvious that there was something that was done that was negligence from the doctor. It is in my opinion that in order to protect the individuals, patients, that we need to expand this statute, and that is it. [LB65]

SENATOR ASHFORD: Senator Lathrop. [LB65]

SENATOR LATHROP: I have some questions for you if you don't mind. The statute of repose is different than the statute of limitations, am I right? [LB65]

NATALIE OSORIO: Yes, it is. [LB65]

SENATOR LATHROP: And for professionals, for the average guy on the street if they commit some negligent act they're exposed to liability for four years, is that right? [LB65]

NATALIE OSORIO: Correct. [LB65]

SENATOR LATHROP: So the statute of limitations for anybody in their everyday life is four years, but for professional people we have a special exception and we make it a two-year statute, is that right? [LB65]

NATALIE OSORIO: Yes, we do. We make it a two-year statute. [LB65]

SENATOR LATHROP: And so when someone has had some medical negligence inflicted on them, we have two years to bring that lawsuit against the offending careless doctor, is that the case? [LB65]

NATALIE OSORIO: Yes. [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR LATHROP: And if it takes beyond two years before you discover any symptoms, in other words you can have malpractice happen and not know it for two years, is that right? [LB65]

NATALIE OSORIO: Right. [LB65]

SENATOR LATHROP: And if you discover it after the two years, you get one year to file a suit against the careless doctor or the careless hospital, is that the case? [LB65]

NATALIE OSORIO: Right. [LB65]

SENATOR LATHROP: And that's part of the statute of limitations. The statute of repose that we're talking about ends anybody's right to make a claim regardless of how egregious the carelessness was that caused the injury, is that right? [LB65]

NATALIE OSORIO: Yes, exactly. [LB65]

SENATOR LATHROP: And today the example has been an undiagnosed tumor that was obvious on an MRI scan. But a typical or perhaps even a more typical example of this is where physicians leave something inside of a patient. [LB65]

NATALIE OSORIO: That is the typical. That's the most...that's going to happen more often than not. [LB65]

SENATOR LATHROP: An that's generally referred to as a foreign object, is that right? It's really not foreign while it's in the operating room. It's a sponge; it's a cloth; it's something that doesn't belong in the patient when the surgery is over. [LB65]

NATALIE OSORIO: Right. Once that it's closed it's a foreign object. [LB65]

SENATOR LATHROP: And generally speaking, in the operating room the doctors count the objects that were on the tray or in the operating room before they close the patient to make sure they haven't left a sponge or a rag in the patient. [LB65]

NATALIE OSORIO: Yes, there's more than one person that does the count. [LB65]

SENATOR LATHROP: Okay. So to leave something behind in a patient, like a rag or a sponge, they just have to fail to count or miscount or otherwise make a mistake while the patient is unconscious and in surgery. [LB65]

NATALIE OSORIO: Correct. [LB65]

SENATOR LATHROP: The foreign object case, do the symptoms of a foreign object

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

generally become evident within ten years? [LB65]

NATALIE OSORIO: Sometimes yes and sometimes no. [LB65]

SENATOR LATHROP: And in fact it's very common for the consequences of a foreign object left inside the patient by a careless physician to take more than ten years to become evident, is that the case? [LB65]

NATALIE OSORIO: Correct. It all depends exactly where it's left, but, yes, it can take many, many years to become evident. [LB65]

SENATOR LATHROP: We call that a latent injury. It takes more than ten years to discover, to even have a symptom from it. [LB65]

NATALIE OSORIO: Right. [LB65]

SENATOR LATHROP: Tell us, if you've had experience with this, what happens to somebody that's had a foreign object left in them? [LB65]

NATALIE OSORIO: Well, I've had experience. I am also a nurse. So in my practice as a nurse I've had patients that have come back after many years of having something left in, and either if they're going to have a reaction, in the beginning it will be acute. There will be infection. It will be obvious. For those that it hangs out, it could show up, especially if it's in the peritoneal cavity, as an obstruction. And a lot of times that's because it adheres to something and you do not see it. It does not become evident until there is truly something blocked. And that can be acute after many, many years, or it can be something where they have had a nagging pain or the bowel movement has changed. [LB65]

SENATOR LATHROP: It becomes...scar tissue develops around the foreign object, does it not? [LB65]

NATALIE OSORIO: Right. It becomes (inaudible). [LB65]

SENATOR LATHROP: And in some cases that can become a very, very, very painful condition, is that right? [LB65]

NATALIE OSORIO: Right. It will become an adhesion; yes. [LB65]

SENATOR LATHROP: And for those people who have had a careless doctor leave a foreign object in them and it takes more than ten years to discover notwithstanding that it's a very painful condition, a ten-year statute of repose cuts them off from any claim against the careless medical practitioner. [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

NATALIE OSORIO: Right. Yes, it does. It cuts them off (inaudible). [LB65]

SENATOR LATHROP: And what you are asking for today with this bill is to extend that to 20 years. [LB65]

NATALIE OSORIO: Yes. We would like to extend it to a period of time that...I mean, we would like to have it gone completely but 20 years is a significant period of time that would help a patient in this regard. [LB65]

SENATOR LATHROP: All right. Thank you. That's all the questions I have. [LB65]

SENATOR ASHFORD: Senator Pirsch. [LB65]

SENATOR PIRSCH: If you know, could you comment, how typical...currently it's set a ten years. How typical is that in the United States compared to other states? [LB65]

NATALIE OSORIO: You know, I don't know exactly. I recall when I was working on the Jacobsen case, Marlene and I have discussed it in many regards and I did some research, but I know Nebraska's ten years, I believe there are some states that might have 15. That's just very vague in my memory, though, so please don't hold me to that. [LB65]

SENATOR ASHFORD: Could I...do you have a question, Senator Schimek? Let me just follow up, and I'm trying to...and I've always wondered about why there is a limit on the statute of repose. The two years is the statute of limitations. An action must be brought...if it's discovered it must be brought within two years in a professional negligence case, correct? [LB65]

NATALIE OSORIO: Correct. [LB65]

SENATOR ASHFORD: And the logic of ten years, I suppose, and it was passed in 1976 initially or maybe there was something before that, was to put some end to it I guess. [LB65]

NATALIE OSORIO: Right. I think that was a nice even number at the time. [LB65]

SENATOR ASHFORD: Right. But what you're suggesting is...and I'm trying to understand the logic of 20. I mean, there really...there should be no real...I mean, if in fact if something like this were to happen to someone and there is no reasonable way they could have discovered it within a period of time, the limitation is simply imposed to put some limit, I guess. [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

NATALIE OSORIO: Right, it is. And as I stated previously, we would like not to have a statute of repose whatsoever because if something like this was to happen, especially in the case where there's a foreign object that's left within a body, the patient whatsoever has no part in that. I mean, they don't know. They're sedated. If it comes 25 years later from now that they're having a... [LB65]

SENATOR ASHFORD: A problem. [LB65]

NATALIE OSORIO: ...a problem. [LB65]

SENATOR ASHFORD: So that gets to the, I guess, the last question, is there a way of...if we were to expand, if it were to be expanded from ten to 20 or unlimited, would there be a way of differentiating what types of claims? Is that logical? Are there types of claims? You've mentioned the foreign object claim. Is that a prevalent claim that, in your experience...I guess it is, you mentioned it was...that occurs as a nurse and so forth, that occurs after ten years. It can occur at any time. [LB65]

NATALIE OSORIO: Right. [LB65]

SENATOR ASHFORD: Are there other types of claims that...like...that you have seen that occur after...or types of problems that would occur after ten years in a...? [LB65]

NATALIE OSORIO: Well, I've seen, along with the foreign bodies, that is a very variable thing. I've seen them where they've been a week and I've seen where they've been as much as 15 years. Misdiagnosis is another issue. I think you need to consider those two together. I don't think you can separate them necessarily. I think, especially with the misdiagnosis, that's probably a more important area because we have the ability to run many tests now. It's almost...we are a very civilized country. We have the access to this high-tech technology, and if a doctor is neglecting listening to the patient or perhaps really following the syptomology, I think that's more egregious than actually leaving a foreign body in a patient. [LB65]

SENATOR ASHFORD: So the prevalent practice is an issue--what is prevalent, what is the practice at the time. [LB65]

NATALIE OSORIO: Right. [LB65]

SENATOR ASHFORD: There is always an issue, I suppose in these cases, in determining whether or not the doctor used reasonable care. [LB65]

NATALIE OSORIO: Right. [LB65]

SENATOR ASHFORD: And that can change though. The prevalent practice can change

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

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February 21, 2007

obviously as advances... [LB65]

NATALIE OSORIO: It could change. It could. [LB65]

SENATOR ASHFORD: Okay. Any other questions? Senator Pirsch. [LB65]

SENATOR PIRSCH: I guess I'm trying to get a harder concept of (inaudible) some quantification to the problem, and I know if you're aware of any objective studies on the issue, that kind of information would be helpful, but even anecdotally insofar as you...you practice as an RN, is that...? [LB65]

NATALIE OSORIO: Yes. [LB65]

SENATOR PIRSCH: In the cases where...I'm trying to get a sense of how many cases are at the point now where they're exceeding the ten-year limit. Is this a common occurrence? Is this a common enough occurrence that, you know...can you quantify there and give it a percentage of the types of cases where there is a misdiagnosis or is...? I guess the example was a foreign object left. You know, is it 5 percent of those type of cases that exceed, or 50 percent? [LB65]

NATALIE OSORIO: From my personal experiences working in an OR and in recovery, I can't tell you necessarily...I cannot quantify necessarily how many have been over ten years, how many have been over 15 years. I can tell you that foreign bodies happen more often than we want them to. I would probably say 1 in every ten there is something that happens, whether it's found before the patient even knows. [LB65]

SENATOR PIRSCH: I'm sorry. You said 1 in ten operations...? [LB65]

NATALIE OSORIO: Of my experience in the OR and recovery at a medical center in Omaha, this happened 1 in ten. [LB65]

SENATOR PIRSCH: Uh-huh. [LB65]

NATALIE OSORIO: Many times I would say that is before a patient really even knows. The nurse or recovery room nurse will find it, will have...there will be changes in the vital signs, notify the physician. They will do some kind of study and they'll take them back. As for ones that have been over ten, 15, or 20 years, in the last year of my practice I have run across three. [LB65]

SENATOR PIRSCH: Over ten. [LB65]

NATALIE OSORIO: Yes. [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR ASHFORD: Okay. Thank you. Any other questions? Thank you very much. [LB65]

NATALIE OSORIO: Thank you. [LB65]

SENATOR ASHFORD: Next proponent? Opponents? [LB65]

DAVID BUNTAIN: (Exhibit 8) Senator Ashford, members of the committee, my name is David Buntain, B-u-n-t-a-i-n. I'm an attorney and I'm the registered lobbyist for the Nebraska Medical Association and am appearing here in opposition to LB65 which would change the statute of repose from ten years to 20 years. The statute of repose is not unique in this area. In fact, the bill that would amend this statute of repose in the Medical Liability Act which covers those physicians and nurse anesthetists and hospitals that chose to be under the Medical Liability Act who participate in the Excess Liability Fund, that does not include all physicians. Not all physicians are under the Excess Liability Fund. There is a more general statute of repose that applies to all professionals that is ten years in length, Section 25-222. There is also a statute of repose for products liability cases, which is ten years. And the notion of a statute of repose is basically that, as with the statute of limitations, you need to have some certainty as to, to cut off claims and provide finality. And ten years is admittedly an arbitrary time frame, but I would submit to you, if you look at the laws in other jurisdictions, Nebraska's is one of the longest statutes of repose. In fact, we could not find a statute of repose in the medical liability area that's longer than ten years. And I do have a compilation I'd be happy to share with the committee. I just have one copy now of all of the laws relating to medical liability and I can get this to your counsel afterwards. There are...as far as we could tell in looking at this, there are four other states with ten-year statutes of repose: Missouri, Texas, Virginia, and West Virginia. All of the other states, and this is an area where it varies considerably, those that have statutes of repose, for the most part are three to seven years. We could not find any other than Nebraska and the four others that goes out to ten years. In the surrounding states, Iowa is six years unless there is a foreign object, and that is an exception that is made in some states; Missouri is ten years; Kansas is four years; South Dakota is two years; Colorado is three years unless there's been active concealment or there is a foreign object in the body. And that's similar and it varies from state to state, but really the ten-year period is not out of line and, if anything, you can make an argument to bring us into alignment with what the other states do, it should be reduced. The issues that you have, have to do with the proof in these cases. The records...you have to retain the records. You have to have the witnesses. And you have to be able to develop testimony as to what the standard of care is. And in many areas of medical malpractice, you think about medical care generally, the changes that have occurred in the last ten years and trying to go back and recreate what happened, what the records were, who the witnesses were, what the standard of care was. And I've distributed to you a letter from Bill Lamson who is an Omaha attorney who defends a lot of these cases. He has

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Transcriber's Office

Judiciary Committee
February 21, 2007

gotten into the practical issues. I've not...I've tried other cases; I've not tried a medical liability case. And Mr. Lamson's comments, I think, are right on point as far as what the practical problems are that are addressed by the statute of repose. So we would urge your committee not to advance LB65. [LB65]

SENATOR ASHFORD: Senator Chambers. [LB65]

SENATOR CHAMBERS: Mr. Buntain, as a lobbyist you are an advocate for your clients, correct? [LB65]

DAVID BUNTAIN: That's correct. [LB65]

SENATOR CHAMBERS: We are policy makers and our role is different from yours, would you agree with that? [LB65]

DAVID BUNTAIN: Absolutely. [LB65]

SENATOR CHAMBERS: Okay. Now, as time passes, years roll by, policies that the Legislature put in place may turn out to be inadequate for the changes that occur in circumstances. And if the Legislature is presented with cases of people who were harmed through the negligence of medical practitioners, policy makers could very well have a different view of that than an advocate for those practitioners, would you agree? [LB65]

DAVID BUNTAIN: Certainly. [LB65]

SENATOR CHAMBERS: Okay. Now, without disparaging you or seeming to be insulting or demeaning to what your role is, I wanted to establish that I know what your role is. How is a policy maker to react when actual persons can bring us examples of a statute of repose cutting off their right to seek redress even before they know that they have a basis for seeking redress? A statute of repose can cut off a person's right before they even know that they have it, isn't that true? [LB65]

DAVID BUNTAIN: That's correct. A statute of limitations can do the same thing. [LB65]

SENATOR CHAMBERS: Well, suppose we put a statute of limitations then of four years after discovery of the harm or the act...after discovery of the harm produced by the act. The we have a four-year statute of limitations during which the person must bring an action or be forever barred. Would you agree to that? [LB65]

DAVID BUNTAIN: The Legislature can set these limits wherever you want to set them. The argument against doing that is that you want...there is...there are good public policy reasons for encouraging people, once they are aware of a potential claim, to pursue that

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

claim, and that's why we have, in the case of medical liability claims you can...there is a basic two-year statute of limitations but if you discover it after that two-year period you have a year after discovery up to the ten-year statute of repose. In other words, we want to encourage people, both for their benefit and also for the benefit of the system, if they have a claim to come in after they have discovered it. And that's why we have... [LB65]

SENATOR CHAMBERS: So are you telling me that even if the ten-year statute...and maybe I'm misunderstanding...if the ten-year statute of repose has elapsed, subsequent to that a person discovers harm that was caused prior to the expiration of the statute of repose, that the person can still file an action after the statute of repose has elapsed? Is that what you are telling me? [LB65]

DAVID BUNTAIN: No. What I'm saying is, after the initial two-year statute of limitations has expired and during that period up to the ten-year statute of repose, if there is alleged negligence that's discovered during that period you had one year from when that's discovered, but in any event it's cut off after ten years. So if it's discovered after the ten years, the statute of repose says it's too late to bring that claim. [LB65]

SENATOR CHAMBERS: And now we're on the same page. How about letting there be a statute of repose or whatever you want to call it, but say four years...within four years after discovery of the harm the person must file an action. Why would your group be opposed to that if they're not opposed to injustice? In other words, do they want to get away with having harmed somebody due to their negligence? That's what they're interest is in having the statute of repose, isn't it? [LB65]

DAVID BUNTAIN: No. No. It's a matter of having claims adjudicated in a manner that's fair to the patient but also to the defendant. I'll give you a good example of what I'm talking about. Right now, attorneys advise their physician-hospital-clinic clients, you have a ten-year statute of repose. You could be sued for something for ten years. Keep your records for ten years. You have offices that are routinely taking that advice and don't have records back beyond ten years. [LB65]

SENATOR CHAMBERS: Okay, I understand all that. How is it fair to the patient to say that in the interest of expeditiously resolving claims you have to file a claim before you know you have one. And if you don't know you have one, you can lose the right to file the claim before you know you had one. That doesn't make sense to me if we're talking about fairness to the patient. Does it make sense to you? [LB65]

DAVID BUNTAIN: What you have is a balancing of the equities of the parties that are involved, and obviously there are going to be situations as has been described. I think the foreign object example is the best example. Most cases are not that clear-cut where you're talking... [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR CHAMBERS: And Mr. Buntain, I'm not going to take much more time, but a balancing would mean that you have the same amount on one side that you have on the other, and that brings the balance, right? Now, if I put more on this side, there's no balance, right? So on the side that the medical practitioners have, there would be 20 pounds and on the side of the patient there would be ten pounds. So there's no balance. It's always going to tip in favor of where the greatest amount of weight is, would you agree with that? In my example, won't it tip to the side? [LB65]

DAVID BUNTAIN: I think your physics is correct. [LB65]

SENATOR CHAMBERS: Have you ever ridden a teeter-totter? Do you know what that is? [LB65]

DAVID BUNTAIN: It's been awhile. [LB65]

SENATOR CHAMBERS: Okay. Which side...? Okay, now, on one side there is a greater weight than on the other. The fulcrum point is exactly in the middle of the board. Which side is going to go to the ground? The one that has the more weight or the one that has lesser weight? [LB65]

DAVID BUNTAIN: If I could just use your example... [LB65]

SENATOR CHAMBERS: Well, see if we understand this principle first. [LB65]

DAVID BUNTAIN: Well, the fulcrum is that time period. A lot of states have chosen to move the fulcrum into a shorter period... [LB65]

SENATOR CHAMBERS: I'm not talking about time; I'm talking about a teeter-totter. Because if you don't understand the principle that I'm discussing then I can't even proceed with it, so I won't use that. [LB65]

DAVID BUNTAIN: I was trying to describe the public policy that's involved. [LB65]

SENATOR CHAMBERS: Well, the public policy is what the Legislature says that it is, and it's grossly unfair to say that policy makers can be shown where patients are harmed through the negligence of these doctors, and before they even know that they have been harmed they lose their right. That's not a balance. That's stacking the deck. That's stacking the teeter-totter on behalf of the doctors. But that's all I have because I don't want to seem more argumentative than I have already. Thank you. [LB65]

DAVID BUNTAIN: All right. [LB65]

SENATOR ASHFORD: Any other questions? Senator Schimek. [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR SCHIMEK: Thank you, just a quick one. What are the exceptions for foreign objects in some of these other states? Can you give us some idea? [LB65]

DAVID BUNTAIN: There are states, and I think I mentioned Iowa is one, Colorado also has an exception... [LB65]

SENATOR SCHIMEK: But can you tell me how long (inaudible)? [LB65]

DAVID BUNTAIN: It accepts it from the statute of repose. Oh, and I would say I haven't studied all of the states but those two, just in looking at the summary, it appears that if there's a foreign object then that is...if the allegation is that there was a foreign object, then those are accepted from the statute of repose. [LB65]

SENATOR SCHIMEK: Okay. I would like to see that information very much. [LB65]

DAVID BUNTAIN: We can get that to you. [LB65]

