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Judiciary Committee
January 18, 2012

[LB734 LB783 LB790 LB865 LB908]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, January 18, 2012, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB734, LB783, LB790, LB865, and LB908. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Colby Coash; Burke Harr; Tyson Larson; Scott Lautenbaugh; and Amanda McGill. Senators absent: Brenda Council.

SENATOR ASHFORD: Welcome, everyone. My colleagues will be coming in as we get started. Good. Those of you who have been here before, many of you have, you know Senator Coash from Lincoln and Senator McGill from Lincoln and Senator Lathrop from Omaha, from Ralston. And why don't we...we are going to have five bills today. LB734 is the first bill, Senator Schumacher, changing the provisions relating to replevin. And we do have the light system, with the exception of the introducer, so those of you...and many of you have been here, obviously you now understand the light system, but we ask you to follow the green, yellow and red lights. When the light turns yellow you have about a minute to go, so keep that in mind. Why don't we get started. I think we're all...enough of us are here. Senator Schumacher, welcome and proceed with LB734.

SENATOR SCHUMACHER: Thank you, Senator Ashford, members of the committee. I'm told that every introduction in Judiciary Committee starts out with this is a simple matter so I will start out likewise. This is a simple matter. [LB734]

SENATOR ASHFORD: Well, it kind of frames it. [LB734]

SENATOR SCHUMACHER: It kind of frames it, yeah. [LB734]

SENATOR ASHFORD: Yeah. [LB734]

SENATOR SCHUMACHER: It was brought to me by the sheriff of Platte County and it has to do with replevin. Replevin is a situation where somebody complains to the court that somebody else is holding their property or has property that they're entitled to and wants the sheriff sent out to fetch it. And we have two particular statutes that are in play in which there is a lack of clarification, according to what I am told from the folks with the sheriff's department and Sheriffs' Association, which will flesh out the presentation here today on behalf of the promoters of this. Section 25-1095 says that the court will issue an order to the plaintiff that can be delivered to the sheriff, telling him he can have his property back, and command the sheriff to go get it and deliver it to the plaintiff, and then make return by a specific day. Then whoever was writing this was logical and the next section says that specific day to return the paperwork and say, I did it, I got the stuff, or I couldn't find the stuff, will be 20 days after its issuance. That apparently has become problematic in that the time and the logistics involved to go out and fetch some

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stuff, particularly if the stuff is a mobile home in a snowstorm and you need equipment and things like that, that is the reason for this bill. So this thing, bill that we have before us today, simply says 20 days or such other time as fixed by the court. So if the sheriff needs more time because of the nature of the situation or to go fetch the stuff and turn it over to the plaintiff, the judge can say, well, you got 30 days to go fetch the stuff and turn it over, or some other particular time. And that concludes my presentation. [LB734]

SENATOR ASHFORD: A somewhat simple matter, but I...Senator Larson has joined us from O'Neill. And Stacey Conroy is the legal counsel and Oliver VanDervoort the clerk today. So with that, any questions of Senator Schumacher? Very well. Sheriff or no... [LB734]

ELAINE MENZEL: I'm going to intervene, if you don't mind. [LB734]

SENATOR ASHFORD: All right. [LB734]

ELAINE MENZEL: Senator Ashford and members of the committee, my name is Elaine Menzel, M-e-n-z-e-l, here on behalf of the Nebraska Association of County Officials, and today I would just like to record the support of our association for LB734. Last fall, our legislative committee was brought this issue by the sheriff that will be testifying after me, and I would just ask to defer questions to him as to the specifics of it, so... [LB734]

SENATOR ASHFORD: Okay. Thank you. [LB734]

ELAINE MENZEL: Thank you. [LB734]

SENATOR ASHFORD: Any questions? No. Sheriff, welcome. [LB734]

JON ZAVADIL: Senator Ashford and committee, good afternoon. LB734 was introduced by Senator Schumacher on behalf... [LB734]

SENATOR ASHFORD: Just give us...just for the record you got to give us your... [LB734]

JON ZAVADIL: Oh, Jon Zavadil, Platte County Sheriff...was introduced on behalf of the Platte County Sheriff's Office and basically what it deals with is extending the time period that the sheriff has to make a return on the replevin and order of delivery. Currently, the statute states that it has to be returned within 20 days of issuance, and in trying to fulfill all the requirements of the statute, such as serving the individual, getting appraisers to appraise the property, getting a bond, seizing the property, giving the property to the plaintiff, trying to do all of that within 20 days is extremely difficult. And what brought this to light was recently we had one from a law firm from out of state and it was on a trailer house. It was not during a snowstorm, like Paul said, but the individual

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was a truck driver so it took us about three days just to find him to get it served. And on the order of delivery, the law firm had a take-possession date that was way beyond the 20 days of issuance as prescribed by the statute. And so conferring with the county attorney at that time, it was decided that we would follow the 20 days listed in the statute instead of the date listed on the order of delivery. And so in order to do that, the plaintiff had to turn around and file another order just to take possession of the property, because when the 20 days were up, when we did our return, he had still not taken possession of the property. And so basically the wording that is being changed in LB734 is just to give more time to accomplish what is prescribed by the statute. [LB734]

SENATOR ASHFORD: Thanks, Sheriff. Any questions of the sheriff? Senator Lathrop. [LB734]

SENATOR LATHROP: Can I ask how many people are going to testify? Because I'm not sure I'm going to direct my questions to the sheriff if he's the last person. [LB734]

SENATOR ASHFORD: Do we have...is anybody else here on this bill? [LB734]

SENATOR LATHROP: Anybody from the county court? Okay. Then I do have a couple of questions. Sheriff, I've done a replevin a long time ago and so I don't remember who signs these. Obviously, if it's an order, it's signed by the court. But the date, normally, by statute is supposed to be 20 days and this would allow the court, is that...is that who's going to extend the date beyond 20 days? [LB734]

JON ZAVADIL: By statute now it cannot be extended beyond the 20 days. [LB734]

SENATOR LATHROP: Okay. And if we adopt this proposal by Senator Schumacher, would it be the county court judge that would say, instead of 20 days, let's make it 30 days? [LB734]

JON ZAVADIL: Well, when the order of delivery would be drawn up, it would list the date that the plaintiff is to take possession, so it would list the 20 days or a later date. And if a later date was listed, then we could go by that date instead of having to stick strictly to the 20 days. [LB734]

SENATOR LATHROP: And the date...the date, if it were later than 20 days, that date would be a date that would be put into the order by the county court judge... [LB734]

JON ZAVADIL: Correct. [LB734]

SENATOR LATHROP: ...or typically the county court judge. [LB734]

JON ZAVADIL: Correct. [LB734]

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SENATOR LATHROP: Is that going to be done at some hearing where both sides have an opportunity to be heard? [LB734]

JON ZAVADIL: I can't answer that question. I don't know. I believe that... [LB734]

SENATOR LATHROP: I was kind of concerned that you wouldn't be able to. Well, maybe I'll bring it up later on in the day. [LB734]

JON ZAVADIL: I think right now the way it's done is the plaintiff's attorney draws up the order of delivery and they put the stipulations in, and then present it to the court and the court just basically signs off on the order of delivery. [LB734]

SENATOR LATHROP: Okay. Maybe I'll ask Senator Schumacher in his close. But thank you. [LB734]

SENATOR ASHFORD: Thanks, Sheriff. I think that's it. Thank you. I guess we have one more. The Bar Association is this coming up here? [LB734]

KATIE ZULKOSKI: Good afternoon, Senator Ashford, members of the committee. My name is Katie Zulkoski, Z-u-l-k-o-s-k-i, testifying on behalf of the Nebraska State Bar Association. We do support this bill. Senator Schumacher brought this to our attention earlier this fall and the attorneys on our legislation committee looked at this and thought this made good sense. This change would be an appropriate way to address how 25-1095 and 25-1096 were not necessarily aligned in current law. [LB734]

SENATOR ASHFORD: Okay. Any questions? I see no questions, Katie. Thank you. Paul, do you have any closing or maybe you'd like to comment on Senator Lathrop's question? [LB734]

SENATOR SCHUMACHER: Thank you, Senator Ashford. I think I've got the answer. [LB734]

SENATOR LATHROP: Maybe if you can, can you walk us through a replevin? The idea is you bring a replevin action because somebody has property that the plaintiff...that belongs to the plaintiff. [LB734]

SENATOR SCHUMACHER: Right, and... [LB734]

SENATOR LATHROP: Could be a car, could be a locket,... [LB734]

SENATOR SCHUMACHER: Could be just about... [LB734]

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SENATOR LATHROP: ...some stuff from a live-in arrangement, something like that. [LB734]

SENATOR SCHUMACHER: ...any personal type of property. And I'm not sure whether you or I did one long ago, but I'll try to remember. The general procedure is somebody believes... [LB734]

SENATOR ASHFORD: Well, Senator Wightman is here. I'm sure he has the answer if we could ask him. [LB734]

SENATOR SCHUMACHER: Okay. You believe somebody has something of yours. You file a petition with the court saying, hey, Judge, somebody, the defendant, has got something of mine and won't give it back; please have the sheriff go get it for me. The defendant in that case is served with normal service of summons so there's notice, there's a hearing, and the judge listens to both sides duke it out as to whether or not...who owns the property and who's entitled to it. If the judge concludes that the plaintiff is entitled to it, then that part of due process is fulfilled at that particular time and the step is, well, who's going to go get this? And at that particular time, the sheriff is ordered to go get it unless something can be worked out peaceably that the property is turned over. When that happens, there's a 20-day fuse on that. I think most of these cases, at the point where it's in the execution phase rather than the determination phase of the case, what ends up happening is that the plaintiff prepares the documents. Right now the documents or the form document says within 20 days. This would give some leeway for the plaintiff's attorney to say, you know, this is a big thing we're asking the sheriff to go out and fetch and, you know, he isn't going to be able to get it done in the 20 days, probably 45 days is more realistic, and fills in on his form 45 days. And as a practical matter, the judge probably says okay and signs it. The defendant isn't prejudiced in any way because this extends the period of time, doesn't shorten the period of time for the sheriff to go out and do his thing. [LB734]

SENATOR LATHROP: Okay. They can...no matter what window of time, whether it's 60 days or let's say that the court puts 90 days, the sheriff can go out and get it any time during that period of time. [LB734]

SENATOR SCHUMACHER: Any time, right. Right. This, as I understand it, is to give the sheriff a little more administrative flexibility and to take into account that in the process of serving the replevin, giving notice that he's going to be there to pick the thing up, any bonds and other procedures that the sheriff described, gives them some time to get it done. [LB734]

SENATOR LATHROP: What if we're in a high volume jurisdiction like the Douglas County Court and it becomes the practice to put 90 days? Are we going to see the sheriff or the constable, whoever goes out to get it, is this just a...like we don't need as

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many people now and we now have 90 days to get these things instead of 60? [LB734]

SENATOR SCHUMACHER: My guess is... [LB734]

SENATOR LATHROP: It seems like the 60 days is something to make sure the sheriff gets it done in a reasonable period of time. [LB734]

SENATOR SCHUMACHER: The 20 days. [LB734]

SENATOR LATHROP: Or 20 days. Pardon me. [LB734]

SENATOR SCHUMACHER: Yeah, the 20, and the 20 days, I mean in a normal case, if you're going out to get an easy to fetch item, I doubt very much if the plaintiff's attorney, because the plaintiff wants the stuff, is going to put a longer than necessary date in there. [LB734]

SENATOR LATHROP: Okay. [LB734]

SENATOR ASHFORD: Thank you, Paul. [LB734]

SENATOR SCHUMACHER: Thank you very much. [LB734]