SENATOR ASHFORD: Thank you. Senator McDonald. [LB65]

SENATOR LATHROP: I have a few questions if I can. [LB65]

SENATOR ASHFORD: But I have to...Senator McDonald is... [LB65]

SENATOR LATHROP: Oh, I'm sorry. I didn't see that. (Laughter) [LB65]

SENATOR ASHFORD: Remember, I never look to the left enough and I apologize so I'm now consciously trying to do that. Senator McDonald. [LB65]

SENATOR McDONALD: So some states differentiate between a misdiagnosis and an object that's been left. [LB65]

DAVID BUNTAIN: That is correct. [LB65]

SENATOR McDONALD: They don't look at them as the same. [LB65]

DAVID BUNTAIN: They make that as a specific exception to the statute of repose. [LB65]

SENATOR McDONALD: Because...the way I look at it, the patient doesn't really have a choice. They don't know that that's in there. But if it comes...you know, in most...not most but in some situations patients will go to other doctors and get the opinion that they didn't get, not necessarily in this case it didn't happen, but you do have that ability

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

to go to another doctor and hopefully that doctor will do the treatment that the other doctor did a second opinion type thing. So I could see why that would be important to do a different time frame on this. [LB65]

DAVID BUNTAIN: Another distinction with a foreign object case is it's typically that's pretty clear that it shouldn't be there. Where you really have problems in a lot of these cases is a claim, for example, of misdiagnosis where you're trying to go back five or six or seven or ten years to establish what was the standard of care during that period. You know, we've changed so much in the way we diagnose many conditions and diseases these days, and that's really where the origin of the statute of repose comes from. It's really directed more to that situation than to the foreign object cases. [LB65]

SENATOR ASHFORD: Thank you. Senator Lathrop is next. [LB65]

SENATOR LATHROP: All right. Mr. Buntain, you have indicated there are two states, neighboring states, with foreign object exceptions and there is no statute of repose in those. [LB65]

DAVID BUNTAIN: That's my...and again I'm just working from the summary we were provided. I haven't actually read the statutes. [LB65]

SENATOR LATHROP: Okay. You told us earlier that the rationale behind the statute of repose is a problem with proof. The witnesses aren't around and you've just suggested that with the foreign object case that really isn't a problem. [LB65]

DAVID BUNTAIN: It is not as big an issue in those cases. [LB65]

SENATOR LATHROP: All we have to do is figure out who did the surgery and we pretty much know who left the foreign object behind. [LB65]

DAVID BUNTAIN: That would be correct, assuming the records are still there, and typically I think they would be. [LB65]

SENATOR LATHROP: Okay. So the foreign object cases don't have the same problems that other misdiagnosis-type cases have, is that the case? [LB65]

DAVID BUNTAIN: I think that's why...yes, and that and also the issue you pointed out with one of the earlier proponents about that it's sometimes...I mean, it sometimes does take longer for that to manifest itself than in some of these other cases. [LB65]

SENATOR LATHROP: And maybe that's a good point too, and that is you don't argue with the fact that there's people that have foreign objects left behind who don't know about it and don't even have symptoms until beyond the ten-year statute of repose.

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

[LB65]

DAVID BUNTAIN: It appears that that's the case. I don't know the specifics. [LB65]

SENATOR LATHROP: And I missed what organization you came here to testify for today? [LB65]

DAVID BUNTAIN: The Nebraska Medical Association. [LB65]

SENATOR LATHROP: Okay. Would the Nebraska Medical Association have any problem following the lead of Iowa and Colorado in excepting from the statute of repose foreign object cases? [LB65]

DAVID BUNTAIN: I don't have authority to do that but I would carry that back to them if that's something that the committee is interested in exploring. [LB65]

SENATOR LATHROP: You don't know what their opinion would be about that? [LB65]

DAVID BUNTAIN: It has not been discussed. I mean, we have a medical liability committee. I'd be happy to visit with them about it. [LB65]

SENATOR LATHROP: Do you have a recommendation? Would you recommend that to the committee? [LB65]

DAVID BUNTAIN: To your committee or to the...? [LB65]

SENATOR LATHROP: To your organization. [LB65]

DAVID BUNTAIN: I cannot say. I'm not going to tell you what advice I'm going to give the committee. I mean I will indicate your concerns about that issue, and I can tell that several of you are concerned about it. And certainly it's an issue that's been addressed by a number of other legislatures. [LB65]

SENATOR LATHROP: That's all I have. [LB65]

SENATOR ASHFORD: And I think that would be helpful if you could obtain that information because I think it is an obvious point. [LB65]

DAVID BUNTAIN: Sure. [LB65]

SENATOR ASHFORD: And obviously other legislatures have dealt with it. Senator Pirsch. [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR PIRSCH: Other than those two things you mentioned, the foreign object and the active concealment exception, are there any other type of state laws that you've been familiar with that has an exception? Those seem to the be two? [LB65]

DAVID BUNTAIN: Those are the two main exceptions I've seen. [LB65]

SENATOR PIRSCH: Thank you. [LB65]

SENATOR ASHFORD: Thank you, Senator Pirsch. Any other questions? Senator Chambers. [LB65]

SENATOR CHAMBERS: Mr. Buntain, as a lawyer your job is to represent your client zealously, right? [LB65]

DAVID BUNTAIN: Yes. [LB65]

SENATOR CHAMBERS: Your job would never be to recommend that your client pursue a course of action which will bring greater harm than if the client pursued an alternative course of action, correct? [LB65]

DAVID BUNTAIN: I believe that is correct. [LB65]

SENATOR CHAMBERS: If your client were going to pursue a course of action...let's make it monetary so that I won't get lost in my example...if your client is facing the possibility of pursuing a course which would cost him or her \$1 million but was presented an alternative course that might result in a loss but only \$500,000, which course would a zealous lawyer recommend to his or her client? And that keeps it from having you make that decision. [LB65]

DAVID BUNTAIN: I believe the later one. [LB65]

SENATOR CHAMBERS: Say it again? [LB65]

DAVID BUNTAIN: Well, I kind of got lost in your hypothetical, but... [LB65]

SENATOR CHAMBERS: Okay, I'm going to make it simple. Course A would result in a loss to your client of a million dollars. Course B would result in a loss of \$500,000 or a half million dollars. [LB65]

DAVID BUNTAIN: I can do the math on that. [LB65]

SENATOR CHAMBERS: Say it again? [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

DAVID BUNTAIN: I said, I can do the math on that. [LB65]

SENATOR CHAMBERS: Okay. Which course would it be, A or B? [LB65]

DAVID BUNTAIN: It would be B. [LB65]

SENATOR CHAMBERS: Okay. Now if your client is facing the prospect of eliminating a statute of repose and putting in a statute of limitation which would begin to run after a person discovers the harm, if that's on one side, or maintaining a statute of repose with certain exceptions, which would be the recommended course based on your representation of a client in that situation? [LB65]

DAVID BUNTAIN: We would have to look at what all the ramifications of both of them are. The way you posed the hypothetical, I think probably the second course makes more sense. [LB65]

SENATOR CHAMBERS: You are a very intelligent man. I don't even have to ask you any more. Thank you. You have confirmed what I always knew about you. [LB65]

DAVID BUNTAIN: Thank you. Was that on the record? (Laughter) [LB65]

SENATOR CHAMBERS: Yes, it's on the record. [LB65]

SENATOR ASHFORD: Thank you, Mr. Buntain. Everything is on the record. [LB65]

SENATOR LATHROP: Mr. Buntain, we'll crack the jokes. [LB65]

SENATOR ASHFORD: Yeah, you can't say anything funny here. [LB65]

DAVID BUNTAIN: Never mind. [LB65]

SENATOR ASHFORD: Thank you. Okay. No, this is a serious matter, but thank you, Mr. Buntain. [LB65]

DAVID BUNTAIN: Thank you. [LB65]

SENATOR ASHFORD: Senator...oh, I'm sorry, Bruce. [LB65]

BRUCE RIEKER: (Exhibit 9) Senator Ashford, members of the committee, my name is Bruce Rieker, that's R-i-e-k-e-r, and I'm here on a couple different capacities. One, as the vice president of advocacy for the Nebraska Hospital Association, and I've also been requested and authorized by the Nebraska State Chamber of Commerce and Industry to register their opposition to LB65. The Nebraska Hospital Association and our

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

85-member hospitals is opposed to LB65. We believe that the extension from ten years to 20 years, will by its very nature, result in less likelihood that both the plaintiff and the defendant would receive a fair trial if it goes to trial. There is no doubt that such a change would result in greater...there is also no doubt that such a change would result in greater healthcare costs for those who pay their bills. The further out in time from an alleged event, the more difficult and expensive it is to present and defend. In many cases it would be similar to trying a phantom event. As Mr. Buntain presented, the standards of care have changed significantly over the last 20 years and would be extremely difficult for a lay jury to sort out what was appropriate 20 years ago but not today. Conceivably, if it stretched the entire spectrum of what we're talking about here, if a case were filed and it went to trial, that case could conceivably be heard 22, 23, or 24 years after the alleged incident. In all likelihood, again as Mr. Buntain outlined, there may be limited medical records. Witnesses, if alive, would be difficult to locate. And even if they could be found, memories would have long since faded, leading to testimony that would be little more than pure speculation. It is very clear to us that the ability to have a fair trial for both the plaintiff and the defendant would be severely compromised by such an extension of this statute of repose. There is no doubt in our mind that the increased exposure for hospitals and its physicians will require more expensive insurance coverage. Greater uncertainty with an extended reporting period and record retention equals more costly insurance for that associated risk. At a time when it appears that almost all discussion about medical care is focused on controlling costs, it seems contradictory to be discussing something that will only raise the cost of healthcare. For those reasons, Nebraska's hospitals appreciate your attention to this matter and we urge you to not advance LB65. [LB65]

SENATOR ASHFORD: Thank you, Bruce. Any questions of Bruce? Senator Lathrop. [LB65]

SENATOR LATHROP: Just briefly, you suggested that extending this ten-year statute of repose beyond ten years would compromise the plaintiff's ability to get a fair trial? [LB65]

BRUCE RIEKER: I believe so. [LB65]

SENATOR LATHROP: They don't even get a trial with a ten-year statute of repose, though do they? I mean, if your point is that the evidence is harder to come by ten years later, the plaintiff isn't compromised. The door is closed to them under the ten-year statute of repose, isn't that the case? [LB65]

BRUCE RIEKER: That is correct. Ten years that's been the public policy since '76 to that; yes. [LB65]

SENATOR LATHROP: Okay, that's all. [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

BRUCE RIEKER: Okay. Thank you. [LB65]

SENATOR ASHFORD: Thank you, Bruce. Any questions? Senator Chambers. [LB65]

SENATOR CHAMBERS: You said you are here to represent the who...the hospital association? [LB65]

BRUCE RIEKER: I am employed by the Nebraska Hospital Association. I represent... [LB65]

SENATOR CHAMBERS: And the Chamber of Commerce. [LB65]

BRUCE RIEKER: And the Chamber of Commerce has requested... [LB65]

SENATOR CHAMBERS: What does the Chamber of Commerce have to do with all of this, because I didn't get that out of your testimony. [LB65]

BRUCE RIEKER: Well, the Nebraska Hospital Association is a member of the State Chamber and they have a healthcare council which we are the chair of, and that healthcare council did vote and they have board approval to oppose LB65, and they asked me to convey that to the committee. [LB65]

SENATOR CHAMBERS: Well, the Chamber of Commerce has a goal of maximizing the profit for its members, isn't that true? [LB65]

BRUCE RIEKER: I would imagine so, yes. [LB65]

SENATOR CHAMBERS: So the hospital is interested in maximizing its profits, and that's why they sent you here so that nothing would be done to cut into their profits. Is that true? [LB65]

BRUCE RIEKER: No. [LB65]

SENATOR CHAMBERS: Then why do you group the two together? [LB65]

BRUCE RIEKER: We have to maximize the healthcare that we deliver. And as I pointed out in the end of my testimony, because all except one of the 85 hospitals in Nebraska are nonprofit I am not going to...I guess we have returns on the money invested. [LB65]

SENATOR CHAMBERS: Why do these hospitals belong to the Chamber of Commerce? [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

BRUCE RIEKER: Well, we're employers, as well. [LB65]

SENATOR CHAMBERS: Don't birds of a feather flock together? [LB65]

BRUCE RIEKER: (Laugh) In some cases. [LB65]

SENATOR CHAMBERS: And this is one of those cases, isn't it? And if it's not, then the two of you... [LB65]

BRUCE RIEKER: Well, not with regard to...the reason we belong to the chamber is because we are employers, and we are interested in many of the same issues that they are. There are some that we part company on. [LB65]

SENATOR CHAMBERS: Well, you're not interested in increasing the minimum wage, are you? [LB65]

BRUCE RIEKER: Am I? [LB65]

SENATOR CHAMBERS: Your hospital association? [LB65]

BRUCE RIEKER: We have not taken an official position on that one. [LB65]

SENATOR CHAMBERS: Well, the Chamber of Commerce has, so that's one of those where you may disagree with them, or are you just a neutral? [LB65]

BRUCE RIEKER: We may. I am only here on their behalf on this particular issue. [LB65]

SENATOR CHAMBERS: So tell me what their interest in this is. Are they teaming up with the Hospital Association or do they have an independent interest of their own that leads them to be opposed to this bill? [LB65]

BRUCE RIEKER: I would say that they have an independent interest of their own but they asked me to rely their opposition during my testimony. [LB65]

SENATOR CHAMBERS: So what is their independent interest? [LB65]

BRUCE RIEKER: They are opposed to it. I wasn't at the healthcare council meeting that... [LB65]

SENATOR CHAMBERS: So they said, you just go there like an automaton or a robotic person, and say they told me to oppose this and I'm here to oppose it; I don't know why; I don't know what their interest is but that's what they told me. Bluntly, is that your situation at this point? [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

BRUCE RIEKER: I think that that's probably somewhat of an overstatement. They asked me to relay their opposition. And without having any approved language that I should be sharing with you, I would say that they are concerned about the costs that this would bring to member hospitals and other members of the State Chamber of Commerce. I would say that. [LB65]

SENATOR CHAMBERS: If you are here representing the Chamber of Commerce and the hospitals, why did you mention the patient so many times? [LB65]

BRUCE RIEKER: Because we believe that it's a fairness issue to both. I mean, we do. I mean, it's a fairness issue to the physician and to the hospital, as well. To go to the example, if this case is heard 23 or 24 years down the road, hypothetically...and I don't think that I've heard much expressed that the physicians may get the benefit of the doubt, but they may be perfectly capable and did provide all of the degree of care that they were supposed to, however in the course of those two decades the information or hindsight or, as somebody said in their testimony, discoveries after the fact, may change the facts that are presented to a jury. And out of all fairness to both the patient and the physician or the healthcare provider, I think that we, and I do too, but I believe that this statute of repose goes too long. [LB65]

SENATOR CHAMBERS: Do you know what a bookie is? [LB65]

BRUCE RIEKER: Yes. Never used one but I know what it is. [LB65]

SENATOR CHAMBERS: Okay. If you're a bookie, you would like to know the outcome of an event on which people are going to bet on, wouldn't you? [LB65]

BRUCE RIEKER: Sure. [LB65]

SENATOR CHAMBERS: Because that would be a sure thing for you. You're not gambling when you know the outcome, right? [LB65]

BRUCE RIEKER: Right. [LB65]

SENATOR CHAMBERS: So the hospitals want to be in a position where the deck is stacked in their favor and the patient is not going to have a cause of action because the right to prosecute that action is lost before the patient knows that the cause of action exists. Here is the question I'm going to ask you now: Would you be in favor of our saying that we will have no statute of repose, but once a person discovers the harm that he or she suffered, an action, if it's to be brought, must be brought within four years of that discovery? Would you agree to that? [LB65]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

BRUCE RIEKER: No. [LB65]

SENATOR CHAMBERS: Did you talk to your hospitals about that? [LB65]

BRUCE RIEKER: No, not... [LB65]

SENATOR CHAMBERS: Then how can you give their position? [LB65]

BRUCE RIEKER: Because we did have...we didn't have a discussion with regard to that specific question however we have, in the various groups that we discussed this issue in preparation for this testimony, discussed that we truly believe that, to use your example... [LB65]

SENATOR CHAMBERS: I'm not talking about other groups; I'm talking about the Hospital Association that sent you here. [LB65]

BRUCE RIEKER: The Hospital Association...I'll say this, on behalf of... [LB65]

SENATOR CHAMBERS: They discussed... [LB65]

BRUCE RIEKER: We have discussed this. As far... [LB65]

SENATOR CHAMBERS: In connection with this bill they discussed opposition to what I suggested. [LB65]

BRUCE RIEKER: Right. And my answer to you about changing it to no statute of repose and a four-year statute of limitations is because we believe that the current policy does, in fact, put the fulcrum where it belongs and that it is properly balanced. [LB65]

SENATOR CHAMBERS: But here's what I'm asking you, my friend,... [LB65]

BRUCE RIEKER: Yes. [LB65]

SENATOR CHAMBERS: ...if this was not discussed, are you speaking on behalf of the Hospital Association... [LB65]

BRUCE RIEKER: Yes. [LB65]

SENATOR CHAMBERS: ...when you oppose what I'm suggesting? [LB65]

BRUCE RIEKER: Yes. [LB65]

SENATOR CHAMBERS: When was it discussed the last time, specifically? [LB65]

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Transcriber's Office

Judiciary Committee
February 21, 2007

BRUCE RIEKER: Monday. [LB65]

SENATOR CHAMBERS: So then it was discussed by the Hospital Association. [LB65]

BRUCE RIEKER: The balance was discussed. Your example of a four-year statute of limitations was not discussed. [LB65]

SENATOR CHAMBERS: So that's what I'm asking you. When was the...has this Hospital Association ever discussed substituting a statute of limitation for a statute of repose? [LB65]

BRUCE RIEKER: No. No, we have not discussed that specific... [LB65]

SENATOR CHAMBERS: So you are just kind of flying on your own. [LB65]

BRUCE RIEKER: No, no. Not doing that. [LB65]

SENATOR CHAMBERS: Did they authorize you to come here and say you're opposed to a statute of limitations? Did they specifically authorize you to say that? If they haven't discussed it, how do they authorize you to say it? [LB65]

BRUCE RIEKER: Okay. They authorized me to speak on their behalf and take the discussion and apply it to the questions that you present to me. [LB65]

SENATOR CHAMBERS: They didn't authorize you though to object to a statute of limitations, did they? Either they did or they didn't. If they didn't discuss it how did they authorize you to do it? [LB65]

BRUCE RIEKER: Well, there... [LB65]

SENATOR CHAMBERS: That's all I have. Thank you. I'm being badgering and unfair to you and I think my question is hard to understand, and since I can't make it any clearer, I'll apologize for being so abstruse or obtuse, and I won't do it again on this bill. [LB65]

BRUCE RIEKER: May I... [LB65]

SENATOR ASHFORD: Well, Bruce, let's just go on. I only have one question. Are there any other questions? Senator Pirsch. [LB65]

SENATOR PIRSCH: I'll just ask you the same question. Is it...just trying to quantify the numbers of cases, do you...have you seen any objective type of studies into the area or have any kind of...shed light as far as the number of cases that are bumping up against

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Transcriber's Office

Judiciary Committee
February 21, 2007

these? And if so, comment on what type of cases those are as (inaudible) quantify that. [LB65]

BRUCE RIEKER: Senator, I do not, for two reasons. One, the Hospital Association, as far as I know, does not track malpractice cases based upon a statute of repose. We do track how many malpractice or negligence cases are filed. But as far as the specifics of that, I'm not aware of any numbers that we have. The second part of it is that because of the current statute of repose of ten years nobody has been keeping those statistics from that ten- to 20-year period. Does that answer your question or...? Okay. [LB65]

SENATOR ASHFORD: Bruce, just one question. How long do you keep your records now? Patient records are kept for how long? [LB65]

BRUCE RIEKER: Patient records, at a minimum, are kept for ten years. Then what each hospital does or the physicians' offices after that, is purely a hospital or practitioner... [LB65]

SENATOR ASHFORD: Is it because the statute of repose is ten years? Is that why it's ten years? [LB65]

BRUCE RIEKER: Yes. [LB65]

SENATOR ASHFORD: But arguably those records could be kept for 15 years or 20 years. [LB65]

BRUCE RIEKER: Sure. [LB65]

SENATOR ASHFORD: I mean, there's nothing... [LB65]

BRUCE RIEKER: Yeah, the records... [LB65]

SENATOR ASHFORD: And if the records were available, arguably you could elicit...testimony could be elicited on those records. [LB65]

BRUCE RIEKER: Um-hum. Yes. [LB65]

SENATOR ASHFORD: So it's not that it...so it would be, arguably, theoretically, fair, to have a physician comment, if they're an expert, of some other expert testify as to what the standard of care was 15 years before based on records that are available. [LB65]

BRUCE RIEKER: Sure. [LB65]

SENATOR ASHFORD: Okay. That's all I have. Thank you. I'm sorry. Senator

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Transcriber's Office

Judiciary Committee
February 21, 2007

Chambers. I should not have opened up...I could have just asked that in the hall. [LB65]

SENATOR CHAMBERS: Next time I have a question, I'm going to ask Senator Ashford to ask it for you because you seem to understand him better than you understand me. [LB65]

BRUCE RIEKER: Oh, I just love the debate, Senator. [LB65]

SENATOR ASHFORD: Thank you for your testimony, Bruce. [LB65]

BRUCE RIEKER: You're welcome. Thank you. [LB65]

SENATOR ASHFORD: Okay, that concludes the hearing. Senator Stuthman, do you wish to close? [LB65]

SENATOR McDONALD: I think we've got one more. [LB65]

SENATOR ASHFORD: Oh, I'm sorry. I apologize. I thought I only saw two hands. I'm sorry and we haven't asked for neutral yet either, so. I'm sorry. [LB65]

CAROLE LAINOF: (Exhibit 10) My name is Carole Lainof; that's Carole, C-a-r-o-l-e, Lainof, L-a-i-n-o-f, and I'm here representing the Nebraska Nurses Association, and I am the president and I'm speaking in opposition to LB65. The Nebraska Nurses Association is the largest nursing organization in Nebraska and the only one that represents all 20,000 nurses in our state. NAA's vision is to be an advocate for Nebraska consumers on issues relating to health; and our mission includes working for the improvement of health standards and the availability of healthcare services for all our people. So we wish to go on record as opposing LB65. Our opposition stems from the potential consequences arising from the extension of the statute of repose for ten to 20 years. This change would most assuredly increase the burden on practitioners and facilities in obtaining and paying the additional costs of medical malpractice insurance which would, in effect, be a domino upon the consumer, resulting in higher healthcare costs and reduced access to quality healthcare. At the same time, the focus would be shifted away from improving patient care and quality patient outcomes. We find there are no compelling reasons to support the extension of time, and therefore urge you not to advance LB65 out of committee. Thank you very much. [LB65]

SENATOR LATHROP: Thank you very much. [LB65]

CAROLE LAINOF: Are there any questions? [LB65]

SENATOR LATHROP: Are there any questions? There are no questions. Thank you very much. Are there any additional opponents? Anyone here to testify in a neutral

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

capacity? In that case that will close our...oh, I'm sorry, forgive me, Senator. [LB65]

SENATOR STUTHMAN: I'll be real short, Senator. [LB65]

SENATOR LATHROP: You can take as much time as you please. [LB65]

SENATOR STUTHMAN: First of all, I want to thank all the testifiers that came here today. But I think you can see by the example in the video that we have, that there is a concern with the ten years. You know, things can still happen after the ten years. The real concern that I have is closing that door to an opportunity of an individual that has been caused some harm, that they can't...they will not be able to get any relief or any consultation as far as something that had happened in years prior. So with that, those are my closing comments. And I would also ask that you would hopefully move this bill out if you see it fit. [LB65]

SENATOR LATHROP: All right. Thank you very much. No questions? Okay. [LB457]

SENATOR STUTHMAN: Thank you. [LB65]

SENATOR LATHROP: (Also Exhibits 2 and 3) Thank you. That will conclude our hearing on LB65. Next up is LB457, Senator Hansen. Welcome to the Judiciary Committee. [LB65]

SENATOR HANSEN: Well, good afternoon. Great to be here. I think we're going to switch gears just a little from what we've been listening to. My name is Tom Hansen, T-o-m H-a-n-s-e-n. I represent District 42 and I come to you today to try to explain why we need LB457. LB457 requires a court reviewing matters in foster care placement to ask questions of foster parents, preadoptive parents, or relatives providing care for a child if they are in attendance at the court review. I would like to...well, before I go to that, if you would turn...if you have the green sheet in front of you, page 2, line 20, we would like to add the words: If a foster parent, preadoptive parent, or relative providing care for the child is present at the court review, the court "shall," instead of "may," the court shall inquire into the well-being of the foster child by asking questions of the foster child...sorry, we've got some lines printed out there...anyway, any such parent or relative that is present in the court. I have a little story I'd like to relay to you that happened in our district, and it's not just our district that this has happened to. I've talked to several people over the last couple years that have had problems with being foster parents. Foster parents is a hard enough job without being subjected to some of the things that this particular had. But anyway I'll use their first names, I won't use their last names; they'll be no last names used in this whole little story. Alan and Diane went through foster care. They were asked to be foster parents. They asked about it and they went through training, and this is the book that they got. They studied foster care, how to be foster parents through this book, okay? October 11, 2001, the bio mom, Brandy,

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Transcriber's Office

Judiciary Committee
February 21, 2007

was arrested in a methamphetamine sting operation conducted by the Nebraska State Patrol and the North Platte police. The 18-month-old baby James was literally used as collateral in a methamphetamine transaction by his mother. James was placed in foster care with Alan and Diane and their 18-month-old daughter Abby. So we have a foster child and their own child very close to the same age. This child, James, lived with them for the next five years until October 1 of last year. On May 8, 2002, bio mom was found guilty of felony child abuse, distribution of methamphetamine, aiding and abetting a forger, and forging a name on a check. July 3, the bio mom was sentenced to 90 days evaluation followed by intense supervised probation for 48 months. She was dismissed from this program due to using an illegal substance. In October 2002, bio dad Joe was arraigned for a methamphetamine lab in his vehicle--dangerous. Bio mom violated probation orders and was sent to the state penitentiary for women in York in January 7, 2003. Visitation with the child was not allowed. In December, so 11 months later, bio mom requested and the judge allowed monthly visits with her son in prison. About 11 months later the judge allowed the county attorney's office to pursue termination of parental rights. (Inaudible) review hearing the judge said, this has gone on way too long; county attorney, you may go forward with termination motion. January 22, 2005, bio mom's parole was denied because due to not meeting prison requirements. December 22, 2005, the bio mom was paroled. Between November 2004 and 2006, seven termination hearings were scheduled and continued. At the May 2006 hearing the county attorney withdrew the motion to terminate. October 1, 2006, James was placed permanently with his bio mom. At this final hearing the judge arrogantly pointed his finger at the attorney and said, foster families have no standing in this courtroom. This is a direct contradiction to the legislation that was passed last year and became operative July 13. James, this little boy that's 5 years old now had five different case workers in five years. One in particular had absolutely no contact with the foster parents for the entire year that she was on their case. Domestic abuse and neglect has not been addressed or treated. Prior to the incarceration, bio mom Brandy was involved with a gentleman named Dave. Dave has a felony record and Brandy's probation ordered her not to have any contact with him. So while in prison, July 2005, she married Dave. They both admitted to domestic abuse documented in a case plan and blamed drugs and alcohol. Now James is permanently in a potentially abusive, violent, and hostile environment. Ultimately these are the words of the foster mom: Ultimately the calamity of errors in mishandling on the part of so many who were entrusted to look out for James has only led to the devastation of many lives. These people loved and raised James as their own for five wonderful years. Life with them and their extended family and friends is all he had ever known. There is a project going on now in September 2006, a new project was created Through the Eyes of the Child Initiative. That initiative is guided by the Nebraska Supreme Court Chief Justice, the project chair, and also by local leading judges. Through the Eyes of the Child Initiative is a collaborative effort to improve the court process in abuse and neglect cases in Nebraska. The initiative believes, as common in many of other states, too many of our Nebraska children are prolonged in foster care without permanent homes and families. There is public law

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

from the federal register as of July 3, 2006, where it concerns the right to be heard in foster care proceedings, and that...so we do have federal law to back this up that foster parents do have a right in court to be heard. I want to relay just a little bit on sitting on the HHS Committee, we talked about another senator's bill. She had a bill of rights, if you remember that one. I don't remember the number. I do remember the senator that introduced it but she had a bill of rights. Well, there was a gentleman from HHS that said we can't use that word "rights." He said if you give someone a right and the state violates those rights, if those rights don't come to full fruition, well, that person can sue the state for monetary damages. So we were looking for adjectives to fill out how you can give someone the opportunity to be heard in court but still not use the word "rights." And that adjective just couldn't come, and I finally looked at the gentleman and I said, well, would the foster parents bill of common sense work? And he didn't like that. Somewhere along the way we're going to have to come together with the judges, the lawyers, foster parents, and foster children. These people that I read this story about, the chronological story, no longer live in North Platte. They no longer live in Nebraska. They took a job just to get away from this child, her bio mother. I mean, the heartbreak that they went through; they left the state. They'll never be foster parents again. It looks to me like we need to do something for foster parents and be proactive in that and get the best foster parents we can. Any questions? [LB457]

SENATOR ASHFORD: Thank you, Senator. Any questions of Senator Hansen? Any questions? No. Thank you, Senator, for your comments. [LB457]

SENATOR HANSEN: You're welcome. [LB457]

SENATOR ASHFORD: Do you wish to close? [LB457]

SENATOR HANSEN: If there's no testimony. Oops. Yes, I'll be here (inaudible). [LB457]

SENATOR ASHFORD: Thank you, Senator. Do we have any proponents? We have one proponent. Two. Any opponents? Okay, good afternoon. [LB457]

CAROLYN STITT: (Exhibit 11) Good afternoon, Senator Ashford. Welcome back. I'm Carol Stitt, the director of the review board, and we are supporting this legislation in large part just because of some of the changes that children experience, and foster parents know what's going on in the case. We looked at some cases, birth to age 5, and 174 of 900 children had four or more different people transporting them. There are a lot of changes these kids encounter, including caseworkers as the case that was described; 305 of these kids had between four and seven caseworkers. So having someone in court who knows what's happening at the time is critical for these cases to be able to move forward. I think this is important legislation and I wholeheartedly endorse it as well as the Foster Care Review Board. These statistics are on page 4 of my testimony and I would really urge you to take a moment to look at those, keeping in

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Transcriber's Office

Judiciary Committee
February 21, 2007

mind these are birth to age 5 children with this many changes in the system. Any questions? [LB457]

SENATOR ASHFORD: Thanks, Carol. Any questions of Carol? Thank you. [LB457]

CAROL STITT: Thank you, Senator. [LB457]

SENATOR ASHFORD: Further proponents? [LB457]

PAMELA ALLEN: (Exhibit 12) Senator Ashford, members of the committee, I am Pamela Allen and I am...A-I-I-e-n...I am the executive director of the Nebraska Foster and Adoptive Parent Association, and my husband and I have been fostering for 10 years. We have had 40 children go through our home; 38 of those children have either successfully gone home or gone into independent living. Imagine, if you will, imagine you are a veteran National Football League running back. You have been with your current team several years. You are still a pretty good football player--durable, strong, and a player with a strong upside. You show up to practice and have been told you have been traded to a new team and that you need to get on the plane and leave to join your new team. Upon arriving with your new team, you find out there are also other capable running backs with that team. You may be as good as some but maybe not the premier running back. Your position coach will be your confidante, mentor, teacher, and the person you will spend the most time with besides other players. The offensive coordinator and the head coach will look to the positions coach for input on occasion, but they will make all the decisions about who plays in the games on Sunday. You, the player, work hard, spend a lot of time with your coach and your teammates, but you don't get much time to associate with the other coaches and the owner of the football team. You believe you are a pretty good football player and yet aren't getting a chance to succeed. As you approach a game with your former team you have input you feel would be important for your new team to be successful and win. You share that input with your positions coach, the person you spend the most time with. You don't know if that information gets to the right people. The big game comes and during the course of the game it is clear to you that the input you gave is not being utilized. You seem frustrated, angered, and betrayed because they didn't value your input. When your team lost, you questioned the positions coach and asked him what happened. The head coach and offensive coordinator didn't feel the input was valid or important enough to them when, in fact, had they listened it might have proven otherwise. As you return to practice the following week it seems that the input you shared had a negative impact on those people that should have been listening to you. It appeared they felt their years of experience were more important than your practical playing experience. Foster parents in preservice training are taught that they are an important part of a team. Other persons on the team are the caseworker who may see the child once a month, possibly a CASA worker who sees the child once a month, a guardian ad litem who may or may not ever see the child, and various other therapists, school personnel, and biological

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Transcriber's Office

Judiciary Committee
February 21, 2007

family. Of that team, the foster parent is the only one who is with the child 24/7. The foster parent is the one who has important information to the emotional, educational, physical, and developmental needs and accomplishments of the child. Up to this time, the foster parent is not able to share that experience and information with the court. In most cases the foster parent, even if they are in the courtroom, are not acknowledged or asked to speak. I urge you to pass LB457 as it is written to give foster parents the right to be heard in court, the right to advocate for the children in their care. The Nebraska Foster and Adoptive Parent Association has put together a form that we suggest might be used in this process. Foster parents are not in court to put down bio-parents or the caseworker or the guardian ad litem. They are there to advocate for the children they have in their care, to seek what is in the best interest of the child, and give those that cannot speak for themselves a voice in court. Sorry, I took so long. [LB457]

SENATOR ASHFORD: Thank you. No, no, you were fine. Any questions? Does this...Senator Pirsch, sorry, did you...? And you think this bill or this change will do the trick? This will do it? This will be the kind of change that...by bringing the foster care parent into the process at that level, that that will do it? [LB457]

PAMELA ALLEN: I've seen...I personally have been in courtrooms where I have been asked to speak. [LB457]

SENATOR ASHFORD: And that helps. [LB457]

PAMELA ALLEN: And that helps. And I've been in courtrooms where I was not even acknowledged. [LB457]

SENATOR ASHFORD: And that doesn't help. [LB457]

PAMELA ALLEN: And that does not help. [LB457]

SENATOR ASHFORD: That makes sense. Okay, thank you very much. [LB457]

PAMELA ALLEN: Thank you. [LB457]

SENATOR ASHFORD: Next proponent. [LB457]

LARRY RUTH: Chairman Ashford and members of the committee, my name is Larry Ruth, R-u-t-h, and I'm representing today the Nebraska State Bar Association in support of the bill. And I don't know exactly what to call it, whether it's the right to be heard, the opportunity to be heard, the access to be heard. I'm not sure. But I can also speak from personal position on this. My wife and I have been foster parents in the past during the '70s and '80s and vicariously even to the present time as we adopted one of our foster

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Transcriber's Office

Judiciary Committee
February 21, 2007

children. Back in the '70s, just to give a little bit of perspective, back in the '70s you were lucky if you were even notified that something was taking place in a courtroom relating to your child. You might find out about it from the caseworker; you might not, too. And the caseworkers, they were sporadic, that things are improving there, but still there was a great turnover. There is still far too much turnover. But of the five placements that we had, which included multiculturally, potentially disabled, and children having children, I can tell you from personal experience that you have to keep the parents engaged. The foster parents have to feel like they are a part of the process or you just do not have a good working relationship. And what we're looking at here is having a situation where the parents can feel they can come forward and give their assessment and will be asked their assessment of the child. The other half of this is, why wouldn't you ask? Why wouldn't you ask the foster parents? They are the ones that see the child 24/7. They are the ones that get up in the middle of the night when the child is crying. They are the ones that go to the child counselor. Every school counselor we ever had, one of us was there. They are the ones that are in the trenches, and I cannot understand why we wouldn't want to ask the parents for their opinion. I just would opine that it makes a lot of sense to me, and, goodness, it doesn't seem to cost anything. This is one of those where you're probably getting free advice. [LB457]

SENATOR ASHFORD: Why would we do that the, I mean, if it doesn't cost anything? Why would we do it? [LB457]

LARRY RUTH: It doesn't cost anything. You are getting free advice, and what's more you are getting advice from somebody who really, really wants to give it or else they wouldn't be doing it. [LB457]

SENATOR ASHFORD: Thanks, Larry, very much. Appreciate your testimony. Any questions of Larry? Thank you. Bruce, better talk fast. [LB457]

BRUCE RIEKER: I will do it. (Laugh) [LB457]

SENATOR LATHROP: Are you a proponent? [LB457]

BRUCE RIEKER: I am a proponent and I'm not always opposing everything. But with that exception, my name is Bruce Rieker; it's R-i-e-k-e-r. I am not here on behalf of the Hospital Association. I am here on behalf of myself. Earlier today I was asked to come share our story. I didn't ask my wife for permission so I am not saying that I'm representing her. In 1998 two beautiful little girls were born in Hastings and they were abandoned at birth by biological parents that had substance abuse problems. They have half siblings by their birth father's prior marriage that are doing time at the state prison. But these little girls were placed in emergency foster care and there they were for four and a half months--a great foster home, no doubt about it. But then they became my wife's and my foster children and now they are my beautiful daughters and

they will be 9 this weekend. But here's the deal: There were child abandonment charges against the biological parents. There were parental termination proceedings. There were all sorts of things going on with regard to trying to reunify my daughters with two biological parents who did not want them. Because I'm a lawyer and because I had done adoptions when I was practicing long before I got in the political arena, I knew something about the law. But I had no standing. I was their foster father but I had no standing. And I believe those children have rights, but no...they were four months old. They were five months old. This whole process took a year once they became our foster children, to get through this whole thing, but somewhere about four or five months into the process after they were our foster children...and I was vigilant and I feel fortunate that I had the legal training to understand what was going on. I feel sorry for foster parents who don't have the legal training because to watch these proceedings...and to give you an idea about how convoluted my daughters' case was, there were two guardian ad litem, one for each of my daughters. There were two for each of the biological parents. There were two county attorneys that were prosecuting, one, the parental termination, and the other one the child abandonment. Everybody had a lawyer. There were lawyers on top of lawyers, but nobody was...the guardian ad litem were somewhat representing the best interests of the child, but I'm here to tell you that nobody more passionately represents the best interests of the child, which is the guiding standard of our law, than the foster parents. They see those children day in and day out. For the older children, they can be the voice for those children without fear of retribution, the abuse that may happen if they are reunited with their biological family or something like that. These children have rights. They deserve to have a voice. Senator Ashford, when you asked if this legislation will do the trick, I'm glad that this legislation is requiring the judge to question the foster parents if they are present. But I truly believe that because of public policy we need to give the foster parents a standing in these proceedings so that they are notified, that they can be there, and to make sure that those children's best interests are represented during all of these proceedings. [LB457]

SENATOR ASHFORD: Thank you, Bruce. I appreciate your comments. Any questions? Thanks, Bruce. [LB457]

BRUCE RIEKER: You bet. [LB457]

SENATOR ASHFORD: Congratulations on your children. [LB457]

BRUCE RIEKER: Thank you. [LB457]