SENATOR ASHFORD: Senator Wightman, LB783. And Senator Burke Harr is here from Benson. [LB783]

SENATOR HARR: Dundee. [LB783]

SENATOR ASHFORD: Parts of Benson. Welcome, John. [LB783]

SENATOR WIGHTMAN: Thank you. Good afternoon, Senator Ashford, members of the Judiciary Committee. For the record, my name is John Wightman. This is a simple matter, in keeping with the order of the day, or at least I thought it was when we introduced it. Since then there's been maybe a little concern that maybe it wasn't quite as simple as I thought. I have introduced LB783 at the request of the Nebraska State Bar Association. The intent of LB783 is to provide a new and needed express authority in state law for a personal representative. A personal representative of a deceased individual must have the authority to control or terminate any accounts or message services that are considered digital assets. This power can be limited in the person's will or by court order. Such things as Web sites, e-mail, Facebook, and Twitter accounts did not exist until recently and, as a matter of fact, they don't exist in my home yet, but we hope some of you are more technologically up-to-date. This bill is to address how these digital assets or accounts can be closed or otherwise changed upon the death of the creator of those digital accounts. Personal representatives have broad powers under

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current law but not express or specific authority to close or control digital assets, and that's apparently created a problem in some estates. Attorneys are being asked where in Nebraska law does a personal representative have the authority to terminate this account or have any control over this digital account. LB783 answers this question clearly in the affirmative, as the question should be answered, that the personal representative would be clothed with that power. This bill has attracted the attention of national companies that create digital assets and accounts. We are in the process of working with them just in the last day or two to draft clarifying amendments to this legislation that will correlate this law with their user agreements. As a result, I would ask the committee hold LB783 until these amendments are finalized, because we do assume that there will be amendments coming from these meetings. With that, I would answer any questions you have. [LB783]

SENATOR ASHFORD: And this is sort of the Facebook account? [LB783]

SENATOR WIGHTMAN: Facebook, Twitter, and other Web sites. [LB783]

SENATOR ASHFORD: Okay. Yes, Senator Larson. [LB783]

SENATOR LARSON: Thank you, Senator Wightman. Who is the personal representative? In most cases is that the lawyer or a wife or who exactly is a personal representative? [LB783]

SENATOR WIGHTMAN: Well, I can only speak out in our area that in 90 percent of the cases, probably way higher than that, it's a family member, whether it's a son or a daughter or a spouse, but usually a member of the family. [LB783]

SENATOR LARSON: Usually a member of the family. Okay. [LB783]

SENATOR WIGHTMAN: But I think you get into larger cities and you do have far more corporate personal representatives than we see out there. [LB783]

SENATOR LARSON: Uh-huh. [LB783]

SENATOR WIGHTMAN: That's pretty unusual out in our area. [LB783]

SENATOR LARSON: Why would the personal representative need to conduct or continue a social networking account or like a personal account? I read it, it says to take control of, conduct, or continue instead of...I mean why would they need to do that on a personal account? Why not just terminate? [LB783]

SENATOR WIGHTMAN: Well, chances are 90 percent of these or much higher than that will be terminations, although there might be some continuation to...and that's going

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to be one of the questions is the privacy issue with regard to continuing accounts. Termination, I think there's not going to be much problem with the termination portion of it. But you will be addressed by a member of the Bar Association and I think you'll have at least written objections by members of the national companies, so... [LB783]

SENATOR LARSON: Okay. And that was my question. I mean I can understand the concept of termination but the continuing of either a blogging account or Facebook or Twitter is... [LB783]

SENATOR WIGHTMAN: And I think, as I said, that by far the greater percentage will be terminations, but... [LB783]

SENATOR LARSON: Okay. Thank you. [LB783]

SENATOR ASHFORD: Senator Harr. [LB783]

SENATOR HARR: Thank you, Senator Ashford. Senator Wightman, I know you're on the forefront of technology and know all...(laughter) [LB783]

SENATOR WIGHTMAN: You've noticed that. [LB783]

SENATOR HARR: ...yes, and know all the current apps out there. And I think this is more... [LB783]

SENATOR ASHFORD: Senator Harr... [LB783]

SENATOR LATHROP: Cutting edge, it's all those wireless devices. [LB783]

SENATOR HARR: I'll form this in a question but I think it's really more in response to Senator Larson's previous question. Are you aware, are there apps out there and/or if someone passes away would this bill allow somebody to post that the person on there...the continuation could include this person has passed away and maybe there's an app where the person prerecords what they want said on their Facebook page after they die. Would that be used in that situation? [LB783]

SENATOR WIGHTMAN: It may or may not be able to be, depending upon what we come up with for clarification language I think. [LB783]

SENATOR HARR: Okay. Thank you very much. [LB783]

SENATOR ASHFORD: Okay. [LB783]

SENATOR LATHROP: I just, while you're working on this, I'm thinking of poor Anthony

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Weiner who probably wouldn't want his wife going on to his Facebook page and going through there. [LB783]

SENATOR WIGHTMAN: I could see that. [LB783]

SENATOR LATHROP: So to some extent, we have to be mindful that the decedent may not want the PR to go through their Facebook stuff. They might even be blocked. I'm sure Mrs. Weiner was. (Laughter) [LB783]

SENATOR WIGHTMAN: We hope she was. [LB783]

SENATOR LATHROP: But there are a lot of different considerations that I'm sure you'll have the... [LB783]

SENATOR WIGHTMAN: Yeah. [LB783]

SENATOR ASHFORD: Thank you, Senator Wightman and Senator Lathrop,... [LB783]

SENATOR WIGHTMAN: Thank you. [LB783]

SENATOR ASHFORD: ...for that compelling question and answer. Katie is up. [LB783]

KATIE ZULKOSKI: Good afternoon, members of the committee. My name is Katie Zulkoski, Z-u-l-k-o-s-k-i, testifying in support of LB783. We'd like to thank Senator Wightman for introducing this on behalf of the Bar Association and undertaking more of an interesting discussion than we anticipated at the beginning of this. We do support this bill. This bill came from our real estate probate and trust section. The attorneys that work closely in this area with the personal representatives, this was their suggestion. This has come up across the country. The language in this bill comes from Oklahoma. This bill was passed in Oklahoma last year. We have been working with Facebook on this bill for looking at issues. They have some issues with their service contracts and what their service contracts say you can and cannot do versus what this law would say, and we have been working on amendment language to clean that up. We have since been contacted by other groups who have concerns that Senator Wightman indicated and we have told them that we certainly would work with them and look at language that everyone is comfortable with that we could all move forward on this in agreement. [LB783]

SENATOR ASHFORD: Okay. Thanks, Katie. Any questions? Thanks, Katie. Anyone else? Senator Wightman, do you wish to close? Okay, that concludes the hearing. And Senator Coash, LB790. [LB783]

SENATOR COASH: (Exhibit 1) Thank you, Senator Ashford and members of the

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Judiciary Committee. My name is Colby Coash, C-o-l-b-y C-o-a-s-h, and I represent District 27 and I'm here to introduce LB790. LB790 is a bill that came out of last month's Judicial Resources Commission hearing that was held on December 12, and I have copies of that hearing for the committee. At that meeting, the commission met to discuss a county court judge retirement in the 5th District of Judge Miller and to discuss whether or not they should fill that vacancy or move it. The commission unanimously decided that that particular vacancy should not be filled and be moved to the 5th (sic) District, which is here in Lancaster County. There were no...it was...during this open forum, there was no opposition from the county judges in the 5th District. They seemed to recognize that their need had changed over the years and Lancaster's had increased, and it was moved and seconded that the vacancy would not be filled and should be filled in the 5th (sic) District, and all voted yes and the resulting outcome of that is LB790, which would statutorily change and add...this isn't adding a judge, it's just moving a current vacancy. And with that, I will take any questions. [LB790]

SENATOR ASHFORD: Thank you, Senator Coash. Any...yes, Senator Larson. [LB790]

SENATOR LARSON: What do you mean their needs have changed... [LB790]

SENATOR COASH: Well, the... [LB790]

SENATOR LARSON: ...in terms of why these rural counties don't need a county court judgeship? [LB790]

SENATOR COASH: Every so...on a frequent basis there is an analysis of caseloads and how many cases are trudging through the county court system and district court system. And so they use that as a marker to decide how many judges they need per caseloads. And the caseloads in that particular district have gone down because of some of the demographics in that judicial district. [LB790]

SENATOR LARSON: And why Lancaster and not Douglas? [LB790]

SENATOR COASH: In the packet that I think was handed out by...you should have, there is some information there about priority system regarding caseloads versus how many judges, and Douglas County certainly does need judges. And what the commission looked at was the effect of missing a judge in Lancaster County when they only have 6 versus the effect of adding one to Douglas County which has 12. So that was a factor that the Judicial Resources Commission used to determine that. They made the recommendation it would go to the 5th (sic) District. [LB790]

SENATOR LARSON: How many judges will District 5 still have? [LB790]

SENATOR COASH: District 5 will have...I'm going to defer that to some testifiers. It will

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go to seven in the 5th. I'm hearing five, five judges. [LB790]

SENATOR LARSON: They'll have five in the 5th? [LB790]

SENATOR COASH: I believe so. We'll clarify that for you in the testimony. [LB790]

SENATOR LARSON: All right. Thank you. [LB790]

SENATOR ASHFORD: Thank you, Senator Larson. Thank you, Senator Coash. Chief, are you...or some... [LB790]

SUSAN STRONG: (Exhibit 2) Good afternoon, Senator Ashford and members of the committee. I'm Susan Strong and I'm a county court judge in the 3rd District, that's Lancaster County, and I can probably answer your questions. The 5th District currently has 6 judges and, according to the weighted caseload study, needs 4.5. You should find I passed out...there's a little...yeah, you're looking at it now but there's a list here of the need and the current number of judges. Like I said, the 5th District currently has 6; they have a need for 4.5, according to the weighted caseload study. The 3rd District currently has 6 and has a need for 8.14 judges, according to the weighted caseload study. During the last five years, in order to help out with the caseload in Lancaster County, Judge Rouse from the 5th District, who's in Seward, has been coming to Lincoln three times a week every week. We even have an office for him in Lancaster County where he's been sitting basically as a Lancaster County Court Judge to help with our caseload. That's why it makes sense for us to now make that temporary situation more permanent by transferring a judge from the 5th District to the 3rd District. If you're concerned about Douglas County, I think they would also agree that we have the most need for an additional judge at this time. If you look at the pure number of cases filed in 2010, Lancaster County had 66,170 cases filed. That means for each of our judges, we're responsible for over 11,000 cases each. In Douglas County, they had a total of 110,000 cases filed; they have 12 judges, so their caseload per judge is at 9,239. Even if you give us a 7th judge for Lancaster County Court, that would split the 66,000 by 7, we would still have over...you'd have 9,453 cases per judge, which is still over the amount that Douglas County Court Judges currently each handle. Are there any questions? Senator Larson. [LB790]

SENATOR ASHFORD: Senator Larson. [LB790]

SENATOR LARSON: When you do the caseload study, do you take in the fact, you know, mileage that the judges in rural Nebraska are having to travel, all of that, or is this just purely number of cases? Because I mean it's a lot easier for a judge in Lancaster County to get to work than somebody who has to drive 50 to 75 miles before they hear a case. And, yeah, they might hear less cases but... [LB790]

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SUSAN STRONG: It certainly is. I understand your point and that was why, I believe, that they did the weighted caseload study. So the figures I've given you are...we have a need for two additional judges not only by the weighted caseload study, which does take those factors into account, such as travel, types of cases. You know, we did less credit for a traffic case that someone might pay by waiver than we do for, you know, a DUI jury trial. So they've taken all that into effect in the weighted caseload study. That study as well as just the pure numbers of the annual cases filed show that we need an additional two judges. And we can certainly tell you about our experiences in the courtroom that that is definitely the case. [LB790]