SENATOR ASHFORD: Next proponent. Opponent? Neutral? Senator Hansen, do you wish to close? [LB457]

SENATOR HANSEN: Thank you for the opportunity to be here today, and this is a guide for foster parents that they university put out, and it was for the...well, it's for the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

University of Nebraska Center for Children and Families in the Law, and this is how they try to get foster parents interested in being foster parents. The judge, this is his definition: The judge is the person who conducts the court hearings. The judge will listen to each side and make a decision that is in the best interest of the child. If we don't have legislation similar to LB457, the judge doesn't have to listen to the foster parents, and I think that's important. [LB457]

SENATOR ASHFORD: Thank you, Senator. It's good to know that. I didn't realize they didn't, so...or weren't as a matter of course. So thank you for your testimony. [LB672]

SENATOR HANSEN: This is similar legislation that went through your Judiciary...oh, you weren't here, you're a freshman too...through this committee. [LB457]

SENATOR ASHFORD: Thank you, I'm... [LB457]

SENATOR HANSEN: It went through this committee last year and it was voted out and then got changed from "shall" to "may." And the judge may hear now and that went into effect in July. But some judges...it's all we can do as senators is do our job. And if the Chief Justice does his job, and the Governor does his job, then all this will come together, but. [LB457]

SENATOR ASHFORD: Well, I appreciate your coming here with this. Thank you, Senator. [LB457]

SENATOR HANSEN: Thank you. [LB457]

SENATOR ASHFORD: Senator Lathrop, you're next. LB672. [LB672]

SENATOR LATHROP: Good afternoon, Mr. Chairman and members of the Judiciary Committee. My name is Steve Lathrop, L-a-t-h-r-o-p. I represent District 12 in Omaha. I'm here today to introduce LB672. LB672 is one of a number of bills that are before various committees of the Legislature. The purpose of which is to promote wind energy in the state of Nebraska, and not just wind energy but to promote wind energy as an economic development tool for rural Nebraska. You will hear, after I testify, John Hansen with the Farmers Union, who can describe this C-BED project. The piece that we're here to talk about today and that is covered by LB672 is LB672 creates an exception to the eminent domain authority of the Nebraska Public Utilities, or more specifically the electric utility districts, that prevents the condemnation of community-based energy projects as defined in the Act. The purpose is to protect investments made in rural community-based energy projects--that's C-BED--the projects as defined in LB629. The exception for C-BED projects would be added to those that already exist for private ethanol and hydrogen production storage and distribution. The long and the short of it is that there is a statutory scheme in place or moving through

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

various committees that will allow investment by landowners in rural Nebraska to get into the wind energy business. It will be good for rural economic development and this is an important piece so that those people who invest in wind energy do not have our publicly-owned electrical companies coming along and eminent "domaining" their project once they've made the investment. Mr. Hansen will follow me and be in a better position to answer questions or give you the particulars of the C-BED project and the overall scheme that we're trying to advance with this bill. [LB672]

SENATOR ASHFORD: Thank you, Senator. Any questions of Senator Lathrop? It's great to get an environmental bill here in the Judiciary Committee. [LB672]

SENATOR LATHROP: This is it. [LB672]

SENATOR ASHFORD: So thank you for that. I think it probably is it for the whole session. Yes, thank you. [LB672]

JOHN K. HANSEN: (Exhibit 13) Chairman Ashford and members of the committee, for the record, my name is John K. Hansen, H-a-n-s-e-n. I'm the president of Nebraska Farmers Union and appear before you today also as their president and lobbyist. It's good to be before Judiciary the first time this year. This is, as Senator Lathrop indicated, a part of an effort to try to help move a community-based wind energy forward in the state of Nebraska. A bit of background. Did I spell my name, H-a-n-s-e-n? [LB672]

SENATOR ASHFORD: Got it. [LB672]

JOHN K. HANSEN: I've been getting a little forgetful in my old age. [LB672]

SENATOR ASHFORD: I remember you spelled it yesterday, so I remember the spelling. (Laughter) [LB672]

JOHN K. HANSEN: Good, good. I had to be reminded yesterday. The background of this is that as in the written testimony, in the late spring of 2002, Nebraska Farmers Union, the Center for Rural Affairs, the American Corn Growers of Nebraska, and some interested individuals entered into discussions with the Nebraska Public Power District about wind development issues in the state of Nebraska. The inequities in federal wind energy development incentives between private sector interests and public power entities was discussed. Other items on the discussion list included ways to maximize rural economic development, the need to protect the integrity of the Nebraska Public Power System, the impact and sweep of federal regulations on Nebraska, among others. In April 15, 2005, NPPD issued a white paper regarding NPPD's position on privately owned wind generation entitled "Rural Wind Generation White Paper." And it was in that section, the "Farmer's Concerns/Opportunities" section, has been highlighted. That is a part of your packet. So you can see that it was clearly supported

by Nebraska Public Power District. And also the letter from NPPD president CEO William Fehrman. And so that's kind of the background and as the result of those discussions and others. Then over the summer of 2005, the Nebraska Public Power District invited Nebraska Farmers Union and others to bring them a C-BED type project, a community-based energy development project, which could be also used as a development model to move forward in Nebraska with wind energy. And as we did that, one of the issues that came to the front of that discussion was the issue of eminent domain and how that impacted. The issue of eminent domain was important because part of the C-BED financing structure, it's a very innovative financing structure which is a 20 year contract system that allows us to be able to utilize equity partners who have tax appetites who can use the production tax credits that are available at the national level. And our equity partners and our lenders both looked at Nebraska law and said they were a bit leery, to say the least, of investing substantial amounts of money into this kind of project if, in fact, that project could be ceased. Why take any unnecessary risk without any additional reward, I think is the way they said it. And so as we tried to work forward then through administrative procedures to try to circumvent this issue. We tried several. The simplest, the easiest, the one we tried first was to just deal with the issue through contract language and stick it in the contract. You have a power purchase agreement with the public power entity. You're performing according to the criteria of the contract. You know, we're not fixing to take your project as long as you're in compliance with the contract. That was simple. It was straightforward. And of course as most things that have to do with legal matters, that was drawn into question. We had NPPD hired an outside law firm to research it. Unfortunately, their view was the same as our legal counsel's view, which was that there were issues surrounding the voluntary surrendering of statutorily seated powers to future public officials, and that that was a problem. And so then we tried several other kinds of administrative procedures. We're not able to come up with a satisfactory one that we thought worked. And as a result, we have gone forward with this particular bill which is intended to be narrow, specific, precise, and limit C-BED type projects only. Also we would say that in the case... [LB672]

SENATOR ASHFORD: John, go ahead and sum up, too, if you would. [LB672]

JOHN K. HANSEN: In the case of the proposed amendment to eliminate Section 1 is we're completely good with that. The Metropolitan Utilities District has been good to work with. That particular section was added by bill drafters, not by our request, as we went forward with our original bill. And so we think that they misapplied based on the research that we've done with MUD, a particular interpretation of statute. We believe that Section 1 need not be in the bill. So we are good with that and would be glad to answer any questions that we could. [LB672]

SENATOR ASHFORD: Thanks, John. Any questions of John? Just describe for me what a project looks like, two turbine project. Is that the big poles with the two... [LB672]

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Transcriber's Office

Judiciary Committee
February 21, 2007

JOHN K. HANSEN: Most of the projects that we're talking about here in the case of C-BED, which is what Minnesota has done. They have 250 megawatts of wind energy developed. And if you go through your packet you'll see the size of the development in Minnesota. [LB672]

SENATOR ASHFORD: Right. [LB672]

JOHN K. HANSEN: And also the AWEA handouts and the wind maps of Nebraska and all of that. We're talking about 40 megawatt projects in order to harness, for the most part... [LB672]

SENATOR ASHFORD: How many of those poles is (inaudible)? [LB672]

JOHN K. HANSEN: A 40 megawatt project would be 22 megawatt turbines, each turbine right at \$3 million. Sixty million dollars for a 40 megawatt project, that would be 20 turbines. [LB672]

SENATOR ASHFORD: Okay. And each pole...how many? 20? [LB672]

JOHN K. HANSEN: 20. [LB672]

SENATOR ASHFORD: Okay. [LB672]

JOHN K. HANSEN: So we're talking about a lot of money here. [LB672]

SENATOR ASHFORD: And how close together are they? Do you know? [LB672]

JOHN K. HANSEN: Depends on the lay of the land and the distance. [LB672]

SENATOR ASHFORD: Okay. It varies. [LB672]

JOHN K. HANSEN: It varies. It really does. [LB672]

SENATOR ASHFORD: Okay. [LB672]

JOHN K. HANSEN: In some cases if you're riding a ridge, you can put them closer together because you don't have any other things. But you know, you certainly like to spread them out because there is an impact on each turbine creates its own wind regiment of air currents that go through it. [LB672]

SENATOR ASHFORD: It sounds complicated, but I was just trying to get an idea. [LB672]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

JOHN K. HANSEN: I was trying to give you the short answer as opposed to the engineering answer. [LB672]

SENATOR ASHFORD: It was a good answer, but I didn't want...other people probably know the answer and I didn't want to have them have to listen to stuff that I should know about. But thank you for your comments. Any other questions? Thank you, John. [LB672]

JOHN K. HANSEN: You bet. Thank you very much. I would be glad to also work with the committee if you have additional questions in the future. [LB672]

SENATOR ASHFORD: Senator Dierks, welcome. [LB672]

SENATOR DIERKS: Thank you. It's always a pleasure to come before your committee, Senator Ashford. [LB672]

SENATOR ASHFORD: Thank you. Well, it's a pleasure to have you here. [LB672]

SENATOR DIERKS: My name is Cap Dierks. I'm the legislator from the 40th Legislative District. And you spell that C-a-p D-i-e-r-k-s. I'm here today to add my support to LB672. I'm the sponsor of LB629, the bill that creates rural community-based energy development projects, or C-BED. That bill was recently heard by the Natural Resources Committee. That bill had a 2.5 hour hearing and I know this committee has many pressing issues of its own. Let me just say I do believe in C-BED projects as an excellent tool for economic development and wind energy development in rural Nebraska. The issue of eminent domain is a major hurdle to the development of C-BED projects. It is one of the issues that prevented a C-BED project from moving ahead in Bloomfield, Nebraska, which is in my legislative district. C-BED projects cost millions of dollars to create and local residents must find lenders and equity partners to assist them with this expense. It's difficult to convince anyone to contribute millions of dollars to a project that could eventually, in the future with new community leaders, be seized by the power of eminent domain. This eminent domain exemption already exists for private ethanol and hydrogen production storage and distribution. I'm simply asking that the Judiciary Committee include C-BED projects in this category of renewable energy projects that are protected from eminent domain authority. LB672 is among a package of bills introduced this year to advance wind power. This bill is important and needed whether other C-BED bills are passed or not. There is a sense of urgency with this issue because private entities are trying to buy wind rights from farmers as we speak. While these private groups have every right to buy wind rights, farmers in rural communities are much better served, and C-BED projects are created, and all profits stay with the local landowners and within the rural community. C-BED projects are true economic development. Once again, I support LB672 and I ask the committee to advance the bill

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Transcriber's Office

Judiciary Committee
February 21, 2007

to General File. And I will try to answer any questions you might have. [LB672]

SENATOR ASHFORD: Any questions of Senator Dierks? Senator Schimek. [LB672]

SENATOR SCHIMEK: Yes, thank you, Mr. Chairman. Excuse my voice, Senator Dierks. I'm not sure I understand what we're doing here exactly. Why can't the public power districts do this kind of economic development? Why wouldn't they be able to spur economic development in the rural areas with this kind of project? [LB672]

SENATOR DIERKS: They can do this type thing. They have done some. They can do it. There's nothing that stops them from doing it. But for private enterprise, for individuals in the state that do it, we have to have these C-BED projects and we need the eminent domain provision in order for them to be willing to invest the dollars that they need to invest in these type projects. It's a community development type deal. [LB672]

SENATOR SCHIMEK: Okay. I didn't hear the introducer's introduction. So I'm a little bit behind the... [LB672]

SENATOR DIERKS: You were out in the hallway when I was, weren't you? [LB672]

SENATOR SCHIMEK: Yes, yes. Thank you. [LB672]

SENATOR DIERKS: You betcha. [LB672]

SENATOR ASHFORD: Is the idea that the protection is necessary in order to get the investment? If you didn't have the protection, you would have the possibility of that project being the subject of some sort of a condemnation action and being brought into another grid or another power...well, NPPD or MUD would utilize that wind (inaudible)? [LB672]

SENATOR DIERKS: I think you're right. [LB672]

SENATOR ASHFORD: Is that what it boils down to? I mean, I haven't read it. Who else would condemn it? I suppose a city could condemn it or...but it would be most likely it would be NPPD or MUD or... [LB672]

SENATOR DIERKS: We just think it's in the best interest for the protection of the investor. [LB672]

SENATOR ASHFORD: Right. There's that fear then you get into the whole...your return is jeopardized potentially and so forth, and so why invest? Right, okay. [LB672]

SENATOR LATHROP: I do have one question. Senator Dierks, this is kind of your

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Judiciary Committee
February 21, 2007

project, the whole C-BED project, you're coordinating these four pieces of legislation for the most part. [LB672]

SENATOR DIERKS: Pretty much. [LB672]

SENATOR LATHROP: Okay. And you were asked a question by Senator Schimek. This is the rural fellows jumping ahead of NPPD or OPPD. This is not wind energy that they intend to take advantage of at the present time or any time in the foreseeable future. [LB672]

SENATOR DIERKS: You say is it? [LB672]

SENATOR LATHROP: It isn't. This whole C-BED project isn't an attempt by the rural people to jump ahead of public utilities. They're not doing anything with it right now. Is that the case? [LB672]

SENATOR DIERKS: Well, that's pretty much the case. We just...there's an interest on the part of individuals to be involved with this sort of investment. They've seen the investments work other places and they think there's an opportunity for them to take advantage of those same investments here. But in order to protect their investment, they need to have this type of legislation as a protective device for the amount of dollars they're going to spend. [LB672]

SENATOR LATHROP: And just one last thing. Once these...if this whole process can get off the ground, what will take place is the folks with farms and ranches in the good wind areas of Nebraska, which is in the rural parts of Nebraska will be allowed to put these turbines up and essentially have a different crop, which is energy. [LB672]

SENATOR DIERKS: Yeah, essentially that is correct. I mean, I think there's going to be some reasons you can and reasons you can't put them up, but like you say good wind area, closeness to a transmission line. There's certain qualifications before you can establish this. [LB672]

SENATOR LATHROP: Okay, thank you. [LB672]

SENATOR DIERKS: You bet. [LB672]

SENATOR LATHROP: Thank you, Senator Dierks. Senator McDonald. [LB672]

SENATOR McDONALD: Will this be done through existing transmission lines? The wind energy that's (inaudible). [LB672]

SENATOR DIERKS: It should be in areas they... [LB672]

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Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR McDONALD: What? [LB672]

SENATOR DIERKS: Did you ask if it should be next to them or... [LB672]

SENATOR McDONALD: No. Will they be using the transmission lines to take that energy and put it into the grid? [LB672]

SENATOR DIERKS: They'll be built next to places where they can get access to transmission lines. That's right. I mean, it's not much sense to build one out in my section of pasture which is 20 miles from anywhere. You need to really have it someplace where the transmission line can utilize the electricity. [LB672]

SENATOR ASHFORD: Good question. Thanks, Senator McDonald. Thanks, Senator Dierks. [LB672]

SENATOR DIERKS: You bet. Thank you very much. I appreciate your kind attention. [LB672]

SENATOR ASHFORD: Thank you. Ken? You next? How many other proponents do we have? Any opponents? Okay. [LB672]

KENNETH C. WINSTON: (Exhibit 14) I have written testimony. Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Kenneth Winston, last name is spelled W-i-n-s-t-o-n, and I'm appearing on behalf of the Nebraska Chapter of the Sierra Club. Just quickly, regarding Senator Schimek's question, the main reason that you do a C-BED as opposed to having NPPD or OPPD do something like this is that the C-BED investors would be able to take advantage of the federal tax credit of 1.9 cents per kilowatt, whereas OPPD and the other public power entities can't take advantage of that. And so that's part of the idea. Part of this, it's somewhat complicated and it's hard to describe it in three minutes or less. But I'm going to talk just a little bit about a variety of different things, because this is a big issue and there are several bills involved here. But one of the things I wanted to mention as I indicate in my written testimony is that Nebraska has excellent wind potential. We're ranked as being the 6th best state for wind energy development, but we're only 18th out of 29 states that have significant wind energy development. And our neighbors are all ahead of us. Iowa and Minnesota, Kansas, Wyoming, they've all developed a lot more wind than we have. There's an estimate by the National Renewable Energy Laboratory that this could be a \$60 billion potential economic impact for the region and would be a shame if we were not involved in that economy because of the fact that we are way behind in terms of our wind energy development. Let me just check off some of the benefits of renewable energy. It could be economic development for rural areas as Mr. Hansen indicated. Reduces the reliance on foreign oil and other related energy security

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

issues. The nonrenewable fuel costs are going up, in particular anyone who drives a car knows how much gasoline prices have gone up recently. And of course, the cost of wind and solar remain constant. There's greenhouse gas emissions that are related to particularly coal fire power plants. There are other pollutants, including mercury, that are involved. And then there's water used by power plants. One other thing that I wanted to mention is the fact that there's a likelihood that there's going to be a national renewable energy standard. And if there's a mandate by the federal government that we have a certain percentage of our power generated by renewable energy sources and we're not on board or if we're not involved in developing renewable energy, we'll be even further behind the eight ball than we currently are. And I guess the final thing that I wanted to say is that Sierra Club is in support of public power and we look at the C-BED idea as being one way that's consistent with public power to generate more renewable energy. And we'd ask that this bill and the other bills that are related to this be advanced to the floor of the Legislature. Thank you. [LB672]

SENATOR ASHFORD: Thanks, Ken. Any questions of Ken? Senator McDonald. [LB672]

SENATOR McDONALD: Aren't you worried about the birds? [LB672]

KENNETH C. WINSTON: Well, you know those studies have mostly been shown to be fallacious. And actually house cats kill a lot more birds than wind turbines do. And we're certainly not opposed to... [LB672]

SENATOR ASHFORD: I think we have a house cat bill here this year making it a felony to be a house cat. (Laughter) I'm not sure. Excuse me. [LB672]

KENNETH C. WINSTON: Well, I won't respond to that, Senator Ashford. But actually there were some problems in California with some of the early wind turbine sites because of the fact that they put them in bird flyways, but with better sighting, as long as you don't put it right in the, you know, where the birds are flying there really isn't much of a problem. I mean, tall buildings in big cities there's bird kills from that too as well. And so, you know, if you do it with sensitivity to those kinds of things it shouldn't be a problem. [LB672]

SENATOR McDONALD: I appreciate your answer. [LB672]

KENNETH C. WINSTON: Thank you. [LB672]

SENATOR ASHFORD: Thank you, Ken, very much. Any other questions? Thank you for your testimony. [LB672]

KENNETH C. WINSTON: You bet. Thank you. [LB672]

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Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR ASHFORD: Any further proponents? Opponents? [LB672]

CHARLES HUMBLE: Senator Ashford, members of the committee, I'm Charles Humble here today representing the Nebraska Power Association. While there's been a lot of testimony today on wind energy matters, I'm here to discuss the subject of this bill and that is limitation on the powers of eminent domain on public bodies charged with generating electric service and providing electricity to our customers. Now you know that Nebraska is the only all public power state in the union and we're not opposed at all to wind energy or to the concept of C-BEDs and that type of thing, but in order to carry out our public mandate we must build public projects to keep the lights on. And in order to that, a vital component is the authority to use eminent domain or at least to threaten to use it. In that manner, we can complete what we all want to have happen. You start to erode that and all kinds of problems ensue. We hear today from Senator Dierks that this bill is to protect the investors of this particular kind of project. Where do you stop that? There will be investors in all kinds of projects that will come forward and want the same kind of protection as is afforded by this bill. And this will cripple public power in this state if taken to its illogical conclusion. Now we had some testimony earlier in connection with the ability of public power entities to not use eminent domain power. It is true. No defining case in Nebraska. But there are a number of cases from around the country that make a distinction between the proprietary or business functions of government and the governmental functions. Providing electricity is a proprietary function. And the state of Indiana and others have allowed the suspension of the power of eminent domain or the contracting away in those instances. And I have talked with both Steve Bruckner, who is general counsel for OPPD, and day before yesterday with John McClure who is general counsel of NPPD who asked for the opinion that you heard about. The opinion is inconclusive. It doesn't prohibit it. So I'd like to say also that you could or this Legislature could address this problem directly through legislation by providing that the electric industry could, in these circumstances in dealing with C-BEDs could contract away its authority to use eminent domain if that be of question. Or you could provide for the survivability of tax credits that would survive an eminent domain action. So in this way, a legislative response on the issue would be much preferable to a legislative curtailment of a very important aspect of sovereignty and the ability to provide what we have to provide in terms of electric generation. And I'd answer any questions you might have. [LB672]

SENATOR McGill: Senator McDonald. [LB672]

SENATOR McDONALD: Do we utilize all the electricity that we produce in the state of Nebraska or do we sell it other places to other states? [LB672]

CHARLES HUMBLE: Yeah, we're part of a grid and so part of what we would generate--if that's your question--here may be sold elsewhere. Part of what is generated

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Transcriber's Office

Judiciary Committee
February 21, 2007

elsewhere may be imported. It's a very complex situation because various electric utilities have more need for more electricity at different times of the year. And with the transmission grid you can flow electricity from areas that are summer peaking to areas that are winter peaking and vice versa. [LB672]

SENATOR McDONALD: So some of this electricity that's generated, once it goes into--I guess I'm not quite sure--once it goes into the grid then it becomes part of the electricity that's generated, then that goes to be either used here or sold? [LB672]

CHARLES HUMBLE: Well, it's part of the whole range of transactions on how electricity is distributed and used. There's no earmarking that says well, this electricity here is generated in Nebraska and therefore is only used in Nebraska. It can become part of the electricity which is also generated elsewhere. [LB672]

SENATOR McDONALD: So could they sell that to the public power? What they produce? [LB672]

CHARLES HUMBLE: Definitely. Definitely, yeah. [LB672]

SENATOR McDONALD: Just as you buy from others. [LB672]

CHARLES HUMBLE: Sure. And under LB629 that is exactly provided for. And what I was saying is that under the proprietary powers of government, which is all of the electric industry would fall under that, is part of a contract I believe, and others also, other lawyers, believe that you could then through that contracting process with the C-BED limit your authority on extending eminent domain. But if there be a question, it could be addressed legislatively in that connection as opposed to just imposing a limitation on the use of eminent domain which we think will just grow. You'll see it more and more. [LB672]

SENATOR ASHFORD: Senator Pirsch. [LB672]

SENATOR PIRSCH: Just to kind of clarify that, is the opposition based on rather a specific kind of belief that there may come a time, which I don't know, to achieve scale or whatnot, that condemnations may need to take place of these type of operations? Or is it a second concern, it just sets a bad policy where you start allowing exclusions for this and that, which would tend to then lead to other to make the system unmanageable at the end of the day? [LB672]

CHARLES HUMBLE: It's really the second concern, because frankly I cannot see where an electric utility would condemn a C-BED. You'd be more likely to enter into a contract, use the power and it's beneficial that way. But the second concern that you express so ably is exactly what we're leery about. The one interesting exception you have now

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Transcriber's Office

Judiciary Committee
February 21, 2007

relating to ethanol plants really squares with the kilo decision in connection with not being able to use the public authority for private purposes. And so that one is not as threatening as what is proposed in this legislative bill as far as we're concerned. [LB672]

SENATOR ASHFORD: Senator Schimek and then Senator McDonald. [LB672]

SENATOR SCHIMEK: Thank you. Charlie, nice to see you. What kind of wind projects do the public power districts have at the present time and are those done by the district or is there some private involvement? I'm aware of the windmills, for instance, north of town here that LES has. Do you have any idea? [LB672]

CHARLES HUMBLE: Well, Senator, thank you and I'll try. Yes, the windmills north of town they are part of an LES project. I'm also aware of the fact that there is a very large NPPD project for wind generation. [LB672]

SENATOR SCHIMEK: Up in northern Nebraska? [LB672]

CHARLES HUMBLE: Yes. Now I am not privy to all of the details of those, Senator. So I don't know exactly how those were accomplished. And I'm sorry for that, but I do not. [LB672]

SENATOR ASHFORD: Senator McDonald. [LB672]

SENATOR McDONALD: Would it be feasible in the near future for a small community such as St. Paul or a small town to have a wind farm right outside of town and to generate enough electricity for that town, and they would then go off public power? [LB672]

CHARLES HUMBLE: Well, I don't know if it would be feasible. And it's kind of interesting. I mean, you've raised an interesting point. Here we are an all public power state and we're really talking with a range of legislation for allowing private power producers to come into the state and produce. But I don't know if it would be feasible or not, but it's kind of an interesting thing that's occurring here in relation to us being a public power state. In any event, I will say that if a municipality, if they would do it it would probably be more community-based like these C-BEDs. That kind of a thing. But it still needs approval from the power review board. [LB672]

SENATOR McDONALD: Do you see that could be a concern down the road? For something like to happen? [LB672]

CHARLES HUMBLE: A concern...what, Senator? [LB672]

SENATOR McDONALD: For the review board. For these little projects to be situated

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Transcriber's Office

Judiciary Committee
February 21, 2007

across the state. [LB672]

CHARLES HUMBLE: I do know that it is a concern. I think that Tim Texel, who is the administrator or executive director of the power review board, I think testified last week before the Revenue Committee and indicated that there are some members that do have some concerns about that very thing. And about whether or not these projects meet the statutory standard that they have to meet in order to justify their existence. But... [LB672]

SENATOR McDONALD: So would you say this is a turf war? [LB672]

CHARLES HUMBLE: No, I wouldn't at all. As I said at the outset as far as the industry is concerned we're not here appearing against wind energy or against C-BEDs, that type of thing. Our focus is on the eminent domain issue. [LB672]

SENATOR ASHFORD: Thanks, Charlie. Thank you. [LB672]

CHARLES HUMBLE: Thank you very much. [LB672]

SENATOR ASHFORD: Any other opponents? Neutral testifiers? Senator Lathrop, do you... [LB672]

SENATOR LATHROP: I'll waive close. [LB672]

SENATOR ASHFORD: Senator Lathrop waives closing. Senator Lathrop, again, LB673. [LB672 LB673]

SENATOR LATHROP: Good afternoon, Chairman Ashford and members of the Judiciary Committee. My name is Steve Lathrop, L-a-t-h-r-o-p. I represent District 12 in the Omaha-Ralston area. And I'm here today to introduce LB673. LB673 would modify the definition of medical malpractice to include certain relationships between a mental health provider and a patient. There is a special relationship that exists between a mental health professional and a patient. Very often the patient comes to a mental health professional for counseling. They are often vulnerable and easily susceptible to entering into intimate relationships with those they counsel with. Maintaining a professional boundary between the patient and the mental health professional is very important. It is recognized as part of the standard of care for those who are involved in the mental health field. When that boundary is violated by the mental health professional by entering into an intimate or a sexual relationship with the patient, a great deal of damage follows and it is in every sense of the word a violation of the standard of care for a mental health professional to enter into such a relationship with a patient. Presently, that's regarded as a deliberate act and so it's not covered by any medical malpractice policies, including the definition that we have in LB673 and the amendment

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

to LB673 would be the operative language will allow those patients who have been injured by mental health professionals who violate the boundaries with their patients and enter into relationships. And the bill specifically says, includes sexual or a dating relationship occurring between a mental health care provider and a patient. When that happens the standard of care has been violated and allowing for a change in the definition will permit those patients who have been victimized by mental health professionals who allow that boundary to be violated, it will allow them to make a recovery which they're unable to make at this point in time. We think it's an important right for those who have been injured through this type of activity by mental health professionals. You'll hear some testimony here this afternoon, I think, regarding how that happens and some of the problems that follow the violation. The principal is called transference. And it is where the patient develops an affection for their counselor. It's very important. It's part of the standard of care to maintain that boundary. And when that boundary is violated, the patient ends up injured and typically with further mental health problems. So with that, I'll ask you to move LB673 to General File. [LB673]

SENATOR ASHFORD: Thank you, Senator Lathrop. Any questions of Senator Lathrop? Senator Chambers. [LB673]

SENATOR CHAMBERS: Senator Lathrop... [LB673]

SENATOR LATHROP: Yes. [LB672]

SENATOR CHAMBERS: ...I can talk to you later, but I'm looking at the term sexual abuse. And maybe we could include in front of that sexual conduct or abuse so that there won't be the impression that it has to be something extreme in the nature of a sexual...I'd used the word contact. Maybe you wouldn't want to use that word, though. [LB673]

SENATOR LATHROP: Right. As the bill was initially drafted it made reference to any sexual contact between a physician or a care provider and a patient. On second thought, my feeling was that that was probably too broad. We were taking into and trying essentially to ensure deliberate acts of people. As amended, the bill is directed not at something that's deliberate on the part of the patient or even the caregiver. They're breaching the standard of care and it is negligence and it breaches the standard of care for them to enter into a relationship with a patient when they're providing mental health treatment. [LB673]

SENATOR CHAMBERS: Um-hum. Okay, but as I said, if I have any other questions I can talk to you later. But that's all that I have. Thank you. [LB673]

SENATOR LATHROP: I'd be happy to. [LB673]

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Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR ASHFORD: Thank you, Senator Lathrop, for your testimony. How many proponents do we have? One pro. How many opponents? Two opponents. Oh, and another opponent in the back. [LB673]

NATALIE OSORIO: (Exhibit 15) Good afternoon. Natalie Osorio, O-s-o-r-i-o. I am an attorney here on behalf of the Nebraska Association of Trial Attorneys. I am also a nurse. I stated that earlier. The beginning part of my career I worked in psychiatric nursing, so I have some personal experience with this. When an individual is in a mental health therapy they enter into a complex clinical relationship with their therapist or their physician in a very intimate space. Amongst going through the therapy, there's a theory of transference and other therapeutic modalities that expose the patient emotionally and mentally to the care of the providers, which creates a degree of vulnerability. Transference is part of the therapy process and that is where, as Senator Lathrop said, a patient starts to develop an affection, but more or less it's to identify they have a validity in themselves through a connection with this therapist. Where there's a problem that occurs and the vulnerability can be exploited is when the therapist or the mental health care provider has countertransference that comes back at them. This can happen. The fact is that the health care provider needs to be able to identify this, stop it, redirect therapy. Often it is something that can be very subtle where the health care provider doesn't even recognize it themselves. It can be not just sexual, but intimate. I have passed around an article from the British psychiatric journal, which goes through different types of what they call crossing borders, which is exploitation in sexual therapies as well as some of the intimate relationships that occur with a therapist. There's a standard of care with the mental health provider that they are to provide a level of therapeutic care that is focused on safety and well-being of the patient. When the mental health care provider does not recognize that this countertransference is occurring, then a standard of care can be breached and not just ethically, but through the guidelines of negligence. The most common exploitation in a therapeutic relationship, and I believe they state it in that article, the one that's most studied upon, is through the sexual abuse aspect. But they do hit on other areas. And I was very surprised when I read through it that even calling your therapist by the first name could lead to countertransference later on. I believe that we, in Nebraska, we have had some case law that has discussed this, but I believe it's very important to protect those that are in a very vulnerable state and those that undergoing mental health counseling usually are. I believe it needs to be identified in black and white in our statutes so that those that are the most vulnerable can be protected. It's not necessarily left up to a court of law where precedents can be overturned. [LB673]

SENATOR ASHFORD: Thank you, Natalie. Any questions of Natalie? Senator Chambers. [LB673]

SENATOR CHAMBERS: Do you have a copy of the amendment that is being offered to the bill? [LB673]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

NATALIE OSORIO: I have seen one, but I don't have one in my possession at this time. [LB673]

SENATOR CHAMBERS: Okay. Now if it's not clear what I'm asking after I read this then I'll withdraw the question. [LB673]

NATALIE OSORIO: Okay. [LB673]

SENATOR CHAMBERS: For purposes of this section, dating relationship means frequent intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context. What I'm looking at is near the first part of that sentence where it says frequent intimate associations. Is the inclusion of that word giving protection to a number of these types of associations which might be intermittent but not frequent? [LB673]

NATALIE OSORIO: I understand what you mean. And you're hitting the... [LB673]

SENATOR CHAMBERS: And you don't have to answer right now, but I'm trying to think my way through this because I don't want a bill whose purposes I agree with 100 percent, but to be drafted in a way where if this activity takes place but is not considered frequent then it's protected by the language of the law itself. [LB673]

NATALIE OSORIO: I understand what you're saying. And I believe there is some wording that needs to be more refined. [LB673]

SENATOR CHAMBERS: I don't have a solution yet. I just wondered if I was missing something. [LB673]

NATALIE OSORIO: I think it's more of a cumulative effect. And then intermittent could also, you know, create this relationship. And I don't believe that, yes, we should necessarily pigeonhole it with the word frequent. [LB673]

SENATOR CHAMBERS: Okay. And as I said I'll talk to Senator Lathrop, but I'm just trying to get some things in the record so nobody will think I'm trying to sabotage the bill. [LB673]

NATALIE OSORIO: Okay. [LB673]

SENATOR CHAMBERS: Okay. [LB673]

SENATOR ASHFORD: Thank you, Natalie. [LB673]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

NATALIE OSORIO: Thank you very much. [LB673]

SENATOR ASHFORD: Any opponents? [LB673]

DAVID BUNTAIN: Senator Ashford, members of the committee, my name is David Buntain, B-u-n-t-a-i-n. I'm an attorney and the registered lobbyist for the Nebraska Medical Association. We are opposed to LB673. And I understand that there is an amendment and I've talked with Senator Lathrop about it, but I've not seen it. And so I can't really comment on what the changes are in the amendment. I do want to make several kind of basic points, though, for the committee's consideration. One is that it's my understanding that this is intended to address situations, as narrowed down, situations involving people who practice in the mental health area who provide counseling or the possibility of transference could occur. As with the other bill I testified on earlier today, I want to point out that the section that's being amended is in the Medical Liability Act, which only covers those physicians and hospitals and certified registered nurse anesthetists who participate and are within the excess liability fund. It doesn't cover psychologists. It doesn't cover counselors. It doesn't cover licensed mental health professionals. And you know, if you want to go in that direction it has to be done outside of the Hospital Medical Liability Act. Our concern with this bill and what we will be looking at in the amendment is that we need to draw a distinction between what is negligence and what is intentional conduct. And negligence generally has to do with whether or not a professional has met the standard of care for that professional in that community. And we support the negligence system and certainly would not...and generally we think that the system works well as far as defining what the standard of care and what negligence is through case adjudication rather than have the Legislature try to define what is or is not negligence. We have a particular concern with LB673 the way it was drafted, because it addresses what is intentional or criminal behavior, which is different than negligent conduct. And this bill has been around before--or a very similar bill--and it was our understanding that the intent of this was to try to force professional liability insurers to provide insurance coverage to enable victims of sexual misconduct or sexual abuse by medical professionals to be able to recover. Well, you run into a problem with public policy, which is it's against public policy to write insurance to insure people against intentional or criminal acts. So again, I'm glad to see that Senator Lathrop is trying to focus this into an area and I'm going to have to talk to the experts myself as far as the professional issues that are involved as far as is this intent? Is it negligence? Whatever. But I think we're certainly interested in being involved in the conversations on that. [LB673]

SENATOR ASHFORD: Thank you, Bob. Any questions? [LB673]

SENATOR CHAMBERS: For the record... [LB673]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

DAVID BUNTAIN: Yes. [LB673]

SENATOR CHAMBERS: ...deja vu all over again. [LB673]

DAVID BUNTAIN: Yes. [LB673]

SENATOR CHAMBERS: Nothing in your testimony should be construed to endorse or excuse the kind of misconduct that is discussed here. [LB673]

DAVID BUNTAIN: That is correct. [LB673]

SENATOR CHAMBERS: Okay. I thought so but I just wanted to state a category. [LB673]

DAVID BUNTAIN: No, you are correct. [LB673]

SENATOR CHAMBERS: Okay. [LB673]

SENATOR ASHFORD: Dave, Bob, I don't know what your name is. [LB673]

DAVID BUNTAIN: That's all right. My father is Bob so no problem. [LB673]

SENATOR ASHFORD: I'm sorry. Yes, any other questions of Dave? Thanks. [LB673]

DAVID BUNTAIN: Thank you. [LB673]

SENATOR ASHFORD: Bruce? Oh. Well, no. It's up to you. [LB673]

BRUCE RIEKER: Kind of like a bad dream, isn't it? I'm back. [LB673]

SENATOR ASHFORD: Yes, you are. Well, proceed. [LB673]

BRUCE RIEKER: (Exhibit 16) Chairman Ashford, members of the committee, my name is Bruce Rieker, R-i-e-k-e-r, and in this instance I am only representing the Nebraska Hospital Association. (Laughter) I'm wearing lots of hats before the committee today. But I'm going to make this very quick. In the second paragraph of my written testimony for you we expressly state that we do not condone any of these acts that we're talking about. However, I'm going to make this very brief. For all of the reasons that Mr. Buntain outlined in the previous testimony we, the hospital association, are also opposed to LB673. But if this is the intent of the committee to go this direction, just as Mr. Buntain mentioned, we would be happy to work with you. [LB673]

SENATOR ASHFORD: Thanks, Bruce. Any questions? Thank you. Any further

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

opponents? [LB673]

PATRICK CARMODY: (Exhibit 17) Chairman Ashford and members of the committee, my name is Patrick Carmody, C-a-r-m-o-d-y, and I'm here on behalf of the Midwest Medical Insurance Corporation, or some of you may know it as MMIC. They provide professional liability coverage for doctors, clinics, and hospitals. And I will also be brief. I have not seen the amendments that Senator Lathrop has offered, but we have the same concerns as the previous two opponents where there seems to be a public policy issue here. And we also have the issue of if these claims are covered for criminal acts, the cost of professional liability insurance will increase. And that's something we think you should consider. We would ask that you not advance the bill. [LB673]

SENATOR ASHFORD: Thanks, Pat. Any questions? Thank you. [LB673]

PATRICK CARMODY: Thank you. [LB673]

SENATOR ASHFORD: Any neutral testifiers? Senator Lathrop, do you wish to close? [LB673]

SENATOR LATHROP: I think I can waive close. [LB673]

SENATOR ASHFORD: (Exhibit 18) That concludes the hearing. What's next? I know it's my bill. LB450. Steve. Members of the Judiciary Committee, Brad Ashford, Legislative District 20. Very simply...and before I get started there's an amendment that we're handing out here, which limits the scope of this bill rather significantly. The idea of the bill is to provide some degree of protection to employers who provide written information upon request about thefts that have taken place in their businesses. This bill was brought to me by some small business owners who were concerned about not having information about employer-employee misdeeds when they call and try to get information. But I felt the bill was too broad as drafted and have narrowed it down to what I think is the real problem or real issue that was identified to me and that is the situation where an employee very likely who is engaged in theft, that information was documented and the employer then submitted that information to another perspective employer, and then it exposed him or herself to a degree of liability. And so the bill specifically deals with theft and deals with transmission of that information in writing to a perspective employer. [LB450]