SENATOR ASHFORD: Judge, how many jury trials do you have? Do you know that? How many jury trials do you conduct in Lancaster County on an annual basis? [LB790]

SUSAN STRONG: Well, I'm not sure we have those figures. For civil I can tell you that we do conduct about 15 jury trials per year. Those are usually two- to three-day jury trials with...normally automobile. [LB790]

SENATOR ASHFORD: Are those mostly drug or alcohol? [LB790]

SUSAN STRONG: Those are more automobile accident cases. [LB790]

SENATOR ASHFORD: Oh, okay. [LB790]

SUSAN STRONG: I don't do the criminal DUI cases that Judge Yardley does, and she might have those figures for you. [LB790]

SENATOR ASHFORD: Yes, Senator Larson. [LB790]

SENATOR LARSON: What factors were taken into the weighted caseload study? I read the cover sheet and...but like what were all the factors in the case study? I don't see any documentation of what exactly was taken into account besides the number of cases, from the study that has been given me. [LB790]

SUSAN STRONG: That's a good question and I'm not sure that I can answer that because I wasn't on that committee, but I do know that they took the type of case into effect, you know, whether it's a case that doesn't even need a hearing or a trial or it's a case that's going to take, you know, a year to two years to resolve with a jury trial at the end. [LB790]

SENATOR LARSON: Yeah, I was just asking because, I mean, you said that things like the mileage and stuff was taken into account and I couldn't find it and I was just...was wondering if you did know what actually was taken into account besides cases. [LB790]

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SUSAN STRONG: I know that was one of the factors... [LB790]

SENATOR LARSON: Okay. [LB790]

SUSAN STRONG: ...as well as the type of case. [LB790]

SENATOR LARSON: All right. [LB790]

SUSAN STRONG: And I think all...at that time, and this was maybe...this was maybe...this predates me so that's why I'm having trouble with it. This is maybe six or seven years ago that they started doing the weighted caseload study and they had a committee and then they had judges record their time on each case, and they weighted those cases accordingly. So I think it's fairly accurate. [LB790]

SENATOR ASHFORD: Do you do any...I'm sorry, Senator Larson, are you... [LB790]

SENATOR LARSON: Yeah, I'm done. Thank you. Sorry. [LB790]

SENATOR ASHFORD: Do you do any of the felony IVs in Lancaster? Do you felony IV cases in county court in Lancaster County? [LB790]

SUSAN STRONG: We don't. [LB790]

SENATOR ASHFORD: Or are there any filed in...? [LB790]

SUSAN STRONG: There are some filed but we have an agreement with our district court that they handle those cases at this time. [LB790]

SENATOR ASHFORD: Okay. [LB790]

SUSAN STRONG: So we'll just do the preliminary hearing. [LB790]

SENATOR ASHFORD: Okay, so that with the passage of that bill a couple years ago, there hasn't been any change particularly in expanding the... [LB790]

SUSAN STRONG: No, probably one of the reasons is because... [LB790]

SENATOR ASHFORD: ...capacity. [LB790]

SUSAN STRONG: ...we just couldn't handle the additional cases. [LB790]

SENATOR ASHFORD: Right. No, no, I understand. I'm not critical. I'm just wondering. [LB790]

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SUSAN STRONG: Yeah. [LB790]

SENATOR ASHFORD: And...okay. Okay. Yes, Senator Lathrop. [LB790]

SENATOR LATHROP: Just a couple questions. What counties are we taking this judge from? York? Seward? I don't have a...did this come with a map? [LB790]

SUSAN STRONG: Yeah. [LB790]

SENATOR LARSON: Yeah, it's right under your folder, Steve. [LB790]

SUSAN STRONG: Yeah, it's Boone, Nance, Merrick, Hamilton, Platte, Polk, York, Seward, Butler, Colfax, and Saunders. [LB790]

SENATOR LATHROP: And is it Judge Rouse that is currently coming from that judicial district into Lancaster County? [LB790]

SUSAN STRONG: He is. And he's primarily assigned to Seward. Now with the retirement of Judge Marvin Miller, up in Saunders County, which is Wahoo, Judge Rouse also is traveling up there and he's still coming to Lancaster County two days a month. [LB790]

SENATOR LATHROP: Do you anticipate the new spot in Lancaster County, if this bill passes, will Rouse stay in his district and then will...the Governor will appoint somebody from Lancaster County judicial district? [LB790]

SUSAN STRONG: Yeah. I think what will happen is Judge Rouse will continue to travel to Saunders County but not have to come to Lancaster County any longer, and then we'll... [LB790]

SENATOR LATHROP: And then the Governor will appoint somebody from Lancaster County. [LB790]

SUSAN STRONG: Right. [LB790]

SENATOR LATHROP: Okay. [LB790]

SUSAN STRONG: So we'll have just seven judges. [LB790]

SENATOR LATHROP: All right. Thank you. [LB790]

SUSAN STRONG: Uh-huh. [LB790]

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SENATOR ASHFORD: I clearly get the need in Lancaster County. I wonder, with Wahoo's growth and the growth in Saunders County, if we won't be thinking about that again, because if Wahoo is experiencing growth and with its proximity to the metro area and who knows but... [LB790]

SUSAN STRONG: Uh-huh. So far the numbers don't bear that out in effect. [LB790]

SENATOR ASHFORD: Probably not yet but there is... [LB790]

SUSAN STRONG: Right. [LB790]

SENATOR ASHFORD: ...I mean over the next...we can react to that...some other committee can react to that. [LB790]

SUSAN STRONG: It's hard to say. I mean we've been this way for at least five years. The numbers have been fairly consistent so that's why we feel we need the additional resources. [LB790]

SENATOR ASHFORD: Okay. Thanks, Judge. Next testifier. Another judge. [LB790]

LAURIE YARDLEY: I'm Laurie Yardley, I'm a Lancaster County Court Judge, and I tried to get the Chief to go. I didn't...I just want to tell you that I've been a judge for almost 17 years here in Lancaster County and I watched the growth here. It used to be, when I became a judge, the DWI laws were .10. There wasn't such an animal as an aggravated DWI. The only DWI that you had an automatic right to a jury trial was a third offense. That's changed dramatically and it's changed the county court's caseload dramatically. Not only DWI laws, just in general, the laws in general. Again, driving under suspension used to just be for points or driving; now it's because of child support or insurance violations. And it's just impacted the county courts tremendously. I don't think we as a court have just been standing around going, oh, the sky is falling, the sky is falling. I want you know that we've done some things within the court to try to alleviate the problem without having an extra judge. We participated in an efficiency study through the Court Administrator's Office. They did a report. We followed those recommendations. I think it alleviated some of the problems for a while in some of the areas. But again, the amount of litigation we do in Lancaster County I think exceeds some of the other jurisdictions. A couple years ago we really expanded on the DWI jury trials and we were doing 50 and 60 DWI jury trials a year. I was doing some two-week sessions where I would have 7 or 8 jury trials in a two-week session. It's come off...backed off a little bit but we've changed the DWI laws again and I never know for sure how that's going to impact. We still are doing quite a few of them. We do domestic violence, DWI juries. We just I think are a high litigation court for I'm not sure what reason, but we are. We also have the university here and every fall we get 20,000 new

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students who come and test their parents I think a little bit (inaudible) Lancaster County. We have seven or eight Saturdays, we're the third largest city in Nebraska, and a few of those individuals imbibe in some alcohol and it causes problems. So with that, I am going to ask that you change the judicial districts and decide there's a vacancy and transfer it to Lancaster County. [LB790]

SENATOR ASHFORD: And I think, Judge, you make a great point. I know this committee has really struggled over the...in the last 20 years, the expansion especially of the...and Senator Harr has taken a special interest in DUI laws and the suspension. Utilizing suspension as a penalty for these various other behaviors has thrown, you know, public defenders, prosecutors, and judges into this massive increase in cases, seemingly without a decrease in what they're trying to prevent from happening. And that's no fault of the court's. So I do, I think you make...and I know this committee is very cognizant of that. I wish there was a way we could, on some of these things, we could wave a magic wand and go back 20 years and say, you know, do you know what you're doing. So...but with that, that's a good point. Any other questions or comments? Thanks, Judge. [LB790]

LAURIE YARDLEY: Okay. Thank you. [LB790]

SENATOR ASHFORD: Chief, are you...? [LB790]

MIKE HEAVICAN: The Chief is here. I'm Mike Heavican, the Chief Justice of the Nebraska Supreme Court. [LB790]

SENATOR ASHFORD: Lightning strikes when the two branches come in such close... [LB790]

MIKE HEAVICAN: Right. I don't have a lot to add. I think you've heard a lot about the statistics and so forth. I would note that the Nebraska Supreme Court is fully supportive of this particular transfer and it has been through, obviously, through the Resources Commission. The Resources Commission has anticipated this transfer or a similar transfer for some time, given the really excess of judges in the county court in the 5th Judicial District. If you look at the numbers, they're really more than one judge over capacity there. We think that the transfer to Lincoln is the most appropriate place to transfer. And I would note that the Resources Commission passed this recommendation unanimously. They are vigorously represented by folks, lawyers from the 5th Judicial District. None of the judges in the 5th Judicial District are opposed to this and they have anticipated it for a number of years. So we would recommend it to you. Questions? [LB790]

SENATOR ASHFORD: Thank you, Chief. I don't see any. Thank you. [LB790]

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MIKE HEAVICAN: Okay. [LB790]

SENATOR ASHFORD: Any other testifiers on...Warren. [LB790]

WARREN WHITTED: I'm Warren Whitted, the president of the Nebraska State Bar Association, and I'm here on behalf of the Bar Association to support this legislation. You've heard the entire arguments. The Bar Association takes a little more global view in that we feel that the proper allocation of judicial resources is critical to the administration of justice throughout the state. The weighted caseload study is a comprehensive analysis of the factors which go into determining where we do and where we don't need additional judicial resources. We all are aware of the budgetary impact of making new judgeships, creating new judgeships, but in this particular instance we have the Bar's Judicial Resources Committee, the Judicial Resources Commission all fully in favor of this change. We believe that it does not adversely affect the administration of justice in the 5th District and will provide much needed relief in the 3rd. And with that, I'll close and support the legislation. [LB790]

SENATOR ASHFORD: Thanks, Warren. Any questions of Warren? Seeing none, good job. Thank you. Any other testifiers on this bill? Seeing none, Senator Coash. [LB790]

SENATOR COASH: Well, thank you. I'll just wrap up briefly just to clarify a few things. In the 5th District, it will go down from six to seven judges; in the 3rd District it will go from six to five (sic). This is really putting in statute, as a practical matter, what is really occurring already, as Judge Yardley mentioned. Judge Rouse is currently already spending three days a week here in Lancaster County. He has an office. That's where he is for the majority of his time. This would make that move permanent and allow the Lancaster County district to appoint their own judge as full-time. Really only adds two days a week, as a practical matter, to caseloads, because the Chief and the judges have already identified this was a need and, therefore, reallocating one judge from the 5th to the 3rd three days a week. So this just makes this a, as a practical matter, a temporary to permanent position that requires legislation to do so. Thank you. [LB790]

SENATOR ASHFORD: Thanks, Senator Coash. Thank you. And I guess the one thing I would say though, I think this...we go through these things quite quickly, we have them every year, but this issue of this enlargement of cases, because of some of these new punishments that have been enacted over the last 25, is a real issue for our state. And I'm not sure I have the answer for it, I know I don't, but it is putting tremendous strain on the courts. And I commend the county court in Lancaster County for their work in this matter. So thank you. Senator McGill. [LB790]