SENATOR LATHROP: Any questions for Senator Ashford? Senator Chambers. [LB450]

SENATOR CHAMBERS: Did John Milton write Paradise Lost ? [LB450]

SENATOR ASHFORD: I knew that was...I think he did, Senator Chambers. [LB450]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR CHAMBERS: Okay. That leads me to what my question is. Why would not an employer who had suffered theft want another employer to suffer the same thing since Milton in trying to explain why Lucifer, who has lost already, would want others to suffer the fate? And he wrote it is a solace to the wretched to have companions in grief. Modern lingo says misery loves company. Why should we grant what it is you're asking for in all seriousness? [LB450]

SENATOR ASHFORD: Seriously, Senator Chambers, being a small business person myself and dealing in this area a little bit, it does come up where there's been a theft, and at least in the case of a small business. And I've had it occur in my business a couple of times. It can be pretty significant--\$500, \$1,000, \$1,500 theft--can really impact your business. And I think if...in one case we had an employee where this occurred. And it occurred in other places as well we subsequently found out. And I think it's information that's important. [LB450]

SENATOR CHAMBERS: I just wanted a little in the record. Again, I can talk to you later, but I wanted to ask that. [LB450]

SENATOR ASHFORD: Yeah, right. Right. [LB450]

SENATOR LATHROP: I don't have a copy of the amendment so I'm wondering what's... [LB450]

SENATOR ASHFORD: It's coming apparently. Where did it go? [LB450]

SENATOR LATHROP: Well, let me just ask you... [LB450]

SENATOR ASHFORD: I mean, we just started submitting it. It's not that big an amendment. (Laughter) [LB450]

SENATOR LATHROP: Well, let me just ask then. Because as drafted this was about any information an employer would give to another employer. What's the standard for passing information along? If we're going to give an employer immunity and he has six employees and \$500 comes up missing, and every time one of the people that were there--all six of them--does he get a free pass to say well, I had a theft of \$500 and he was one of the people that was here. [LB450]

SENATOR ASHFORD: I don't believe so. I think that would be...the standard we use in the bill is knowing or reckless. And that may not be the right standard, but I don't think...we would not want to protect an employer in that situation unduly. It would be a situation where there's one individual involved, not six, and that's a good example because that comes up a lot. But it would be a well-documented situation where one individual has engaged in the theft. [LB450]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR LATHROP: Can we limit it to those instances where the employee has been convicted or do you think that doesn't cover it enough? [LB450]

SENATOR ASHFORD: You know I thought about...that's a possibility. If they have been convicted it would be a matter of public record. We're trying to get to something that's maybe slightly below that standard, but not a free pass so to say. [LB450]

SENATOR LATHROP: Okay. Any other questions? Senator Pirsch. [LB450]

SENATOR ASHFORD: Senator Pirsch [LB450]

SENATOR PIRSCH: Oh I can just... [LB450]

SENATOR ASHFORD: Oh, I can't say. I mean, Senator... [LB450]

SENATOR PIRSCH: I guess I just kind of echo that sentiment that if they have a criminal conviction employers can obtain that. And so the only purpose of this bill would seem to exist if some sort of standard below conviction and...it's more of a statement than a question. Yeah. [LB450]

SENATOR ASHFORD: That's right. That's what I'm getting at. Thanks. [LB450]

SENATOR LATHROP: Those in support of LB450. [LB450]

JIM MOYLAN: Mr. Chairman, members of the committee, I'm Jim Moylan, an attorney from Omaha, Nebraska representing the Nebraska License Beverage Association and I'm here supporting this bill. As we call it in the industry it's what they call a till tapper bill. And this is mainly a bill to prevent persons who have worked in a liquor establishment and have taken money out of the till and then has been discharged, and goes down the street and goes into another establishment, and that establishment wants the reference. So she said well, I worked just down the street at so and so. So you can call them. Well, they're not about to say anything because they don't want to get in trouble. They have no immunity. And this is the type of bill that would give them some immunity if they had a theft. Now we are mostly interested in the theft aspect of it. It's unusual. Just this week, Monday, I got a call from a little establishment in Northeast Nebraska and this bill came up while we were talking about a couple of other bills. And this bill came up and he said well, I'm for it. I just had a young lady that had been at work for me for a long time and I didn't know how much money I was losing until she left. And he said it made a lot of difference in my bottom line after she left. But he said I really couldn't prove that she took it, but when she was gone, you know, the funds were much more so at the end of each day. So he said I'm certainly in favor of it. And I know most retailers would be. Now you get to the...Senator, you mention about conviction. That would be pretty hard

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

to do. Most of them don't have time to go down and file a complaint every time, you know, they've had a theft of \$1,000 or \$1,500. Although they might have the proof, you know. But I think under this bill you pretty much have to have the proof before you would tell a guy down the street you know that, yes, they pilfered some money from me. I have the evidence. I had the camera in there. It's right down on there. I saw her take a handful of bills out of there and stick them in her pocket, lock the place up, and leave, you know. So he'd be in a pretty good position then to say--now, just no comment--but then he'd be in a position to tell them, you know, that yes, I had her. She took some money from me and I would not recommend that you hire her. So this is just kind of a bill that I think not only this industry, there's other industries too. And I think there's other industries here that want it a little broader for other things that they have in their particular establishment, you know. So I think we recommend that you pass this this year. So thank you very much. Thank you, Senator Ashford, for introducing it for the organization. [LB450]

SENATOR ASHFORD: I was sort of doing it for myself, but that's okay. [LB450]

SENATOR LATHROP: I do have a question if I can. It seems to me that when we look for how much does it...we need to address the question of how solid is the proof the employer has before we give them an immunity for what they're saying to somebody else. And there can be suspicion and so if you're suspicious...let's take your bar example. A lot of these bars--and I've been in a few myself--they might have three people working the cash register and tending bar on a given night. There could be more than one person that has access to the till so to speak. And if you let one person go because you've come up short, what is the standard? How certain does the employer have to be before they get a free pass? Or at what point does it become reckless to pass that along? [LB450]

JIM MOYLAN: I think under those circumstances if he didn't have any direct evidence that that was the particular person that did it, I think that would be rather reckless to tell the guy down the street, you know, that this person took... [LB450]

SENATOR LATHROP: Okay. [LB450]

JIM MOYLAN: Now then that would give her an opportunity. Then she would be in the position to file suit against him. [LB450]

SENATOR LATHROP: Exactly. And here is maybe where that goes. Then if the standard is you have to know it was a particular employee before you can make that negative recommendation to a perspective employer then are you really doing anything you need immunity for? [LB450]

JIM MOYLAN: Well, that's a good question. I think they probably feel that they do, you

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

know? That person could still turn around and sue them. Kind of a "nuisant" value, but he might have the evidence to defend it, you know? And the picture and everything that showed that that person took it, you know, but still wouldn't prevent them from suing them, you know. [LB450]

SENATOR LATHROP: But even if you have immunity it doesn't stop somebody from filing a suit. I mean, It just means you're ultimately going to win, right? [LB450]

JIM MOYLAN: No, it wouldn't. But I think most lawyers if they saw this particular bill when a client came in under those circumstances, looked up the law and saw that this bill was in effect, say well I don't think you have a case from what I understand from the evidence and from what the law is. [LB450]

SENATOR LATHROP: Okay. [LB450]

JIM MOYLAN: Does that sound logical? [LB450]

SENATOR LATHROP: Yeah, thanks for your answer. I appreciate it. [LB450]

SENATOR ASHFORD: Thank you, Jim. [LB450]

JIM MOYLAN: Thank you. [LB450]

SENATOR ASHFORD: How many testifiers do we have here today? Oh my. Okay. I didn't think I would engender that much interest. [LB450]

BRUCE STECK: Good afternoon, Mr. Chairman, committee members. My name is Bruce Steck, that's spelled S-t-e-c-k. I am a human resource practitioner and I am also the state legislative director for the Society for Human Resource Managers Nebraska State Council. On behalf of the SHRM Nebraska State Council and the Nebraska State Chamber of Commerce, I'm here in support of LB450 introduced by Senator Ashford. I had quite a bit of testimony prepared and due to the amendment offered, which I was not aware of, I will keep things pretty brief. In general, HR practices and obligations under existing local, state, and federal law require that employment decisions be based on job performance. This issue supports the need for access to and exchange of information on an applicant's previous job performance, which based on this amendment would limit it to theft. We are in support of this legislation based on the fact that, you know, as businesses are forced with the decision to hire individuals, it's obviously very important that that decision be a good one. It can be very costly to hire someone and turn around and have to hire someone else based on bad information you receive through that process. Theft is obviously a huge issue for employers. In my consulting practice I have a retail client and we deal with this on an ongoing basis. You brought up the case of how do you identify. You know, in a lot of the retail environments

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

the registers are such that you can pinpoint specifically where the issue came from and there are controls in place to address that. Currently--and I shouldn't even say currently--but the stat that I found back in 2002 there are 35 states that have legislation similar to this regarding reference checking. Their statutes allow for the free exchange of information between employers enabling them to make more responsible hiring decisions and ultimately enhancing employee satisfaction with their new jobs. It is increasingly difficult for employers to obtain information and make a reasonable decision in hiring. Most employers today, on advice of counsel or other individuals that they work with, are simply giving name, rank, and serial number in regards to previous employment. When you're trying to identify if the perspective employee that is sitting in front of you has the qualifications necessary name, rank, and serial number, and the time they were at a previous position really doesn't help with that. To inhibit the growth of counterproductive nondisclosure policies and to begin addressing the inequitable results when employers need to request information the fear responding to references requests, we do urge the passage of LB450. With that, I'll be happy to answer any questions. [LB450]

SENATOR ASHFORD: Thank you. Senator Pirsch. [LB450]

SENATOR PIRSCH: Did you say that 38 other states have this specific type of a statute? [LB450]

BRUCE STECK: Actually, yeah. As of 2002, in my research there are 35 states that have, you know, much stronger language in regarding to immunity to employers acting in good faith. [LB450]

SENATOR PIRSCH: Thank you. [LB450]

SENATOR ASHFORD: Senator Chambers. [LB450]

SENATOR CHAMBERS: Is the employer who is receiving a request for information held liable if he or she refuses to give information? [LB450]

BRUCE STECK: They're actually not in the state of Nebraska. But there have been lawsuits from employers to other employers not providing that information. It has not happened in the state of Nebraska that I'm aware of. [LB450]

SENATOR CHAMBERS: So the aim here is to compel employer A to give to potential employer B information about a person who worked for employer A? [LB450]

BRUCE STECK: Correct. In good faith. [LB450]

SENATOR CHAMBERS: So then employer A will be liable if this law is passed and

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

employer A refuses to give that information. Is that true? [LB450]

BRUCE STECK: I don't foresee that, no. It, as I understand it, would provide them immunity when acting in good faith. [LB450]

SENATOR CHAMBERS: What if employer A doesn't want to give that information? [LB450]

BRUCE STECK: I believe that is still their right even under this legislation. [LB450]

SENATOR CHAMBERS: How many employers do you know of--and I don't need an actual number, but some kind of estimate--who hired somebody who turned out to be a clunker because a prior employer refused to give information on that person? [LB450]

BRUCE STECK: I think it happens on a regular basis. I think employers today have really implemented many other avenues to try to obtain information that really can help them properly identify is this candidate a good candidate or not? The things such as assessments or pre-hire assessment testing that is based on personality or scientific research such as the Gallup test. But I think, you know, it happens all the time where there is a poor hire and when you look at it closer and dig down deeper you probably could have found more information based on their previous employment history had that information been shared with them that would have assisted you in making a better decision in that hire. [LB450]

SENATOR CHAMBERS: Now with this amendment that is being proposed charges of theft would be information that could be disclosed. [LB450]

BRUCE STECK: As I understand. I have not seen the amendment. [LB450]

SENATOR CHAMBERS: And there would be no liability. [LB450]

BRUCE STECK: As I understand it. I have not seen the amendment, Senator. [LB450]

SENATOR CHAMBERS: So what is there in this bill that says the charges cannot have been maliciously filed? The last sentence talks about knowingly or recklessly releasing or disclosing false information. If the charges were recklessly filed that wouldn't make that employer subject to this last sentence, because the information that charges were filed is true. It's true that charges were filed, but they were filed maliciously. So this doesn't say disclose false information or charges of theft maliciously filed. It just says charges of theft. So I don't like Senator Pirsch. I can say I'm kicking him out of here and I'm going to charge him with having stolen and I file the charges. And the city prosecutor says we're not going to do anything with this. So when they say charges of theft do they mean that I, the employer, really brought an accusation or that the prosecutor accepted

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

my accusation and formally filed a criminal charge. What does it mean? [LB450]

BRUCE STECK: Again, I have not seen the amendment. I apologize. [LB450]

SENATOR CHAMBERS: Oh, okay. [LB450]

BRUCE STECK: But you know, I would read to understand that as, you know, as testified to earlier that there is going to be obviously some concern from employers and how to proceed with that. And that you would need to be very clear. I talked about my client in the retail sector. You know, if I have an individual... [LB450]

SENATOR CHAMBERS: We're not concerned about employers who overcharge customers and do bait and switches or will sell knock-off products as the real thing, ersatz or false products, faux leather as real thing. We're not interested in going after employers for doing that to the customers in this bill, are we? [LB450]

BRUCE STECK: Not as I understand it, no. [LB450]

SENATOR CHAMBERS: Well, could we draw them into this and say that if employers do that and an employee knows it, the employee can be a whistle blower and can not be disciplined for that? Would that be okay with you if we put that in there? [LB450]

BRUCE STECK: If...say that again, please. [LB450]

SENATOR CHAMBERS: That the employee knows that the employer is doing these things that I mentioned and the employee... [LB450]

BRUCE STECK: But you provide the whistle blower protection based on... [LB450]

SENATOR CHAMBERS: ...and the employee wants to tell the authorities what this thieving employer is doing. But it's not enough to put the employer out of business. So the employee would be able to keep his or her job. Would you want that or do you think the relationship would have been soured too much? [LB450]

BRUCE STECK: I think that legislation is already in place on a federal level. [LB450]

SENATOR CHAMBERS: No, I'm talking about putting it in this bill so we're dealing with a specific area. So we put that protection in this specific area where we mention the employer. You probably wouldn't be interested in having that in this bill though, would you? [LB450]

BRUCE STECK: I'm not sure I'm understanding your point, Senator. [LB450]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR CHAMBERS: Okay. That's all I'll ask. Where are you from? Are you from Omaha? From Nebraska? [LB450]

BRUCE STECK: I am. I'm from Omaha, yes. [LB450]

SENATOR CHAMBERS: Okay. Were you educated by OPS? [LB450]

BRUCE STECK: No. (Laughter) Western Nebraska. [LB450]

SENATOR CHAMBERS: When I get a chance. I couldn't resist. (Laughter) That's all I have, though. Thank you. [LB450]

BRUCE STECK: Thank you, Senator. [LB450]

SENATOR CHAMBERS: Okay. [LB450]

SENATOR ASHFORD: Any other questions? Thanks. [LB450]

BRUCE STECK: Thank you. [LB450]

SENATOR ASHFORD: Bob. [LB450]

ROBERT J. HALLSTROM: (Exhibit 19) Chairman Ashford, members of the committee, my name is Robert J. Hallstrom. I appear before you today as a registered lobbyist on behalf of the National Federation of Independent Business in support of LB450. I'm also signed in on behalf of the Nebraska Pharmacists Association and the Nebraska Bankers Association. Most of the testimony that I have that I'm handing out in written form has already been touched upon. The old name, rank, and serial number. Our concern that legal counsel suggests that employers not give meaningful references of any nature can act to the detriment of both the good employee and can also act to the detriment of perspective employers by not knowing if there is an employee that perhaps they ought to have second thoughts about hiring. I have not either seen Senator Ashford's amendment. Obviously theft is a major issue that you'd want to know about as a prospective employer. So that is certainly an element of the bill that should go forward. We perhaps would like to see it broader in the form of introduced, but subject to reviewing the amendment I would suspect that we would still be supportive of the proposed amendment. I'd be happy to address any questions. [LB450]

SENATOR ASHFORD: Thank you, Bob. Are there any questions? I'm sorry. Senator Pirsch. [LB450]

SENATOR PIRSCH: Just a couple of things. When it comes to...and I guess Senator Lathrop kind of touched on that earlier in his questioning, I think. As an attorney it would

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Transcriber's Office

Judiciary Committee
February 21, 2007

probably be appropriate to pose that to you that, you know, you have cases where clearly of, you know, the spectrum of various degrees of suspicion as he touched with the till example. And so obviously when you reach the level of conviction you don't need to use the bill. Would it just be...first of all, I guess what are the type of possible claims that can be filed against an employer by an employee who doesn't agree with the information that was shared? [LB450]

ROBERT J. HALLSTROM: Well, I assume the manner in which the information is conveyed could be defamation of character, liable, slander, things of that nature that could come back. There could also be perhaps a general damages action that if I could have or should have had a particular job and the nature of the reference that was given--good, bad, or indifferent--had an adverse impact on me, perhaps some type of damages action could be brought in that respect. [LB450]

SENATOR PIRSCH: Would that be tacked on to a defamation suit or was that... [LB450]

ROBERT J. HALLSTROM: I don't have specific familiarity with that type of litigation, Senator. [LB450]

SENATOR PIRSCH: I see. Okay. And that's why I'm wondering, because obviously truth would be a defense. I mean, that would be something litigated if... [LB450]

ROBERT J. HALLSTROM: And Senator, as far as...and we can get into the truth can be a defense and I appreciate Senator Lathrop's comments that even with the truth it doesn't necessarily mean somebody's not going to go ahead and sue you, but I think with the statutory provisions, the standards clearly set out in statute, that the potential attorney for that individual is going to be less likely to suggest that they move forward. I think what we see a lot of times is that you may have an employee based on the records and the documentation who possibly even has admitted to something having occurred. But you're not going to rise to the level of a conviction because you may or may not get the prosecuting attorney to go forward with that, but you have well-documented evidence that is at least going to convince, whether it's an admission or something short of an admission, that they feel comfortable in their conviction that they can tell another employer that yes, this did in fact happen and you probably should know about this in making a hiring decision with regard to that individual. [LB450]

SENATOR PIRSCH: Would an employee have a right to have notice of...say he applied to a corporation and was turned down. Would he be aware of the material that was or would that... [LB450]

ROBERT J. HALLSTROM: I don't know about the notice, but as Senator Ashford's bill was drafted, upon written request I believe there could be or would have to be a provision of whatever was provided to the prospective employer to that employee as I

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

read the bill. [LB450]

SENATOR PIRSCH: Thank you. [LB450]

SENATOR ASHFORD: Thanks, Bob. Senator Chambers. [LB450]

SENATOR CHAMBERS: Mr. Hallstrom, how would the employee know to make a written request of a previous employer? How would that employee know that that employer had given this kind of damaging information? [LB450]

ROBERT J. HALLSTROM: Senator, that's why I suggested that there wasn't a notice provision in there. That could very well be an issue. I think that intuitively the employee may know, and in fact even if they've done some things that perhaps they shouldn't, they may still ask the former employer for a recommendation. So they may have some reason to believe that either upon request by them that something... [LB450]

SENATOR CHAMBERS: Should a notice provision be included in the interest of justice? [LB450]

ROBERT J. HALLSTROM: I certainly don't have any particular problem with that, Senator. It's not in the bill at this time. [LB450]

SENATOR CHAMBERS: And should the employee have the opportunity to rebut that before that information is passed on to a prospective employer? [LB450]

ROBERT J. HALLSTROM: I'd probably have to think about that longer, Senator, as far as whether or not we would be in a position to suggest that that's something that ought to... [LB450]

SENATOR CHAMBERS: Okay, I'll let you think about it longer. Okay. Now. Give me...(laughter). [LB450]

ROBERT J. HALLSTROM: I was hoping it would be longer than while I'm sitting up here, Senator. I'm kind of a ponderous individual, not pandering. [LB450]

SENATOR CHAMBERS: Under the language of this bill, false information can be given. Correct? [LB450]

ROBERT J. HALLSTROM: I heard your question earlier and I would assume that that could be an interpretation of the last section of the bill that possible could readily be resolved if, in fact, your interpretation is accurate. [LB450]

SENATOR CHAMBERS: And let's say that in order to bring it within the language of this

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

last provision that the false information was neither knowingly or recklessly released, but it if false. That information is given to a prospective employer. Is the employee who was wronged and harmed by this false information any less harmed because the false information was disclosed in a way that was not reckless? In other words, the prospective employer refuses to hire this person who but for that false information would have been hired. That employee who was harmed has no recourse if this bill were in place. Isn't that true? [LB450]

ROBERT J. HALLSTROM: If I'm tracking you correctly, Senator, I would imagine there is no differential in the harm. [LB450]

SENATOR CHAMBERS: Mr. Hallstrom, I'm very concerned when innocent people suffer harm. And I'd rather see an employer have lost something to a thieving employee than to be in a position to give false information that would harm an innocent person. In other words, the 10 guilty escape rather than the single innocent one be harmed. Now I'm not going to ask you to grapple with that right now, but I want you to know what my thought processes are right now on this particular bill. I don't see it as something that's necessary. If these employers don't want to give information because they fear being sued leave it as it is. They don't give the information. And they're not liable for not having given information. They could simply say based on the recommendation of counsel or advice of counsel, I'm not disclosing that information or they don't have to give an explanation. Just don't give it. They can do that. Isn't that what they do now? [LB450]

ROBERT J. HALLSTROM: Senator, we can certainly continue with that as a state of the law if the policy of this state is to not make any changes in this area. I would just suggest as I indicated in my earlier testimony that you also have the balancing effect of those good employees who are not getting a high-grade recommendation for future employment opportunities because the protections are not in the law to the extent that legal counsel that are advising employers would like to see. I'm here on behalf of the Pharmacist Association. We've got another bill that touches on this type of issue... [LB450]

SENATOR CHAMBERS: Mr. Hallstrom, pardon me, I don't want to be rude, but I don't want you to have to answer more than what I'm asking. If you have a good employee, what is there to stop you and why would an employee sue you for giving a high recommendation? This is a good employee. This employee came to work on time, ate his spinach, brushed her teeth, or whatever. Why is an employee who receives a recommendation like that going to sue the employer who gives it? [LB450]

ROBERT J. HALLSTROM: Senator, I don't know exactly what the prior witness was referring to in terms of some of the cases where employers had gotten sued for not giving information, but I would rather imagine what the course of liability would be is if I

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

have a...the consistency of whether or not you're making recommendations or not, I think the general advice of counsel is that you should be consistent, and that consistency under the current law is that you don't give anything other than name, rank, and serial number in every case. And... [LB450]

SENATOR CHAMBERS: And consistency is the hobgoblin of what? Little minds. [LB450]

ROBERT J. HALLSTROM: Well, and I understand that, but there's also an issue of liability that if I give a glowing reference for Senator Ashford, and Senator Lathrop thinks he's just as good as Senator Ashford was in performing the duties, and finds out that I didn't give the next employer the same type of reference for Senator Lathrop, that could form the basis of liability. Why did you give Senator Ashford a good reference when you didn't Senator Lathrop and they both seem to think... [LB450]

SENATOR CHAMBERS: So then you feel Senator Lathrop would take you to court because you did not give him a glowing recommendation? [LB450]

ROBERT J. HALLSTROM: I think that's happened in some cases. [LB450]

SENATOR CHAMBERS: And has the employer lost? [LB450]

ROBERT J. HALLSTROM: In other states my understanding is yes. [LB450]

SENATOR CHAMBERS: Who gave you that understanding? Or are you speaking anecdotally? [LB450]

ROBERT J. HALLSTROM: I'm speaking anecdotally from testimony that's been given in prior years when these types of bills have been introduced. [LB450]

SENATOR CHAMBERS: That's the prior year. We're talking about now, Mr. Hallstrom. If this bill is not passed, it's not going to harm employers one whit. Is that true or is that false? [LB450]

ROBERT J. HALLSTROM: I would probably not accept that as a given. [LB450]

SENATOR CHAMBERS: What would you accept it as? [LB450]

ROBERT J. HALLSTROM: I guess I'd use the reverse, that if you pass this legislation you can put something on the books that would provide both employers and employees with better protections. [LB450]

SENATOR CHAMBERS: You're talking about the opposite of what I asked you. I'm

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

asking, what harm is going to be done if we don't put it on the books? [LB450]

ROBERT J. HALLSTROM: As I testified earlier, Senator, the harm that's going to be done by not putting it on the books is that you will continue not to get meaningful references for employees. [LB450]

SENATOR CHAMBERS: And who does that hurt? [LB450]

ROBERT J. HALLSTROM: That hurts employees who ought to get good references, and it hurts employers who ought to know whether or not to hire somebody that has stolen from their former employer. [LB450]

SENATOR CHAMBERS: Well, if all of the employers are getting the same advice from their lawyers, the fact that an employer does not give a recommendation doesn't mean anything, because the employer seeking it has gotten the same advice from his or her counsel. So in this universe of potential employers, they've all gotten the same advice. None of them is going to give a recommendation to anybody. So how in the world are they going to say, because a recommendation wasn't given for Senator Ashford, a recommendation wasn't given for Senator Lathrop, that it means anything one way or the other when none of them is going to give a recommendation to anybody? [LB450]

ROBERT J. HALLSTROM: Because, Senator, in my opinion, those who might have otherwise known that you had an employee who had stolen from the former employer, who had violated their requirements as a healthcare provider, are not going to know, and they should've known. And if they had known, they wouldn't have hired that person and whatever harm may flow from having hired that employee. [LB450]

SENATOR CHAMBERS: As you answer my questions, do you have the feeling that you're not getting anywhere or really saying anything of substance? [LB450]

ROBERT J. HALLSTROM: Senator, I hope I'm saying things of substance. I'm not sure I'm getting anywhere, but that's happened before. (Laughter) [LB450]

SENATOR CHAMBERS: Do you have the feeling that what you're saying is of substance? [LB450]

ROBERT J. HALLSTROM: Yes. [LB450]

SENATOR CHAMBERS: Now I'm going to ask you this question and you can give me a substantive answer. If all of the employers in a given locale are receiving counsel from their lawyers that they should not write a recommendation of any kind, why is any employer in that universe going to think it's strange that an employer won't write a recommendation? But before you get there, why would that prospective employer even

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

seek a reference when he or she knows it will not be forthcoming? [LB450]

ROBERT J. HALLSTROM: I don't think they will think that's strange. Whether or not they'll ask for the recommendation because of that, if it becomes full-scale that nobody under any conditions gives a reference.... [LB450]

SENATOR CHAMBERS: Then they would have to hire the person on the basis of their examination of that person's credentials, his or her suitability for the job, and so forth. Correct? [LB450]

ROBERT J. HALLSTROM: Criminal background checks, whatever. [LB450]

SENATOR CHAMBERS: Okay. That's all that I'll ask you. Thank you, Mr. Hallstrom. [LB450]

ROBERT J. HALLSTROM: Thank you. [LB450]

SENATOR ASHFORD: Thanks, Bob. Any other proponents? How many opponents do we have? [LB450]

JIM OTTO: Senator Ashford, members of the committee, my name is Jim Otto, O-t-t-o. I'm president of and a registered lobbyist for the Nebraska Retail Federation. I just want to put our...go on record to be in favor of this bill. I just have a few things to say. I don't want to repeat anything. In the case of retailers, in many times, there is actually...I mean, we aren't just talking about cash. We're talking about merchandise many times. And employee theft is a significant part of retail loss. And many times the actual--if it's merchandise or something like that--many times it's actually on videotape. So there is proof. I recognize and appreciate your concern, Senator Lathrop, to set some kind of a minimum level, because--and I don't know what that is, that's a challenge. But there is usually in the retail setting, especially if it's merchandise, there's probably a videotape or something that actually documents it. And as far as the perception--I am not an attorney and I'm really glad that I'm not one right now (laugh)--but the perception...whether or not the reality--I guess perception is reality--the perception is out there among employers that they do take a risk in divulging anything negative about someone, even if they're very positive that it's true. So I think that does exist. With that, I'll answer any questions. [LB450]

SENATOR ASHFORD: Any questions of Jim? Senator Pirsch. [LB450]

SENATOR PIRSCH: Just briefly, if you can just...are you familiar with other states in which this type of a bill or this, a similar bill is enforced? [LB450]

JIM OTTO: I have not done that research, Senator, so I don't... [LB450]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR PIRSCH: Okay. Well, I won't ask you. [LB450]

SENATOR ASHFORD: Senator Chambers. [LB450]

SENATOR CHAMBERS: Mr. Otto, this time of afternoon any man whose last name is the same coming or going, forward or backward, right side up or upside down, is entitled to a pass from me and you just got that. (Laughter) [LB450]

JIM OTTO: Okay. Thank you, Senator. [LB450]

SENATOR ASHFORD: Thanks, Jim. Thank you, Jim, very much. The next proponent or opponent. Proponent. [LB450]

KATHY SIEFKEN: Senator Ashford and members of the committee, my name is Kathy Siefken, Kathy with a K, S-i-e-f-k-e-n, and I am here representing the Nebraska Grocery Industry Association in support of LB450. And the testimony given by prior testifiers, we agree with all of that. The only thing that I want to add that isn't redundant is the fact that there are some instances that are beyond the theft. And I understand that there is an amendment to limit it to theft. We would like to see this bill pass out of committee without that amendment, and I want to give you two examples. One of them is, we conduct our own compliance checks on alcohol sales. And when we conduct our own checks, police, law enforcement is not involved, therefore no charges are brought. However, those employees, in many instances, are terminated. And that is not something that you really want to keep as a secret. You don't want those people going down to the next retail outlet with a liquor license and selling to their friends out the back door. And another instance would be pseudoephedrine; right now, it is behind the counter. And if you have a clerk that gets into the pseudoephedrine and takes it out of the store and gives it to those people that want to go out and cook meth, again, there is no conviction. It's a theft, it's a taking, but charges won't probably be filed. You'll probably just terminate that employee. And again, those are the instances that we're talking about. These are not people that would be good employees and we would like to be able to share that information without there being an additional liability. So with that, if you have any questions I'd be happy to try to answer. [LB450]

SENATOR ASHFORD: Thank you very much. Any other questions? Senator Pirsch. [LB450]

SENATOR PIRSCH: I just think you're right in recognizing the language, I think, of the amendment in the sense that it specifies 28-511. I take it, your members, a lot of them in the cities, Lincoln and Omaha, those would typically, is it not true, be covered under city ordinance thefts? I'm sorry. The theft provisions under which people are prosecuted in municipalities would tend not to be under the state statute 28-511, but rather under

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

municipal ordinances for theft? Is that also a...? So thereby specifying the state statute 28-511 would exclude those who are convicted under municipal theft charges. Is that...? [LB450]

KATHY SIEFKEN: I'm not an attorney, but I would assume so. [LB450]

SENATOR PIRSCH: Okay. [LB450]

KATHY SIEFKEN: But I guess my concern is that those people, that charges aren't even brought, the employees are just let go. [LB450]

SENATOR ASHFORD: Thank you, Senator Pirsch. [LB450]

SENATOR LATHROP: Can I ask just a question? [LB450]

SENATOR ASHFORD: Sure. [LB450]

SENATOR LATHROP: I know it's getting late, but do you think that it's okay for an employer to be held to a standard of reasonableness? [LB450]

KATHY SIEFKEN: Yes. [LB450]

SENATOR LATHROP: There seems to be two pieces to this. One is, we want to tell people about what's going on with this guy that just got fired, and the other is, the employee who's out trying to find work to support a family. And the way it is right now, without any amendments, you're only held to a standard of reasonableness, right? [LB450]

KATHY SIEFKEN: Correct. [LB450]

SENATOR LATHROP: If you have a reasonable basis for saying what you say, then you shouldn't have any liability, would you? Or we're at someplace where you don't know the answer? [LB450]

KATHY SIEFKEN: Well, as Bob Hallstrom mentioned, you know, legal counsel is saying you can't say anything about anyone. And without some kind of protection, our members are not sharing information with each other. [LB450]

SENATOR LATHROP: The difficulty I have with that, honestly, is that if lawyers are telling people something that isn't true or isn't good advice or a correct statement of the law, to come down to the Legislature to change things so that people are more comfortable doing something they can do anyway, that really isn't our job. And so it seems to me that as long as you behave reasonably, which is the definition of

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

negligence, as long as you behave reasonably you shouldn't be sued. But if we make the standard willful reckless, then you can say almost anything about that employee and it would be pretty hard for them to make a claim against someone who essentially blackballed them. What's the standard...if we pass this, at what point, how much evidence are you going to need before you tell the next guy that you just let a thief go? [LB450]

KATHY SIEFKEN: Now I'm assuming that we will probably have either a photo or a video or a guilty...an admittance of guilt. [LB450]

SENATOR LATHROP: And that's my point. If you have that, you don't need willful reckless. You really don't. I mean, if you have somebody and you've caught them with their hand in the cookie jar, how can they sue you? Would you, right now today, would you not make a recommendation if you caught somebody, they're convicted of theft? Would you or the people in your organization just give their name, rank, and serial number? [LB450]

KATHY SIEFKEN: Probably, because that's what...the attorneys across the state, all of them are saying you can't go beyond that because you could be held liable. So rather than leaving it up to a judgment call over in your HR department, whether you should or should not say something, you're safer just not saying anything and then the next guy just has to learn the hard way. That's what's going on right now. [LB450]

SENATOR LATHROP: Okay. But I wonder if they're going to give you the same advice as soon as the standard is willful reckless instead of careless. [LB450]

KATHY SIEFKEN: I don't know. [LB450]

SENATOR LATHROP: I mean, it doesn't really stop somebody from suing you. It only makes it more difficult to prove that you were in the wrong. [LB450]

KATHY SIEFKEN: Um-hum. True. [LB450]

SENATOR LATHROP: Okay. Thanks for answering my questions. I appreciate it. [LB450]

KATHY SIEFKEN: Thank you. [LB450]

SENATOR ASHFORD: Thanks for your...any other questions? Thanks very...I'm sorry. Senator McDonald? No. Any...thank you very much. Any opponents? Opponents? [LB450]

JOHN LINDSAY: Senator Ashford, members of the committee, my name is John

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

Lindsay, L-i-n-d-s-a-y, appearing on behalf of the Nebraska Association of Trial Attorneys. I would state, Senator Ashford, I have not seen the amendment yet, but from the hearing... [LB450]

SENATOR ASHFORD: Trust me. It limits it to theft. [LB450]

JOHN LINDSAY: Oh, I will assume that. Kathleen Neary, who has testified on this bill in past years, was here to testify, but... [LB450]

SENATOR ASHFORD: You mean this has been here before, Senator Lindsay? It's not my idea, is that what you're saying? [LB450]

JOHN LINDSAY: I suspect these notes are...but she had to go pick up her kids so I'm kind of working from her notes. But I would tell you the general thing that I think we do have to remember is that the fact that if you look at a case when somebody gets a bad reference, what the hurdles are that that person has to overcome under current law in order to recover anything. The first hurdle, and it's not inconsequential, is to find a lawyer willing to take the case. Lawyers are in the business of making money. That's their job. That's what they do. We often hear of the bad side of contingent fees, that lawyers get windfalls. But we don't look at the other side of that, and that is that lawyers, if they don't win, don't get paid. So what lawyers, when they're looking at a case, are looking at, is, can I win this case? Now, one of the prior testifiers said we wouldn't give a reference about a theft unless we had a picture, video, or something like that. Showing that video or that picture to an attorney who's handling that case, the attorney is going to say, ah, not interested in this case, because you can't win. I think that's what is important is to look at, do we have a problem? Kathleen, in her notes, said...and she has testified on this, I think, three times, and she has for the last three or four years, she said every Tuesday and Thursday she reads--like most lawyers do--reads the advance sheets from the Court of Appeals and from the Supreme Court. And in past years, she's reviewed those and said, "found no case" on a bad job reference. Hasn't been a reported case. Looked again this year. Hasn't been a reported case. So it gets down to the question of, what is the problem that's trying to be solved? And I think it's come out with some of the questioning, is that it's a perception that's trying to be solved and not an actual problem. A final thing is, truth is a defense, and if you're giving truthful references you aren't liable. That's the simple law. The final thing, and getting specifically to the theft issue, one of the first testifiers talked about a case from northeast Nebraska in which an employee had just left the employment, and the theft stopped. And so under...if this law was passed, that employer would be able to say, hey, that person is a thief, but maybe not thinking that there was a coworker who said, that employee is leaving and maybe it's time I stop this embezzlement scheme, and they're going to blame the person that just left because I'm protected from any liability in that case. And that's exactly the type of case I think that this would... [LB450]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR ASHFORD: You're finished. No, I'm just kidding... [LB450]

JOHN LINDSAY: No, actually I was... [LB450]

SENATOR ASHFORD: You can sum up. (Laughter) You can sum up. [LB450]

JOHN LINDSAY: I was finished, but I'd be happy to answer any questions. [LB450]

SENATOR ASHFORD: Thank you, John. Any questions? No questions. We're going to have to start strictly enforcing this light system. [LB450]

SENATOR LATHROP: Beginning with this... [LB450]

KEN MASS: Senator Ashford, members of the committee... [LB450]

SENATOR ASHFORD: (Laugh) Beginning with the opponents. Go ahead. [LB450]

KEN MASS: Am I at it? [LB450]

SENATOR ASHFORD: Go ahead, Ken. [LB450]

KEN MASS: Senator Ashford, members of the committee, my name is Ken Mass, M-a-s-s, representing the Nebraska AFL-CIO and here today in opposition to LB450. This bill has been introduced a couple times, and we've always been on the opposition side of it, where giving immunity to an employer is almost a license to steal away the employee's maybe good record where they worked at and looking for perspective employment at a new employer. Personally, coming from an industrial setting at a plant in Omaha, Nebraska, we had several employees that were good employees. Came to work, did their job. For whatever reason they left the company on their own accord or were terminated for whatever reason. Seeking employment at a new employer. I could be the best employer in the world, but I didn't have a good relationship with my supervisor, my boss, and that supervisor was liable to put anything in my record they wanted to put in there. And the employer I worked for had two records. They had a company record and they had an employee record. Now, I could see what was in that employee record, but I couldn't see what was in that company record, and all my years I worked there that file just kept getting bigger and bigger and bigger. So what I'm saying, the good old boy club still exists. It always will exist. And as you have the modern age of electronics, they can find out exactly what they want to find out about me. And yes, there's probably some employers that won't hire me for what's in that record. But it exists now and it goes on now. We don't need to give immunity to employers to pass on possibly false information about me to them. I would say to the individuals that are worried about stealing, if they would pay their employees more money they probably wouldn't steal from them. But anyway, that's all I have to say. If you have any questions

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

I'm free to answer them. [LB450]

SENATOR ASHFORD: Thanks, Ken. Any questions? Thank you. Neutral? [LB450]

BRUCE RIEKER: My name is Bruce Rieker, R-i-e-k-e-r. My fourth time here. And Senator Chambers, I am representing the Hospital Association. But since the last time I was here I was adopted by Jim Otto. And so...(laughter). [LB450]