SENATOR MCGILL: Thank you, Senator Ashford. Fellow members of the Judiciary Committee, I'm Amanda McGill and represent District 26. I appear before you today to introduce LB865, which is a very simple matter, seriously. I'm bringing it at the request

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of the Lancaster County Board of Commissioners. This bill is simple in both its content and its goal. The bill would allow individuals to waive their compensation as a juror if they so desired. Currently, individuals are compensated at a rate of \$35 per day plus mileage at the legal rate. Obviously, with longer cases and more days, the compensation becomes more substantial, but in other cases with a one-day trial jurors may just choose not to accept the payment. It is essential to note that this is an optional, not required, option and, as such, would leave it in the hands of our citizens to decide. Right now the counties are looking for creative ideas to bring in at least little bits of revenue after we cut some of our funding to them in the last year, and this is one of the small tweaks that they've brought to me to introduce to try to at least voluntarily capture a little additional revenue if someone chooses to. The chief administrative officer for Lancaster County is going to follow me up here so he can answer any questions. Otherwise, thank you for your time. [LB865]

SENATOR ASHFORD: Thank you, Senator McGill. Any questions? Seeing none, thank you. [LB865]

SENATOR MCGILL: Thanks. [LB865]

SENATOR ASHFORD: Proponents? Okay. [LB865]

KERRY EAGAN: (Exhibit 3) Good afternoon,... [LB865]

SENATOR ASHFORD: Good afternoon. [LB865]

KERRY EAGAN: ...Chairman Ashford and members of the Judiciary Committee. My name is Kerry Eagan. I'm the chief administrative officer for the Lancaster County Board of Commissioners. Thank you for the opportunity to provide information on LB865, and thanks to Senator McGill for introducing it on behalf of the county. The concept of allowing jurors to waive their statutory fees was suggested to us by Troy Hawk, who's the court administrator for the Lancaster County District Court. From prior experience, Troy was aware that in other jurisdictions individuals were allowed to waive the fee for jury service. In fact, Troy indicated he had once done that himself in San Antonio, Texas. LB865 would enable this practice in Nebraska. Last fiscal year the county spent just under a quarter of a million dollars on juror fees and mileage, about \$245,000. Certainly it's hard to predict how many jurors would choose to waive their fee and, quite frankly, the savings would probably not be substantial. However, any savings when you have obligated costs is worth pursuing and we're looking under every rock for savings these days. Moreover, codifying this process I think would be a suitable way to recognize civic-minded individuals who are willing to help us keep our costs down while still fulfilling their duty to society to serve on juries. So thank you and I'd be happy to try to answer any questions. [LB865]

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SENATOR ASHFORD: Yes, Senator Harr. [LB865]

SENATOR HARR: Would anything currently prevent them from just not cashing their checks? [LB865]

KERRY EAGAN: No, there wouldn't. But this process though, number one, would be a recognition in the statutes and, number two, would save us the expense of issuing a check or...because the way it works now is the court will send the information to our jury commissioner, who's our elected commissioner, and then the checks would be sent out. They could not cash the checks or they could donate it back, but all that would involve administrative expense on the front end. This would short-circuit all that because they would probably sign a piece of paper at the time saying that I wish to waive my fee, and would indicate in the mailings to them that they would have that right as well. [LB865]

SENATOR HARR: And what percentage of people don't currently cash their checks? [LB865]

KERRY EAGAN: I don't have that information right at my fingertips. It's a small percentage, but there are some that do not cash them. But there is a cost every time we issue a check. It's, I think, when I testified previously, it was about \$5 to issue a hard copy for a paycheck versus 5 cents for an electronic version. And we are trying to go electronic, so, yeah, there could be some savings there. But there is definitely a cost. [LB865]

SENATOR HARR: Okay. Thank you. [LB865]

SENATOR ASHFORD: That's a great idea, very creative. I'll bet you get more people not taking the money than you think, it would be my thought. [LB865]

KERRY EAGAN: Yeah. [LB865]

SENATOR ASHFORD: Good job. Thanks, Kerry. [LB865]

KERRY EAGAN: Well, thank you. [LB865]

SENATOR ASHFORD: Any other testifiers? [LB865]

ELAINE MENZEL: I'm Elaine Menzel, it's M-e-n-z-e-l, here again and I want to appear on behalf of the Nebraska Association of County Officials. I'm appearing in support of the legislation, LB865. And as Kerry testified, this bill would potentially impact counties favorably since it allows jurors to waive compensation for service as a juror. There is a provision on page 3 of the legislation that adds real property or real estate to allow a delinquency. We would be okay with eliminating that language because my

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understanding is there were some objections that arose later...or earlier this morning. So any questions, and I would be glad to try to answer them. [LB865]

SENATOR ASHFORD: Any questions of Elaine? Seeing none, thanks, Elaine. Any other testifiers on this bill? Senator McGill, do you wish to close? [LB865]

SENATOR MCGILL: I'll waive close. [LB865]

SENATOR ASHFORD: Okay, that closes the hearing. The last hearing of the day, I know, Senator Lautenbaugh, you had another bill. Are you still involved in that bill? [LB865]

SENATOR LAUTENBAUGH: Yeah. [LB908]

SENATOR ASHFORD: Why don't you go ahead and let's introduce the next bill and then you may have to go back to your other bill I suppose. [LB908]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman, members of my committee. My name is Scott Lautenbaugh from District 18. I brought this bill for a very simple purpose. As I understand why the Commission on Public Advocacy was created, it was to provide indigent defense in areas where there may not be enough local attorneys or there may not be a public defender that is accustomed to handling the most severe, if you will, of criminal cases, and to relieve the burden on those counties that can somehow be bankrupting almost if there's a protracted and difficult case and the counsel needs to be hired. This bill would simply allow the portion of the indigent fee to be retained by Douglas County as they provide their own public defender's office and they have what I would describe as a very vigorous criminal defense bar that they do hire in cases of conflict or as needed. And so there really is not a purpose, if you will, for the Public Service Commission (sic) in Douglas County. I think there will be testifiers behind me that can shed some light on how often they've been in Douglas County and substantiate what I'm saying, that basically Douglas County is already paying its own freight for its own system. I'd be happy to answer any questions you might have. [LB908]

SENATOR ASHFORD: Senator Coash. [LB908]

SENATOR COASH: Thank you, Chairman Ashford. Senator Lautenbaugh, would this bill, if it were enacted, would it preclude Douglas County from accessing the commission if they so wanted to? [LB908]

SENATOR LAUTENBAUGH: You know, that's a good question, Senator Coash, and it is not drafted to make it clear that Douglas County then would not be able to use the Commission on Public Advocacy, but I could certainly see that as a rational amendment to this to make it clear that if they're not contributing they would also not be benefiting.

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[LB908]

SENATOR COASH: All right. Thank you. [LB908]

SENATOR ASHFORD: Yes, Senator Harr. [LB908]

SENATOR HARR: Thank you, Senator Ashford. And thank you, Senator Lautenbaugh, for introducing this bill. I guess I have a couple questions on this bill. Do you know what percentage Douglas County spends on conflict defense...criminal defense counsel? [LB908]

SENATOR LAUTENBAUGH: I may defer that to a representative from Douglas County because I don't know the answer to that percentagewise or even dollar amountwise. [LB908]

SENATOR HARR: And do you know how many cases the Commission on Public Advocacy hears in Douglas County currently? [LB908]

SENATOR LAUTENBAUGH: It is my understanding that it is a very, very, very small number. I don't want to say it's... [LB908]

SENATOR HARR: Less than five? [LB908]

SENATOR LAUTENBAUGH: I'm sorry? [LB908]

SENATOR HARR: Less than five? [LB908]

SENATOR LAUTENBAUGH: That's my understanding but, again, there will be other people who can substantiate that with an actual number I believe. [LB908]

SENATOR HARR: Thank you very much. [LB908]

SENATOR ASHFORD: I don't see any other questions, Scott, if you need to go ahead, go back. [LB908]

SENATOR LAUTENBAUGH: I'll stay for a bit. [LB908]

SENATOR ASHFORD: Okay. Any...how many testifiers do we have for this bill? Okay. Let's go with the proponents. Rick Kubat is first. [LB908]

RICK KUBAT: Good afternoon, members of the Judiciary Committee. My name is Rick Kubat, that's K-u-b-a-t. I'm the assistant Douglas County manager in Douglas County and am here today to speak on behalf of the Douglas County Board of Commissioners.

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Senator Lautenbaugh got into the issue of what the intent for the Commission on Public Advocacy and why they were created. I want to talk real fast about how they're funded. Under Nebraska Revised Statute 33-156, a \$3 fee for every court filing in county or district court in the state of Nebraska is used to fund the Commission on Public Advocacy. When court costs are waived, and they often are for indigent defendants, counties still have to pay those fees and those court costs to the state. LB908 is not intended to be a referendum on the quality of services provided by the Commission on Public Advocacy. What LB908 does is to bring to your attention that Douglas County residents are footing a substantial portion of the commission's budget and yet the county "seldomly" benefits from its services. We've estimated that Douglas County and its litigants contribute roughly \$400,000 to the commission's budget. The Commission on Public Advocacy's offices and lawyers are located here in Lancaster County and it is my understanding that a substantial amount of the commission's caseload is derived from Lancaster court appointments. I believe there exists a good working relationship between the Lancaster judiciary and the Commission on Public Advocacy. Douglas County is fortunate to have a well-respected public defender's office and a rather large pool of experienced criminal defense attorneys on standby ready to take court appointments on the most complex of criminal cases. If the Commission on Public Advocacy were to take appointments in Douglas County, you're talking about two hours of travel time, an hour to get to Lincoln and back, as many members of this group knows because you're from Douglas County. I've never heard the Douglas County judiciary complain about a lack of qualified criminal attorneys. At the same time, the county's current economic condition, bills submitted on criminal cases are always scrutinized to ensure that scarce public funds are utilized to its fullest extent. In summary, the Commission on Public Advocacy should continue to serve Lancaster County and the rest of the state. LB908 is a request that court fees paid by Douglas County and Douglas County litigants be returned to their place of origin to help offset our own county's indigent defense costs. [LB908]

SENATOR ASHFORD: Okay. Any questions of Rick? Yes, Steve. [LB908]

SENATOR LATHROP: If this were to pass, where would the money go? Let's say, what do we take, the three bucks? [LB908]

RICK KUBAT: Three dollars, I would see it going one of two places. It would either go to generally subsidize Tom Riley's public defender's office or it would go directly into the general fund with the intended purpose of helping district court and juvenile court pay for their court-appointed counsel costs. [LB908]

SENATOR LATHROP: Do you expect that Tom Riley's office or criminal defendants in Douglas County will see more money for their defense or will this simply be absorbed by the Douglas County Board? In other words, let's say...and I'm going to make up a number, let's say it's \$200,000 and we say we're going to earmark that for Riley's office.

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Then does the county board take \$200,000...pay \$200,000 less from the general fund to run Riley's office? [LB908]

RICK KUBAT: That's a great question, Senator Lathrop. And to be honest with you, I don't know how the Douglas County Board would look at those funds... [LB908]

SENATOR LATHROP: Okay. [LB908]

RICK KUBAT: ...that are now available to help serve the public defender's office. [LB908]

SENATOR LATHROP: Does the bill simply say that Douglas County will get the money? [LB908]

RICK KUBAT: That's correct. [LB908]

SENATOR LATHROP: And then we have to trust that it will be spent on criminal defense. [LB908]

RICK KUBAT: Used in the appropriate fashion. And you know, working with the Douglas County Board, I think that issue can be addressed to make sure that these funds are specifically earmarked for those purposes. [LB908]

SENATOR LATHROP: Okay. Thank you. [LB908]

SENATOR ASHFORD: Thanks, Rick. Seeing no other, I don't think there's any other questions. Next testifier. [LB908]

DAN STOCKMANN: Good afternoon, members of the committee. My name is Dan Stockmann, that's S-t-o-c-k-m-a-n-n. I'm a private attorney in Omaha, practicing predominantly in criminal defense work. I'm here today because I am often appointed by the Douglas County and Douglas County District Court bench on conflict cases that arise from Douglas County, and I'm here simply to offer some testimony with regard to the support of LB908. I, too, believe that the legislative intent behind the Commission on Public Advocacy was to ensure that criminal defendants in rural counties would have sound representation in serious criminal matters. I'm here to say that in Douglas County we have, I would guess, a pool of probably 20 to 25 competent criminal defense attorneys who handle the conflict cases that arise from Douglas County. I personally handle or have been appointed to handle any type of case ranging from misdemeanors all the way up to serious violent felonies and homicide cases, all on an appointment basis from Douglas County. Any case that I have had with Douglas County I have never had a problem in terms of getting extra resources, if necessary, from the county in terms of investigation or experts. The clients that I've had, and I believe the clients that are

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represented by that pool of attorneys in Douglas County, have, if necessary, the funds from the Douglas County District Court bench to hire or investigate the cases, hire experts and do whatever they need to do to soundly represent the defendants in those particularly heinous-type cases. On average, I think that the Douglas County bench pays out about \$1,100 per felony case. That would include the low-grade Class IV felonies all the way up to homicide cases. Homicide trials tend to pay out anywhere from \$10,000 to \$40,000, depending on the length of the trial. But again, I'm simply here to offer testimony or support to the idea that we have a competent and good pool of criminal defense attorneys in Douglas County. I can't speak to the numbers of cases that the Commission on Public Advocacy handles in Douglas County, but I don't think, given the numbers of attorneys in Douglas County who handle these cases, that there's a need for them. [LB908]

SENATOR ASHFORD: Okay. Any questions of Dan? Seeing none, thanks, Dan. [LB908]

DAN STOCKMANN: Thank you. [LB908]

SENATOR ASHFORD: Any other proponents for this bill? Opponents? [LB908]

JAMES MOWBRAY: Senator Ashford and members of the Judiciary Committee, my name is James Mowbray, M-o-w-b-r-a-y. I'm chief counsel for the Nebraska Commission on Public Advocacy and have been so since February of 1996. Prior to 1995, counties in Nebraska were solely responsible for the costs of indigent defense. Because of that, Richardson County almost went bankrupt in trying to cover the legal costs of two first-degree murder cases that occurred in that county. Richardson County was having to borrow money, using ambulances as collateral on the loan. From that, a bill was brought by Senators Vrtiska and Kristensen to change the system and provide counties with financial assistance to cover those costs. In doing so this body, the Legislature, took a giant leap forward by creating the Commission on Public Advocacy. It's obvious you recognized a need for competent counsel to represent indigent citizens of this state who are charged with the ultimate crime and penalty. At the same time this body saw the need for the state to contribute dollars to cover the costs of representation and to save counties over time millions of dollars in property tax relief. That's been accomplished and then some. When you look at LB908, it's a giant step backwards and essentially eliminates my office. The \$3 collected as part of court costs on every case is deposited in our cash fund to pay for our operational expenses. Douglas County contributes about 38 percent of those fees. Therefore, the revenue to my office would be reduced by that amount, which means we simply could not continue to exist. There are four states that contribute less to cover the costs of indigent defense than Nebraska's 5 percent. Two, Utah (sic) and Pennsylvania, contribute nothing; counties pay it all. And in Arizona and Utah they pay about 1 percent. Across the country, including Nebraska, there's an ongoing problem in dealing with the rising costs of

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indigent defense, so there may be a bigger problem that lies out there that may need to be addressed regarding the funding of indigent defense. But not only is LB908 the wrong bill to take up such an issue, if it were passed it would make matters worse, not better. Douglas County wants to opt out of using our services because they claim they just don't use our services enough. They talk about that they have competent counsel, and I agree that they do. But when the Legislature passed this bill, it was not to say that only rural counties are to benefit. It was everybody is to benefit, including Lancaster and Douglas County. Lancaster County has chosen to use our services more, not because we have the office here but because they see a need of saving property tax dollars to be used in other areas rather than for indigent defense, and so we've, in the last ten years, represented approximately 720 people in Lancaster County versus 23 in Douglas County. Now again, it's not because that Lancaster County doesn't have competent counsel. They do. They have a number of defense attorneys that are very good and certainly do take some court appointment cases when the Lancaster County office has conflicts of more than one, when we take most of their conflicts. But there are occasions that other lawyers get appointed. So it isn't the fact that the urban areas don't need our services because we do save Lancaster County hundreds of thousands of dollars that they've been able to use somewhere else, and Douglas County would be in the same situation had they appointed our office. Now we have been occasionally appointed, as I mentioned, 23 cases. Some have been postconviction. We're currently representing one defendant in Omaha on a first-degree murder case, death penalty. We're currently representing Carey Dean Moore, and I can tell you right now we've spent about 1,500 hours to date representing Mr. Moore, and that's approximately \$150,000 in savings to Douglas County. But I want to say that the fact that we're not appointed isn't our fault. We stand ready, willing, and able to take cases, to take murder cases in Douglas County. I don't care whether they're two hours away. We have right now in western Nebraska we have a first-degree murder case in Sioux County, Scotts Bluff County, Kimball County, Cheyenne County, Red Willow, and we have no problem driving there and driving back at no cost to the county, and it would be no cost to Douglas County. [LB908]

SENATOR ASHFORD: Jim, I'm going to kind of ask you to sum up and then...only because the red light is on. [LB908]

JAMES MOWBRAY: Well, I understand. [LB908]

SENATOR ASHFORD: I know. I know. [LB908]

JAMES MOWBRAY: But it's a... [LB908]

SENATOR ASHFORD: I know you're passionate about it. I'm not trying to... [LB908]

JAMES MOWBRAY: Okay. [LB908]

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SENATOR ASHFORD: ...I just... [LB908]

JAMES MOWBRAY: Let me give you...all right, but let me give you an example. [LB908]

SENATOR ASHFORD: (Laugh) Okay, because maybe you'll get a question that will allow you to... [LB908]

JAMES MOWBRAY: All right. All right. I'll sum up with this. Let me give you an idea of the impact that we've had in Nebraska over the last ten years in over 170 homicide cases and millions of dollars in fees and expenses that have been saved. Here's where we've been appointed on at least one homicide: Cedar, Johnson, Box Butte, Hall, Cheyenne, Madison, Scotts Bluff, Saline, Kimball, Dakota, Red Willow, Loup, Gage, Sherman, Harlan, Sheridan, Jefferson, Otoe, Platte, Saunders, Sarpy, Cass, Dawes, Pawnee, Hitchcock, Seward, Custer, Thayer, Dawson, and Butler, Thurston, Clay, Fillmore, and Lancaster, and Douglas County. [LB908]

SENATOR ASHFORD: Okay. Senator Lautenbaugh. [LB908]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman. Thanks for coming today, sir. [LB908]

JAMES MOWBRAY: Sure. [LB908]

SENATOR LAUTENBAUGH: Is your office overseen by a commission of some kind? [LB908]

JAMES MOWBRAY: Yes, there are commissioners that are appointed by the Governor. Those names are forwarded by the executive council of the Bar Association. They're all attorneys. They all have criminal defense experience, as well as civil defense or civil experience. [LB908]

SENATOR LAUTENBAUGH: And how often do they meet? [LB908]

JAMES MOWBRAY: Currently, we're now meeting once a year. We've met up to four to five times a year, but right now it's about once a year. [LB908]

SENATOR LAUTENBAUGH: Now I want to understand, you indicated this would eliminate 38 percent of the court fees that you receive. [LB908]

JAMES MOWBRAY: Yes, that's right. [LB908]

SENATOR LAUTENBAUGH: So your only choice would be to cease existing. [LB908]

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JAMES MOWBRAY: Based on the fact that if you look at our number of cases that we have and the geography that we cover, we could not do that same thing with a third less in revenue. [LB908]

SENATOR LAUTENBAUGH: I think you'll concede that's different than we would cease to exist. [LB908]

JAMES MOWBRAY: No, I think we would have to. I don't know how we would be able to do the same thing with a third less than what we're doing right now. [LB908]

SENATOR LAUTENBAUGH: How would you, if Douglas County tomorrow started using you, how would you accommodate all of those cases? If you've done 720 in Lancaster, I have to assume the number for Douglas would probably be double, triple, quadruple that if they started using you at the same rate. [LB908]

JAMES MOWBRAY: They could. And what I have to do, as I do all the time and which the statute provides, is looking at the caseload. And for example, there are times where I turn cases down in Lancaster County. There are times that we're able to take cases. The same would be true in Douglas County. But I can tell you right now, we would have the ability to handle at least four or five murder cases, which again, if you take the numbers that were given here just a minute ago, that's at least \$200,000 to \$300,000 in savings to Douglas County right there. That doesn't mean we couldn't take possibly more cases. It just depends on the overall caseload throughout the office and throughout the state. And as I said, there are times that we turn Lancaster County down. [LB908]

SENATOR LAUTENBAUGH: So if you have the ability to turn down cases, even with a 30 percent cut, 38 percent cut in revenue, you could just turn down more cases, could you not? [LB908]

JAMES MOWBRAY: We could turn down more cases but then we would reach a point where we would lose our effectiveness. Part of our effectiveness is when we have cases, for example, out in western Nebraska, that many cases that we're able to cover each other's cases, we're able to double up. In fact, all of our cases we always have two attorneys at every trial, especially on murder cases. And so that would make it more difficult for us because I'd have to cut staff. If I start cutting staff, then we're not able to do two cases...two attorneys per case. [LB908]

SENATOR LAUTENBAUGH: How many attorneys do you have? [LB908]

JAMES MOWBRAY: There's a total of six, including myself, and I don't carry quite a full...I carry about a half a caseload. [LB908]

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SENATOR LAUTENBAUGH: What is a caseload? [LB908]

JAMES MOWBRAY: Well, it depends on what the cases are, but generally they're not to have more than 4 first-degree murder cases and then they're generally up to around 15 serious, violent felony cases. [LB908]

SENATOR LAUTENBAUGH: So 20 cases. [LB908]

JAMES MOWBRAY: Maximum. [LB908]

SENATOR LAUTENBAUGH: Maximum. [LB908]

JAMES MOWBRAY: When you keep in mind with a first-degree murder case you're generally spending around 1,600 hours per case on that. [LB908]

SENATOR LAUTENBAUGH: And I think you indicated that's the rule for the other five attorneys in the office. [LB908]

JAMES MOWBRAY: Yes. [LB908]

SENATOR LAUTENBAUGH: Do you actively maintain a caseload? [LB908]

JAMES MOWBRAY: About half a caseload. I have currently right now three first-degree murder cases. [LB908]

SENATOR LAUTENBAUGH: Are the court fees your only source of income? [LB908]

JAMES MOWBRAY: Yes. [LB908]

SENATOR LAUTENBAUGH: Do you have any other sources of income then? [LB908]

JAMES MOWBRAY: No. [LB908]

SENATOR LAUTENBAUGH: None at all. Have you ever had a cash surplus at the end of a business year? [LB908]

JAMES MOWBRAY: Yes. [LB908]

SENATOR LAUTENBAUGH: Do you know which years? [LB908]