SENATOR LATHROP: Spell that O-t-t-o? [LB450]

BRUCE RIEKER: O-t-t-o. Okay. I have often wondered how you could testify in a neutral capacity, and originally, before learning of the amendment, we would have probably testified in support of the bill with a few concerns, but now I feel very comfortable in appearing before you and testifying in a neutral capacity if this is the way you go. Senator Chambers, you asked who would be protected or what would be the harm if this bill is not put into place? And I'm talking more in the broad sense. Last year, there was a person named Charles Cullen who was sentenced for capital murder. And this person had worked at several hospitals. And because of the code of silence that they were not sharing his bad conduct, he admitted to killing nearly 30 people, but he was convicted of 13 of them. Seven of the people that he killed were victims in Pennsylvania and New Jersey, and they were people that had either investigated, fired, or forced him to resign. Now we are not condoning the code of silence, however we do believe that in this case...and it seems to me that one of the great interests of this committee is protecting the patient or those that cannot protect themselves. Because of the Cullen case in Pennsylvania, the healthcare professionals and the public demanded a change. Most of the concerns that they had to that point were defamation lawsuits, and some of them gained a great deal of notoriety. And like I said, we're not here to deny that the culture of silence arose. However, we believe that, at least in the medical arena, the Cullen case has changed the way we're headed. They created in Pennsylvania what's called Act III, which grants immunity from civil liability to employers who provide information about a current or former employee's job performance to the perspective employer, much the way the legislation in its original introduced form was before you, as long as the information is provided in good faith. There is a legal presumption of good faith, which can be rebutted only by clear and convincing evidence. And I know that that is a steep standard in this. To prove bad faith requires two things. The employee must be able to show that the employer gave false information, and the second part is that the employer is at fault. Again, we recognize that this is a substantial burden. This is something that you would have to deliberate and debate if this is the direction you want to go. Some of the folks in Pennsylvania wanted the law to go further. They wanted complete immunity. To that end, they put together a working group. And what that working group is currently working on is what they call a service letter. And this service letter requires that a checklist that outlines the type of work performed, the duration of employment, the nature of the employee's

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Transcriber's Office

Judiciary Committee
February 21, 2007

separation from employment, and the information about reasonably substantiated incidents involving violence, threat of violence, abuse, or neglect could also be included. Delaware, they also have worked on this in Delaware, Pennsylvania and Delaware, as well as New Jersey, so there are three states that are working on this fairly closely in proximity to each other. Delaware law requires the employee...may I continue? [LB450]

SENATOR ASHFORD: Briefly, but... [LB450]

BRUCE RIEKER: Okay. [LB450]

SENATOR ASHFORD: ...we can get the information from you, Bruce. We'd like to... [LB450]

BRUCE RIEKER: Delaware law requires that the employer fill out a form that he or she must present to the employee, and the employee has the opportunity to respond to that. And that the third step of the Act III legislation requires that that is the employee's response is duly noted before any of that information could be shared. So if there is a dispute between the employer and the employee about the facts of this, it would be included in that particular information that would be shared. And... [LB450]

SENATOR ASHFORD: I'm going to ask you to sum up, Bruce, because we're... [LB450]

BRUCE RIEKER: Yup, that's it. I'll stop there. [LB450]

SENATOR ASHFORD: Thank you. Any questions for Bruce? [LB450]

SENATOR LATHROP: Only that I would like to see the statutes from Delaware. [LB450]

SENATOR ASHFORD: Right. [LB450]

SENATOR LATHROP: These three states that have a checklist and they do it in a written form and give the employee a copy. [LB450]

BRUCE RIEKER: I will get that for you. [LB450]

SENATOR LATHROP: I'd like to see it. [LB450]

BRUCE RIEKER: Part of it is in statute, part of it's in a working group type of effort right now. Some of it is not in statute, but I will get that information for you, Senator. [LB450]

SENATOR LATHROP: Okay. [LB450]

SENATOR PIRSCH: Do you have other states or are those the only ones who are going

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

to (inaudible)? [LB450]

BRUCE RIEKER: Those are the only three I know about so far. I did not do a 50-state analysis, but we did come across these and felt it was very interesting to the debate for us. [LB450]

SENATOR ASHFORD: Thanks, Bruce. Good information. Yes, Senator Chambers. [LB450]

SENATOR CHAMBERS: If the employer is the actor and we are looking at a good faith standard, why should not the employer have to prove good faith by clear and convincing evidence instead of placing a harmful act, and the one harmed has to prove by clear and convincing evidence that what was done was inappropriate? That seems backward to me so I'll put it to you this way: Why should it not be incumbent on the employer to prove good faith, if the information given is false, by clear and convincing evidence that it was indeed in good faith? [LB450]

BRUCE RIEKER: Well, I reported to you what we have read about, but I will say this: I agree with you that the preponderance of the evidence or the burden of proof is on the one making the accusation. [LB450]

SENATOR CHAMBERS: Okay. That's all I have, "Mr. Otto." (Laughter) [LB450]

SENATOR ASHFORD: Thanks, Bruce. Thank you. Any other opponents? Neutral? You're testifying neutral. [LB450]

BRUCE REIKER: Neutral. [LB450]

SENATOR ASHFORD: Any other testifiers? Thank you. I'll waive closing. [LB450]

SENATOR CHAMBERS: Good for you. (Laughter) [LB450]

SENATOR ASHFORD: Brad Ashford, Legislative District 20. I'm here finally to introduce LB606. For many years I've worked, and as I did when I was in the Legislature before, on mediation legislation. The Parenting Act was a piece of legislation that I did with a number of other senators and I think it's been successful. In Douglas County, the Parenting Act, which requires mediation or allows for mediation in child custody cases, is a mandatory process. And Lorin Galvin is here and I think can talk about that. We have mediation centers around the state. Working with Senator Landis, who is really the inspiration behind the mediation centers. It was a great experience and we have testifiers here, a testifier, to talk about the mediation centers. But very quickly, what LB606 does is provides that a court may order mediation and sets forth the criteria by which the mediation may be ordered. It does not require mediation, but it does make it a

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

bit more of an option in a civil case that mediation be looked at as an option. Why would we need this legislation? Can't judges do it anyway? That's a good question which I will answer. The answer is in talking to the bar and to some of the, well, the Supreme Court specifically, about this issue, there is some question some judges have as to whether or not they should or can even order mediation. And what this does is I think just sort of ratchets it up a level that says that as a policy of the state that mediation is a solid policy, that judges ought to consider it, they ought to give litigants an opportunity to go through the mediation process, and it provides a 90-day process by which mediation can be undertaken. Obviously mediation doesn't require an agreement. Mediation is a process of trying to reach an agreement. It's not arbitration. Arbitration is like a court proceeding where an arbitrator or someone who is arbitrating the case makes a decision for the parties. In this case the parties themselves make the decision for themselves. I think it's a powerful process. I've been involved in it and it's an amazing process in my mind. It doesn't work always work. And I know Senator Lathrop, I know, and Senator Pirsch, both attorneys, have I'm sure dealt with this, and I'm sure Senator Lathrop has in his practice, so there are other experts than myself. But I certainly am a strong supporter of this legislation and the whole concept of mediation as a way of settling disputes, not necessarily saving costs, but settling disputes, which I think is an important thing. So I would urge that we advance this bill, LB606. [LB606]

SENATOR LATHROP: Any questions for Senator Ashford? I have one, if I can ask? [LB606]

SENATOR ASHFORD: Yes. [LB606]

SENATOR LATHROP: If a district court is going to order a mediation in any type of case, whatever it might be, are they going to send them over to a particular mediator? Is there a state office of mediator? Or are those people, will they then be bound to hire a mediator? [LB606]

SENATOR ASHFORD: That's a good question. I think that we've thought about addressing that in this bill. There are cases where individuals do not have the means to pay for a mediator. They can go to the dispute resolution centers. There are six across the state and those are the centers that Senator Landis is responsible for establishing. And those centers are available for mediation service. [LB606]

SENATOR LATHROP: Do they do that for nothing? [LB606]

SENATOR ASHFORD: They do it for nothing. And there may be other ways of dealing with that issue, but...or if they are litigants of means they can simply hire private mediators of which there are several, at least in the urban areas. Maybe not quite so many in the rural areas. [LB606]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

SENATOR LATHROP: The bill seems to allow for one of the parties to object to that process. [LB606]

SENATOR ASHFORD: Yes. [LB606]

SENATOR LATHROP: So if someone objects, what's a district court judge going to do when there's an objection, or what's the standard for saying, okay, you don't have to go? [LB606]

SENATOR ASHFORD: There is not a standard. I think if there's an objection by a party, a mediation becomes almost impossible really, I mean. And I think that there has to be a willingness to mediate realistically, and we could probably clarify that. [LB606]

SENATOR LATHROP: Okay. That's all I had. Any other questions? Thanks. [LB606]

SENATOR ASHFORD: Thank you. [LB606]

SENATOR LATHROP: Proponents of LB606. [LB606]

TIM BUTZ: (Exhibit 20) Senator Ashford, members of the committee, my name is Tim Butz. I'm the executive director of Nebraska Justice Center. We're one of the six mediation centers that you referred to earlier. And I'm here on behalf of myself, but as a result of a conference call among the six centers where we discussed this bill and another piece of pending legislation affecting mediation. And I was asked to make an appearance on behalf of all six in order to save you some time and energy. Senator Chambers earlier was quoting Milton and Paradise Lost. I'll quote Gladstone instead: Justice delayed is justice denied. We're not yet at a crisis in Nebraska when it comes to our courts, but we have the potential for being there. Civil cases are getting bumped further and further down the docket as courts are being stressed by drug prosecutions. And we really need to start looking forward in order to make sure that those civil matters that are kind of the soul of what brings most of our Nebraska citizens to court, get addressed in a timely manner, and mediation provides an option that allows that to happen. Senator Lathrop, you were interested in costs. No one is ever denied mediation services because of an inability to pay. We have a sliding fee scale that addresses income. And if there are people that simply fall below that poverty line so far that they can't afford it, they're not billed a dime. That's made possible because the Office of Dispute Resolution provides us with some subsidy. We also get contracts from the Commission on Public Advocacy, and Nebraska Health and Human Services. So we're able to pool together enough resources that we can provide high-quality mediation services to any citizen that's in need of them. In my written testimony I spell out some reasons why mediation is this great alternative. I think you're all intelligent enough to know those without me going through the list. It's a great process that allows quick resolution of claims. And perhaps the best benefit of mediation is that time after time it's

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Transcriber's Office

Judiciary Committee
February 21, 2007

been shown that when two parties can sit down at a table and solve a problem themselves, they're more likely to be so invested in the resolution of that problem that they actually adhere to the terms of their agreement. When a judge issues an order, and all of you who practice law have had them come into your office with visitation issues or parenting issues of some kind where there's a clear-cut court order, and the other party isn't living up to it. If you solve the problem yourself, you're invested in it and you live by the terms of the agreement. And that's the true value of mediation. [LB606]

SENATOR ASHFORD: Thanks, Tim. Thank you. Any questions of Mr. Butz? Thanks very much. [LB606]

TIM BUTZ: Thank you. [LB606]

SENATOR ASHFORD: Thanks for your testimony. [LB606]

LARRY RUTH: (Exhibit 21) Senator Ashford, my name is Larry Ruth, R-u-t-h, representing the Nebraska State Bar Association. I looked over here for Sally Gordon. She's not there. So now I don't have to read the long letter from Jim Gordon who would have been here had he not had a problem with the fact that you put this at the end of the afternoon rather than the early (inaudible). [LB606]

SENATOR ASHFORD: That's because it's my bill. [LB606]

LARRY RUTH: Yes. Well, I can read it for you, Senator. [LB606]

SENATOR ASHFORD: And I don't want to impose on anybody else. [LB606]

LARRY RUTH: I will just briefly summarize. Jim Gordon, had he been here, would have expressed his strong support for the bill on behalf of the State Bar Association. He's been involved with mediation activities over the years having been the chair of the board of directors of The Mediation Center in Lincoln, and also one of the six mediation centers across the state. I would just ask you to look at his letter. And he points out where when he met with Lancaster County District Court judges and with Omaha district court judges that the question was raised, do we have authority to do this? And it was not a clear-cut answer. So that's what is the reason for the bill. I would just read this last part of the paragraph. (Jim Gordon Exhibit) "As a practicing attorney, as a practicing mediator, and as a caring human being working with people who need to get on with their lives without the additional trauma of having to litigate their divorce cases in open court,"--he does an awful lot of family work--"I ask the Judiciary Committee to vote to move LB606 to General File." It seemed to me to be very consistent with what you've been doing in the past and what the bar and the state has been going for. The Uniform Mediation Act was passed a number of years ago to work in this area, and I think this is a good bill. It does help if you solve your own problems. People adhere to it, like Mr.

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

Butz said. Thank you. [LB606]

SENATOR ASHFORD: Thanks, Larry. Any questions? Thank you, Larry. Lorin. Thank you for spending the afternoon with us. [LB606]

LORIN GALVIN: Chairman Ashford and... [LB606]

SENATOR ASHFORD: We probably could've used some mediation, couldn't we, on some of these things? [LB606]

LORIN GALVIN: I was going to suggest that. Senator Chambers isn't it here so I'll wait until he comes back. My name is Lorin Galvin, G-a-l-v-i-n. By way of disclaimer, I'm a recovering litigator. I was a civil lawyer, a trial lawyer, for 25 years. I currently work full-time as a mediator and I'm the director of the Conciliation Court Mediation Services for the district court in Douglas County. I'm here, however, speaking personally. I'm not speaking on behalf of the Douglas County district court. As the director of the mediation services in Douglas County, we do about 1,200 new divorces every year. We've kept statistics since mediation was instituted in 1994, and almost every year there's roughly 1,200 new cases. Currently we get roughly 1,000 settlements every year out of those 1,200 cases. If you had to try those 1,000 cases, it would take a lot of court time. Out of the 200 cases that we don't settle, we get about 100 cases because the parties just refuse to participate in mediation or settlement, and we get 100 cases where mediation has been attempted but it has failed. Because of this process, we get also a lot more active participation by attorneys in negotiating and settling cases before they get ready to go to court. And I think this rule will encourage that. This rule supports, I believe, the constitutional amendment that was made in Nebraska which authorized mediation, in that the agreement must be voluntary. And as long as you have voluntary agreements, then I believe you meet the constitutional requirements. The rule, the statute allowing the parties to terminate the process, satisfies that. The statute will foster education about mediation. Currently, judges are required to have annual education. Lawyers will soon have to start having annual education mandatory. And I think the mediation process will be fostered in education because of that rule. The thing that we have found in the mediation process is that the parties find that the process is more responsive in terms of time and in terms of costs. Attorneys are finding that the mediation process results in more client satisfaction, and the overall results are results that the participants go forward with the settlements and actually complete the agreements and you don't have as much enforcement difficulty. And with the large number of cases that are occurring in the state, this could help the court system. I would suggest only one change. In line 9, you say the Supreme Court may adopt rules. I think if you just said that courts may adopt rules, then the county court in probate cases, the district court in civil cases, the county court in civil cases, will make the rules, and the Supreme Court will then approve them. And that's kind of the standard process. If you say the Supreme Court makes the rules, then it may be that all these courts are going to wait until the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

Supreme Court makes a rule. And frankly, I don't know if you have enough votes currently on the Supreme Court to make a rule. So that's just the only cautionary note that I would offer. We, in Douglas County... [LB606]

SENATOR ASHFORD: I've been lobbying them, Lorin, and I... [LB606]

LORIN GALVIN: Pardon? [LB606]

SENATOR ASHFORD: Nevermind. [LB606]

LORIN GALVIN: That's all I have, thanks. [LB606]

SENATOR ASHFORD: Any questions of Lorin? Thank you for everything you've done, Lorin. You've done a remarkable job at the Conciliation Court and I really applaud your efforts. [LB606]

LORIN GALVIN: Thank you. [LB606]

SENATOR ASHFORD: Deb. [LB606]

DEBORA BROWNYARD: I'm neutral. [LB606]

SENATOR ASHFORD: Oh, you are? Any opponents? Neutral. Neutral. [LB606]

DEBORA BROWNYARD: Neutral? Because I work for the Supreme Court, you know? [LB606]

SENATOR ASHFORD: Oh, oh, oh. That's right. [LB606]

DEBORA BROWNYARD: So... [LB606]

SENATOR ASHFORD: Oh, is that why you...oh, sorry. I forgot you did. I thought you worked for your--well, I thought you were in charge. Now I know. Go ahead. I'm sorry to... [LB606]

DEBORA BROWNYARD: (Exhibit 21) Senator Ashford, members of the Judiciary Committee, probably last, hopefully not least. I'm here--Debora Brownyard, B-r-o-w-n-y-a-r-d. I'm the director of the Office of Dispute Resolution, which is an office within the Administrative Office of the Courts. I'm here today on behalf of the office to give neutral testimony about LB606. As has been stated before, this bill would make explicit in statutory language that any judge in Nebraska may have the authority, on a case-by-case basis, to refer parties and their attorneys to mediation or dispute resolution. A few years ago, when I first started in this job, I did an informal survey of

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

district court judges and county court judges at their annual summer meeting as to whether they referred cases to mediation, and if so, how often and what types. About half of the judges in the state did refer cases to mediation. About another half, generally speaking, did not. And I asked, if you don't refer cases to mediation, why not? One of the top two reasons that they wrote on this informal survey is that they did not believe they had explicit statutory authority to make that referral. So LB606, it would be to remedy that sense by trial court judges that they need explicit statutory authority. And over the last couple of years, both the Office of Dispute Resolution Advisory Council and the ADR section of the Bar Association have gone forward with this language, and the Bar Association worked with Senator Ashford to put this up for the committee. In my testimony--I won't go through all of it--I do talk a little bit more about what Lorin mentioned about the Nebraska Constitution and the voluntary nature language in the constitution. I believe the bill addresses that concern. So, any questions? [LB606]

SENATOR ASHFORD: Thanks, Deb. Any questions of... [LB606]

SENATOR PIRSCH: Just...it may be a little off track. What was the other reason that they're not? You said it was the second highest reason. What was... [LB606]

DEBORA BROWNYARD: The two...the other reason was that they defer to the attorneys as to whether...they left that question of mediation up to the attorneys. [LB606]

SENATOR ASHFORD: So this is sort of the middle ground. Because it sort of...the judge refers it, and then would still listen to the lawyers and their arguments, but maybe could persuade them to go through mediation. [LB606]

DEBORA BROWNYARD: Yeah, there's more and more attorneys, especially, you know, the newer ones coming out of law school that... [LB606]

SENATOR ASHFORD: Well, they have the mediation courses too, which is good. [LB606]

DEBORA BROWNYARD: Yes. Yeah. Right. [LB606]

SENATOR ASHFORD: Thanks, Deb, very much. Thanks for your testimony. [LB606]

DEBORA BROWNYARD: Thank you. [LB606]

SENATOR ASHFORD: And I would waive closing except to say that I really appreciate Tim's work and Deb's work, and as I said, Lorin's, in taking what Dave Landis put forth as just a real revolutionary way of solving disputes. And without him, we wouldn't have this, so I always like to give him...that and the Qwest Center. He's responsible for two

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
February 21, 2007

things: the Qwest Center and mediation--and other things, but those are the things I was involved in. Thank you very much. I guess that ends the hearing and all the hearings... [LB606]

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Transcriber's Office

Judiciary Committee
February 21, 2007

Disposition of Bills:

LB65 - Held in committee.
LB450 - Held in committee.
LB457 - Advanced to General File.
LB606 - Held in committee.
LB672 - Advanced to General File, as amended.
LB673 - Held in committee.

Chairperson

Committee Clerk