JAMES MOWBRAY: I think almost every year because I'm efficient in running our office. The one thing that I think could happen, and this is what I've always been fearful of, is if,

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depending on the types of cases, that we run into a situation where we need more money than we're taking in, that that money would be used for that purpose or at some point, and it will happen, that we'll be taking in less money than what we're actually spending in our operations and, again, we would draw down on that cash so we wouldn't have to come and ask to raise the court fee. [LB908]

SENATOR LAUTENBAUGH: Skipping a bit here, going to save some time. Are your attorneys compensated by salary? [LB908]

JAMES MOWBRAY: Yes. [LB908]

SENATOR LAUTENBAUGH: Do they receive state benefits? [LB908]

JAMES MOWBRAY: Yes. [LB908]

SENATOR LAUTENBAUGH: Do you know what your annual budget is? [LB908]

JAMES MOWBRAY: A little over a million. I believe in the fiscal note, I didn't bring that up here, I think it identifies what it is, Senator. [LB908]

SENATOR LAUTENBAUGH: And has that increased over the last ten years? [LB908]

JAMES MOWBRAY: It increased primarily starting in 2003 when we took on two additional attorneys and we lost the federal funding. I'd been receiving grant money from the federal government for two of the attorneys. That Byrne Fund money went away. At the same time, we transferred from being a generally funded office to a cash funded office and we absorbed the two lawyers that were getting federal funds and, at the same time, we eliminated any type of cost back to the county, because prior to 2003 we charged counties one-third of our actual cost. In 2003 that was eliminated so we came...we come to a county not costing anything. [LB908]

SENATOR LAUTENBAUGH: Do you or your attorneys engage in any lobbying activities? [LB908]

JAMES MOWBRAY: Other than what I'm doing right here. [LB908]

SENATOR LAUTENBAUGH: None of them in this? [LB908]

JAMES MOWBRAY: No. [LB908]

SENATOR LAUTENBAUGH: Does the commission prioritize providing civil legal aid versus criminal legal services, or how do you prioritize? [LB908]

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JAMES MOWBRAY: The only thing with a civil...the Legal Services Fund is the other attorneys, only one staff member and myself have anything to do with that. That's again, part of my time is spent in monitoring, reading over the grant requests and reading their quarterly reports, those kinds of things. The other five attorneys and my paralegal have nothing to do with the Legal Aid and Services Fund. [LB908]

SENATOR LAUTENBAUGH: I think you indicated you receive grant requests. [LB908]

JAMES MOWBRAY: We do receive grant requests for the Legal Aid and Services Fund, yes. That's a different fee. [LB908]

SENATOR LAUTENBAUGH: And your office administers that as well? [LB908]

JAMES MOWBRAY: I'm sorry? [LB908]

SENATOR LAUTENBAUGH: Your office administers that as well? [LB908]

JAMES MOWBRAY: Yes, we do. [LB908]

SENATOR LAUTENBAUGH: And I think you may have answered this and I apologize. Do you know how many cases you currently have pending in Douglas County? [LB908]

JAMES MOWBRAY: I think currently pending in Douglas County is three, I think. We get appointed on all DNA cases because statutes mandate that, and if we have a conflict, which has happened in Douglas County, we then pay the attorney who was court appointed. But generally speaking, those are for sure cases that we receive. We do have some postconviction. Like I said, right now off the top of my head, we may have two postconviction cases up there. But I agree, Senator, we aren't used. I'm not...I've never disagreed with that. I have...when some judges have called, like Judge Hartigan, on appointing us on some postconviction cases, I've asked him, you know, why aren't we getting appointed? I don't know. I honestly don't know, but I certainly have never turned any Douglas County judge down on an appointment. Now as I said, we can't handle all of Douglas County's conflicts either, but we can handle the high-end ones. And when the gentleman before, who does private practice, indicated that he hasn't had a problem in obtaining fees for experts, etcetera, and that may be true, I know from my experience when I was in private practice and I had to go to judges and ask them for experts, psychiatrists and stuff, it was very difficult to get judges to go along with it. They'd always want me to use the state's experts and do a great cross-examination. My office is able to provide experts without having to go to a judge because, again, there's no cost to the county. And so I don't have that problem and I wouldn't have that problem in Douglas County. So I'm glad to hear that the judges are doing that, but it's been a problem, I've seen, in other counties and especially when I was in private practice. And that doesn't happen when we represent someone. [LB908]

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SENATOR LAUTENBAUGH: So if I understand your testimony regarding caseloads, you have six attorneys that would have about 20 cases each. [LB908]

JAMES MOWBRAY: Approximately, yes. [LB908]

SENATOR LAUTENBAUGH: So that would be 120 cases. And you have half a caseload, so the entire office has 130 cases. Is that, in round numbers... [LB908]

JAMES MOWBRAY: Open at all times, yes. Now we can handle up to, and we have had up to, 200 felonies in a year, depending on how quickly we open and close them. We have generally always 15 to 20 and sometimes 25 murder cases, again, and we may open and close again in any given period of time. Of course, we handle the direct appeals. We do postconvictions on cases that we didn't...weren't involved. We've been successful in having many cases reversed for ineffective assistance. But I might add we've been in business long enough that every postconviction that's been brought against any lawyer in my office, including myself, no one has succeeded in ever having that conviction overturned by one of my lawyers being ineffective. [LB908]

SENATOR LAUTENBAUGH: I don't have any more questions. [LB908]

SENATOR ASHFORD: Yeah, Senator Larson. [LB908]

SENATOR LARSON: You mentioned a lot of your caseload, you know, that a lot of the focus has been on Lancaster and Douglas County. Roughly, how many cases a year do you handle that are outside of Lancaster, Douglas, and Sarpy County? [LB908]

JAMES MOWBRAY: I would say about, of the 15 to 20 cases, three-fourths are going to be outside of Lancaster and Douglas County. [LB908]

SENATOR LARSON: So in that 720 cases that you mentioned in Lancaster, is that through the lifetime of your organization? [LB908]

JAMES MOWBRAY: Yeah, that's over the last ten years. [LB908]

SENATOR LARSON: That's over the last ten years. [LB908]

JAMES MOWBRAY: Correct. [LB908]

SENATOR LARSON: So 72 cases a year. [LB908]

JAMES MOWBRAY: Right now, to answer your question, for example, right now open cases currently in our office on murder, only first-degree murder, some of these are

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death penalty cases, it's Sioux County, Scotts Bluff, Kimball, Cheyenne, Red Willow, Hall, Platte, Jefferson, Richardson, Madison, Dakota, Saunders, and one in Lancaster...two in Lancaster, and one in Douglas. [LB908]

SENATOR LARSON: Those are your open ones currently. [LB908]

JAMES MOWBRAY: Currently. But as you can see, the vast majority are in the rural counties. [LB908]

SENATOR LARSON: Do you rate...what's the lowest level of case type that you get involved with? [LB908]

JAMES MOWBRAY: Class III felonies. [LB908]

SENATOR LARSON: Class III felonies is the lowest that you'll ever get involved with. [LB908]

JAMES MOWBRAY: Yes. And that's rare. Most of them are Class II and higher. [LB908]

SENATOR LARSON: What...I guess I'm one of the nonlawyers on the committee. What would be considered a Class... [LB908]

JAMES MOWBRAY: Manslaughter... [LB908]

SENATOR LARSON: Manslaughter is a Class... [LB908]

JAMES MOWBRAY: ...would be a homicide that's a Class III felony. But any time when you get above a manslaughter... [LB908]

SENATOR LARSON: But you don't handle the Class IIs. [LB908]

JAMES MOWBRAY: Oh, no, we do. [LB908]

SENATOR LARSON: Okay. It goes III, II, I, yeah; III, II, I, yeah. [LB908]

JAMES MOWBRAY: Right, exactly, but then you start moving up. And we do, do sexual assaults, which are Class IIs. We do robberies, which are Class IIs. We do felony which...kidnappings, which some are Class IIs or they're a IB, which is life. But again, the minimum is a III and that's normally a manslaughter. [LB908]

SENATOR LARSON: Okay. How many of those cases...you mentioned all the cases that you have in rural Nebraska are homicides. Those were the ones that you mentioned right there? [LB908]

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JAMES MOWBRAY: No, we have other cases. I'm only identifying first-degree murder cases. [LB908]

SENATOR LARSON: Yeah. Yeah, first-degree murder cases. How many, of the cases that aren't, you know, the first degree, the Class I felonies, how many of those are from rural Nebraska, or are they usually only using you for the murder cases? [LB908]

JAMES MOWBRAY: No, we have out in Sidney, for example, there is a huge drug problem and there's a very active...well, it's not just Sidney, it's western Nebraska, there's a very active...it's WING, the Western Intelligence and Narcotics Group. They're very active in drug enforcement out there and we do a lot of drug cases that are, again, generally it has to be like a ID, a IC, in other words, a large quantity of drugs. But we do, do a lot of drug cases out west. We do also a lot of sexual assault cases in many counties. In Gage County, for example, we do a lot of sexual assault cases down there. Jefferson County, down in Nemaha, Richardson County we've done sexual assaults. I had up in Dakota County recently a child abuse resulting in death, so it varies. But we do...I would say that it's pretty evenly spread. Even though the numbers in Lancaster sound high, when you look at our total number of cases it really, in the scheme of things, rural Nebraska is represented adequately or more than adequately compared to urban, and I agree with that. I mean I'm not disagreeing with what some people have said, is that I think the driving force behind the creation of the commission was to help protect rural counties from these high-cost cases, but at the same time obviously Lancaster County has seen substantial savings too. So we can benefit the large counties, but we're here to help those small counties. [LB908]

SENATOR LARSON: That's it. [LB908]

SENATOR ASHFORD: Yes, Senator Lathrop. [LB908]

SENATOR LATHROP: Jim, I wanted to ask you, did you say that, in addition, we're talking about a fund of money that finances your office and it comes from \$3 on the filing fee? [LB908]

JAMES MOWBRAY: Yes. [LB908]

SENATOR LATHROP: And is that just in district court? [LB908]

JAMES MOWBRAY: No, it's across the board. [LB908]

SENATOR LATHROP: District and county court (inaudible). [LB908]

JAMES MOWBRAY: It's every filing. [LB908]

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SENATOR LATHROP: So three bucks. Is there another fund that you control (inaudible)? [LB908]

JAMES MOWBRAY: Yes, that's the Legal Aid and Services Fund. [LB908]

SENATOR LATHROP: Pardon me? [LB908]

JAMES MOWBRAY: The Legal Aid and Services Fund. [LB908]

SENATOR LATHROP: And what's the source of the revenue for that fund? [LB908]

JAMES MOWBRAY: A \$5.25 filing fee court cost. [LB908]

SENATOR LATHROP: Are you a pass-through for that? [LB908]

JAMES MOWBRAY: Totally. [LB908]

SENATOR LATHROP: So whatever that \$5 plus filing fee... [LB908]

JAMES MOWBRAY: Yeah, that we don't...we take nothing... [LB908]

SENATOR LATHROP: ...that goes through your office and then straight to Legal Aid? [LB908]

JAMES MOWBRAY: Well, not just Legal Aid. It goes to about 12 civil indigent service providers. Legal Aid is the majority, they get the majority of the funds, but the Catholic Charities up in Omaha, Lutheran Family Services gets money, I'm trying to think who else in Omaha, the clinics, both Lincoln and Omaha. [LB908]

SENATOR LATHROP: Is that entirely up to you or has the Legislature designated how that money is spent? [LB908]

JAMES MOWBRAY: Well, it's up to the commissioners but it's based on a grant application where civil legal service providers send in an application, here's the services we're providing for, you know, basically pro bono or whatever it may be for indigents. A lot of it is immigration services that they're providing. Catholic Charities, you know, helps a ton of immigrants up in Douglas County and we send them about \$100,000. But again, it is all by grant. It's...the grants are approved by the commissioners, which are all attorneys. We have from Omaha, we have three attorneys from the Omaha area, Douglas County area that are commissioners. But we also...there's none of our operation expenses do I take out of that \$5.5. [LB908]

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SENATOR LATHROP: Okay. But I want to talk about the \$3... [LB908]

JAMES MOWBRAY: Okay. [LB908]

SENATOR LATHROP: ...that does fund your office operations. [LB908]

JAMES MOWBRAY: Sure. [LB908]

SENATOR LATHROP: And you've gone through the numbers with Senator Lautenbaugh. Do you end each year with a surplus? [LB908]

JAMES MOWBRAY: Generally, we have I think almost every year. [LB908]

SENATOR LATHROP: And can you give me a typical surplus? [LB908]

JAMES MOWBRAY: I think, roughly speaking, our...over the last several years, our budget has been a little over \$1 million and we've been bringing in like \$1.2 million, so it's about \$200,000 a year. [LB908]

SENATOR LATHROP: What's happening to that money right now? [LB908]

JAMES MOWBRAY: It's in the Treasurer's fund and it's been used by the Legislature on a number of occasions. Probably over the last three years about \$500,000 has been taken out of that cash fund. [LB908]

SENATOR LATHROP: How much is sitting in there now? [LB908]

JAMES MOWBRAY: I believe it's \$1.4 million. [LB908]

SENATOR LATHROP: That's not budgeted for your operations, that's just the accumulation of unused money. [LB908]

JAMES MOWBRAY: Correct. And again, I attribute mostly that to I've been very frugal with our budget and our expenditures. [LB908]

SENATOR LATHROP: I appreciate that. And I'm just trying to understand because Douglas County says where most of the filings happen in Douglas County, or a large share of it is, and the money is leaving Douglas County to go to pay for your office, which is not...doesn't have a huge presence in Omaha or even a big presence in Douglas County, but it's all over the state. [LB908]

JAMES MOWBRAY: But it's available. [LB908]

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SENATOR LATHROP: I got that. [LB908]

JAMES MOWBRAY: Okay. [LB908]

SENATOR LATHROP: If Douglas County started to use your office, how many more cases could you take out of Douglas County before you would say we're full, we have no more capacity, we're using up all the money that comes in off that filing fee every year? [LB908]

JAMES MOWBRAY: Well, here, for example, here's what I would do if I ever...but I've never had to budget for it because we haven't been used. But for example, if Douglas County says, look, we're going to have 10 to 15 murder cases easy on conflicts, because I don't really know how many cases Riley's office has. I mean I can read the newspaper and see all of the shootings up there and there's obviously a lot, and then they also have a lot of conflicts because most of these shootings anymore are gang shootings. So, bing, you've got three defendants, you've got two conflicts. But if I would get a sense of what that may be, I could possibly add someone and still be under or equal to what we take in. But right now, I budget based on the number of cases I've been getting routinely, whether it's from Lancaster, Douglas, or across the state. So what I'm saying is, is if Douglas County could say, look, will you take 10 or 15 of these cases, and I'll sit and figure it out and say, yes, I'll take them. [LB908]

SENATOR LATHROP: I don't know the politics, if indeed it is politics, or why you don't get more appointments out of Douglas County, but it sounds like you're running about \$200,000 more in revenue than you're spending doing the work in Lancaster and all other remaining counties. [LB908]

JAMES MOWBRAY: Correct. I agree. That's a correct statement. [LB908]

SENATOR LATHROP: And if \$200,000...I'm just using that number, if \$200,000 went to Douglas County to pay for the appointment of the lawyers they're using up there in conflicts, what's the downside to that? [LB908]

JAMES MOWBRAY: Currently, it would not hurt my office, and in the future it might. I mean, again, keep in mind we were generally funded, which meant that it was all state dollars that were funding us, and when we switched over the thought was, one, it really will be a court fee where people who are using the courts are paying for it. And that's one I think I want to straighten out, is that the Douglas County residents, although unless...I mean if you get a ticket and you're a Douglas County resident, you're contributing to my office. But if you are a law-abiding citizen and don't get any tickets and aren't sued or sue someone, you aren't contributing a dime to our office. So it is only people that are using the court system. But to answer your question, yeah, I mean that wouldn't hurt us but I'm also worried in the long run what happens when, you know,

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we do start running over just based on raises and benefits increases and those kinds of things. [LB908]

SENATOR LATHROP: Right. I appreciate that. But if Douglas County did what Lancaster County did, you'd be swamped and you'd be back here... [LB908]

JAMES MOWBRAY: Well, I think... [LB908]

SENATOR LATHROP: ...getting another \$1 a filing fee or something. [LB908]

JAMES MOWBRAY: No, I don't think I would. I think I might have to hire someone but I'd stay within our revenue, is what I'm saying. [LB908]

SENATOR LATHROP: Okay. What percentage of the conflicts are you getting out of Lancaster County? [LB908]

JAMES MOWBRAY: I have no idea. I really don't. I mean I have no idea how many cases they conflict out of. [LB908]

SENATOR LATHROP: But you're getting how many cases a year from (inaudible)? [LB908]

JAMES MOWBRAY: Approximately 70 cases a year. [LB908]

SENATOR LATHROP: Seventy. If Douglas County, and I'm going to say Douglas County is twice the size of Lancaster County, that's probably completely wrong, but if you got 140 cases from Douglas County a year, could you do it on the money that you're budgeted? [LB908]

JAMES MOWBRAY: I'm not sure. You mean what we're taking...I mean total? I might be able to. I mean I already have one lawyer that lives up in Omaha and commutes. I mean, as I said, by adding another lawyer, I could probably handle those kinds of cases. But again, I don't...like for example recently with Lancaster County, and again, I'm dealing with a ten-year period of time, and by the way, it's through 2010. It doesn't include 2011. I think it...I don't know whether Judge Yardley is here but she'll tell you that we've actually been having to turn cases down in Lancaster County, especially some of the drug cases and some of the sexual assaults, because our murder caseload here as well across the state, has really gone up in the last 12 months. And so I do make adjustments on none...I mean, my priority is to take a murder case and if I see that all of a sudden we're getting in trouble on being able to take murder cases, then I quit taking the serious felony cases. And so I'm adjusting constantly with the priority to be on the big ticket items. [LB908]

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SENATOR LATHROP: Okay. I will tell you that I'm not sure how this should be reconciled but it doesn't make sense for you to be sitting on a surplus from this \$3 a filing fee and not using it all to provide the services that you provide and Douglas County either isn't using you or isn't getting the money back to pay the people they're using for the conflicts. But...so I think there's a point to the bill and maybe we need to sit down and reconcile, how come you have a surplus and they're still appointing people and paying for them out of the general fund up in Douglas County. It's just my thought. [LB908]

JAMES MOWBRAY: Okay. [LB908]

SENATOR ASHFORD: Senator Larson. [LB908]

SENATOR LARSON: I'll kind of build off Senator Lathrop's. So you're averaging right around \$200,000 a year in surplus. [LB908]

JAMES MOWBRAY: Yes. [LB908]

SENATOR LARSON: And Senator Lautenbaugh's bill is cutting \$380,000 from your budget. [LB908]

JAMES MOWBRAY: Right. [LB908]

SENATOR LARSON: So essentially that's about \$180,000 difference. [LB908]

JAMES MOWBRAY: If the filing fees would remain the same, yeah,... [LB908]

SENATOR LARSON: If the filing fees would remain... [LB908]

JAMES MOWBRAY: ...or filing numbers remain the same, yes. [LB908]

SENATOR LARSON: And the filing numbers. So that's about \$180,000 difference. If you cut out, and you said that your priority is murder cases and I think that's great that you're supplying these services, especially in rural Nebraska, if you were to cut out the third, you know, the Class III felonies and some of the Class IIs, could you still provide the services with your priorities, the murder cases, to rural Nebraska, to Omaha and Lincoln, with \$180,000 less by cutting your caseload that way? You get the concept I'm saying, cutting out the Class IIIs and maybe some of the Class IIs but still provide the necessary services. That way, you know, if somebody needs to use you for a murder case they can. But at the same time, I mean, it's only \$180,000. It really not \$380,000. You can...you get my concept? Is that a possibility? [LB908]

JAMES MOWBRAY: Oh, I think it is. I mean again, trying to run the number,

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hypothetically, I'm not...because, again, I haven't...I'd have to go back and look, okay, how many felonies are we doing that are nonhomicide. But again, I think you have to keep in mind those nonhomicide bills still cost counties. [LB908]

SENATOR LARSON: Oh, I get that they still cost counties money. [LB908]

JAMES MOWBRAY: Right. [LB908]

SENATOR LARSON: And I get that it will still...it might add to the burden to a certain extent but...and, again, I'm not a lawyer, but it's the murder cases that are the big ticket items most of the time. [LB908]

JAMES MOWBRAY: Yeah, absolutely, there's no question about that. [LB908]

SENATOR LARSON: And I want to....I mean...and that was my question. You know it's really, since you're banking \$200,000, it's really \$180,000. If you cut out the smaller cases, maybe you can close that \$180,000 gap much easier than a \$380,000 gap. [LB908]

JAMES MOWBRAY: I know, I totally understand what you're saying. [LB908]

SENATOR ASHFORD: My suggestion would be, I don't know how many other testifiers we're going to have, but this is crying out for some mediation, and we have the president of the bar here. It would seem to me that we have some need in Douglas County. You've acknowledged it clearly. We have need in rural areas, that clearly you provided those services. You take the toughest cases. There's got to be a way of reconciling somehow. Let me just...one basic question: Is it feasible to retain attorneys on an independent contractor basis? Do you have to hire them? Is that... [LB908]

JAMES MOWBRAY: No. No, no, I can do that. I have...no, the statute, when it was...the enabling statute allows me to all sorts of things that I don't do, but I could do it. [LB908]

SENATOR ASHFORD: I mean you could create a series of...you could create a list of attorneys that you feel are competent to handle these tougher, more complicated cases, and you could contract with them through your... [LB908]

JAMES MOWBRAY: I mean I think I could, I haven't looked at it, but I think I could. I understand again what you're saying and I think that's a possibility, yes. [LB908]

SENATOR ASHFORD: I guess my only thought would be there may be some underlying, as Senator Lathrop queried, some sort of underlying whatever, political issue or turf issue, you know, without getting...between Douglas County. And it isn't necessary to get into it. My only suggestion, because this really is an important...this is

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important work that you do and it's important work that Dan does in Douglas County.
[LB908]

JAMES MOWBRAY: Oh, I...no, and that's what I'm saying. Nobody is trying to... [LB908]

SENATOR ASHFORD: Yeah, I mean I think we're all...what we all want to do is serve the people and... [LB908]

JAMES MOWBRAY: Exactly, that's all I'm...I want competent counsel to be adequately compensated... [LB908]

SENATOR ASHFORD: Right. [LB908]

JAMES MOWBRAY: ...and I want the person to be represented. But let me... [LB908]

SENATOR ASHFORD: Right, and I do agree, and I do agree because I was here in the Judiciary Committee and I remember very well year after year the counties requesting help and... [LB908]

JAMES MOWBRAY: But you know in our DNA statute, you've authorized me there, and the reason was, was because when you did that Senator Chambers was afraid...
[LB908]

SENATOR ASHFORD: Right. [LB908]

JAMES MOWBRAY: ...the counties would say, wow, here we go again. [LB908]

SENATOR ASHFORD: Right. [LB908]

JAMES MOWBRAY: So that actually authorizes me, if I have a conflict or, you know, I can't do a DNA case, it says the judge, when they enter their order on fees, that that order is mailed to me and I pay it... [LB908]

SENATOR ASHFORD: Right. [LB908]

JAMES MOWBRAY: ...out of our funds rather than, you know...so I don't even have to be the one appointing the attorney... [LB908]

SENATOR ASHFORD: Right. [LB908]

JAMES MOWBRAY: ...in a DNA case. [LB908]

SENATOR ASHFORD: And you can still allocate resources. [LB908]

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JAMES MOWBRAY: The way the statute is on DNA, that the judge simply says, look, I say I have a conflict, he goes, okay, well, then Lathrop is going to handle it. [LB908]

SENATOR ASHFORD: Okay. [LB908]

JAMES MOWBRAY: And then when he's done he sends his bill to the judge, the judge approves it, mails it to me, and I pay it. [LB908]

SENATOR ASHFORD: I guess just to cut through this, and I...this is...with all the greatest respect for the people here in this room because you do, do great work, is that this has been simmering for a long time and it needs to be somehow resolved and play our strengths, whatever it is. And you know, the bar would be a great organization to try to sort this out for us. But with that, thanks, Jim, for your comments. [LB908]

JAMES MOWBRAY: Thank you. [LB908]

SENATOR ASHFORD: Any further...? [LB908]

JOSEPH NIGRO: Good afternoon. My name is Joe Nigro. I'm a deputy public defender in Lancaster County. I appear before you on behalf of Dennis Keefe, the Lancaster County Public Defender, and our office, and I speak in opposition to LB908. The Commission on Public Advocacy has done excellent work all across the state and provided a huge cost savings to the counties which have taken advantage of this service. Every county can benefit from the commission. It would destroy the system if counties could opt out. The commission was created to keep rural counties from being bankrupted by major cases, to improve the quality of representation of serious criminal cases by providing access to experienced attorneys, and ease the financial burden in all counties from conflict cases. The commission has accomplished these goals, but it has also helped counties such as Lancaster County. The commission has saved Lancaster County hundreds of thousands of dollars in cases which our office had conflicts. Conflicts occur when there are codefendants and our office can only represent one of those codefendants, also in cases where our office may previously be representing someone who becomes a witness in another case, or if we have exceeded our caseload standards. In I think either 10 or 11 years the commission has been appointed, at no cost to the county, in over 700 cases in Lancaster County, including first-degree murder cases where appointment of a private attorney would have cost \$75 an hour. Now Lancaster County also has a number of private attorneys who are qualified to do criminal cases, and we have all kinds of cases where they are appointed on various conflicts, but the commission handles these cases at no charge. And why wouldn't every county take advantage of the commission? It seems to me that's really the question here. The fiscal note does not analyze the harm caused to counties if the commission has to reduce the number of cases it can accept. It will cost counties more

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to appoint private counsel in these cases than to appoint the commission. And obviously, if you take away the funding, you're going to reduce their ability to accept the cases. I also want to say we're one state and allowing counties to opt out of this system would destroy the funding system. It would harm the commission's ability to provide quality legal services to counties in need and it would set a terrible precedent. Excuse me, my pages have stuck together. We don't let counties opt out of having their residents contribute to funding roads or contributing to the State Patrol or other services provided by the state, and if you can make the argument that it can happen in this situation, I mean why can't counties make the argument they shouldn't have to contribute to a variety of things that are provided to all Nebraskans by all Nebraskans? I urge you not to advance this bill and to allow the commission to continue its mission to provide quality legal representation and to save the counties money. Thank you. [LB908]

SENATOR LATHROP: Thanks, Joe. Any questions for Mr. Nigro? [LB908]

JOSEPH NIGRO: Thanks. [LB908]

SENATOR LATHROP: I see none. Thanks for coming down. [LB908]

JOSEPH NIGRO: You're welcome. [LB908]

SENATOR LATHROP: Good afternoon again. [LB908]

ELAINE MENZEL: Hi. Three times. Hope it's not three strikes and you're out. (Laugh) Chairman...well, ex officio Chairman Senator Lathrop and others, for the record, my name is Elaine Menzel. I'm here on behalf of the Nebraska Association of County Officials. And to spell my last name, it's M-e-n-z-e-l. At this time, I'm appearing in opposition to the legislation, LB908, due to the extent that it may impact the Commission on Public Advocacy and the detrimental impact the bill would have on a number of counties that currently utilize the services. The previous testifiers have gone through the history, but I think it's important to point out that this was created in 1995 in large part due to property tax relief measures and because of a fiscal crisis in Richardson County. You could say that those property tax measures would be important and continue to be important to the counties at this time because of past funding and potential current funding that will be depleted from our resources. Our organization has continued to be supportive of the commission and its role in assisting counties with defense and the property tax relief system. If you look at their Web site, it does lay out the mission statement and that is one that we continue to be supportive of. And I think that you can glean some information from that if you have not done so. Again, this mission is one shared by NACO and, therefore, we ask at this time that you oppose this legislation. If it's something that you want further discussions on this legislation, I'm sure our organization would be glad to be a part of those discussions. Thank you. If you have

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any questions, I'll try to answer them. [LB908]

SENATOR LATHROP: Very good. We appreciate your thoughts. [LB908]

ELAINE MENZEL: Thank you. [LB908]

SENATOR LATHROP: Any questions? I see none. Thank you. Any other opponents to LB908? [LB908]

WARREN WHITTED: Members of the commission, my name is Warren Whitted. I am the president of the Nebraska State Bar Association and I'm appearing in opposition to this legislation. I think one thing we must keep in mind as we look at this, as we get down in the trenches of the dollars and cents, is we need to look at the overarching reason why the commission was created, and I think the commission was created to assure that there was competent counsel available throughout the state to represent indigent, criminal defendants before the courts of the state. We heard a number of situations where the lack of such representation cost counties a great deal of money and I think this is a way where all of us, as citizens of the state of Nebraska, regardless of whether we're from Douglas County or Keya Paha County, need to bear that cost, and that's how we do it through the \$3 filing fee. So we are in opposition to the reduction in funding in the allowance of Douglas County to opt out. One other thing that I think we must consider and I think is extremely important to this committee is that filing fees are closely guarded by the Bar Association and by the courts, and it's not the purpose of the filing fee to fund general operations of any of our counties. And I think you heard earlier testimony where in Douglas County, were they allowed to opt out of the \$3 fee, it would go into the county general fund and who knows where it would go from there. There is nothing to assure that it would be used for this purpose. I think that Senator Ashford's suggestion that the parties in interest sit down to discuss this issue and figure out what are the reasons why Douglas County doesn't use the service and see how we can better allocate these resources. I think Jim Mowbray made it pretty clear that he stands ready either through contracting with outside lawyers or hiring additional lawyers to fully satisfy the need and that it's only a question of why, not a question of if there is ability to do it. So the Bar Association stands in opposition to this bill. We'd urge the Judiciary Committee and the Legislature to...not to adopt the bill. [LB908]

SENATOR ASHFORD: I'd just...then I'll give Senator Lautenbaugh...I mean one of the things that I'm having a hard time reconciling here, and I get your...I agree with your point, Warren, is that if the 400...this is not necessarily...I understand Senator Lautenbaugh's point as well, but if this money goes to Douglas County and there still is going to be a need for...there's still going to be conflicts, there's still going to be a need to pay lawyers, say Dan, to represent indigent defendants in a conflict situation. I'm just wondering how. I'm having a hard time reconciling. Whereas, if we get them...if the money goes to the commission and then the...from the commission the money is then

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distributed in some form, to Dan or some competent counsel, it does provide some order to how these cases are processed. And we do get, through that, information about, you know, how the cases are processed, what cases are being tried out there, what cases are being settled, what, you know, where are the...that's the part about the commission I think that's always been valuable, is to be able to get information on where we are in the criminal justice system. But I do think Douglas County has a need to, you know, to be addressed here, and I don't know exactly... [LB908]

WARREN WHITTED: The only comment I'd make to that is that there's got to be a reason why cases aren't being referred and a reason that goes beyond the existence of a competent criminal defense bar. [LB908]

SENATOR ASHFORD: But I'm wondering, what I guess I'm wondering is that even if they were referred and there would be some use of those funds for counsel, you have...I mean the reality is you have a number, 20 to 25 lawyers Dan suggests, that are...work in the Douglas County Court system that are competent criminal lawyers. You know, Dan was talking about the number of cases he has. To me, isn't there a way to get those dollars to those...to that group of attorneys? [LB908]

WARREN WHITTED: I think Jim indicated that,... [LB908]

SENATOR ASHFORD: Yeah. [LB908]

WARREN WHITTED: ...that to the extent there would be someone...a conflict, a conflict about the commission and there were to be an outside lawyer hired, the money is paid and the fees approved by the Douglas County District Court. The bill is sent to the commission to cover. [LB908]

SENATOR ASHFORD: Right. [LB908]

WARREN WHITTED: So there is a way to do that. [LB908]

SENATOR ASHFORD: Right. [LB908]

WARREN WHITTED: I think that your suggestion, mediation, is too strong a term because I'm grossly unqualified to do that, but the idea to get us all around a table is not necessarily... [LB908]

SENATOR ASHFORD: Well, chatting at lunch or something, I don't know. (Laughter) [LB908]

WARREN WHITTED: To get us all around a table would not be a bad idea. [LB908]

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SENATOR ASHFORD: Right. Right. Senator Lautenbaugh. [LB908]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman. And thank you for coming today, sir. Of all the people here from the bar, you're the only one testifying. So should I direct my questions to you or is anybody else following you? [LB908]

WARREN WHITTED: I'm the only one that I know is testifying. [LB908]

SENATOR LAUTENBAUGH: Okay. I'm assuming you're familiar with the Keller decision regarding what mandatory bars can and can't do. [LB908]

WARREN WHITTED: Yes, I'm familiar with the Keller decision. [LB908]

SENATOR LAUTENBAUGH: And is it your opinion that appearing here today complies with that decision? [LB908]

WARREN WHITTED: Yes, it is. [LB908]

SENATOR LAUTENBAUGH: Do you analyze every bill you appear on in that way? [LB908]

WARREN WHITTED: The process that the Bar Association goes through when it is considering legislation is this. Legislation is reviewed...legislation that may come before the Legislature is reviewed by our legislative counsel. It is then submitted to our legislative committee, which is comprised of approximately 40 members of the Bar Association that are selected because of their diversity. So if we have a defense lawyer, we've got a prosecutor. If we've got a plaintiff's lawyer, we've got a defense lawyer. All of this legislation is vetted before this committee. Some of it is sent back to our sections if it needs further study, but all of this legislation is ultimately vetted by this committee. The committee then takes one of three positions. It either takes a position in support, opposition, or no position. And after we do that, the positions of the legislative committee are in the form of a recommendation that then goes to the Bar Association's executive committee, executive council. The executive council then reviews those positions and the positions are then passed on to the house of delegates, which is a representative body of the Bar Association which ultimately makes the determination. So at that point, we have determined on a bill-by-bill basis whether it is germane to our purpose, which is the administration of justice and the furtherance of the administration of justice. If there is a lawyer in the state of Nebraska who is unwilling to have his bar dues used for the purpose of supporting our legislative activities, there is a checkoff. The way the checkoff works is in the upper right-hand corner of the dues statement you check the box that says I do not want my dues used for legislative purposes. Those funds are then segregated into a separate fund and the amount of the segregated funds are deducted from what is paid to our legislative counsel. So those funds, if you, Scott

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Lautenbaugh, elect not to participate in the legislative activities of the Bar Association, your funds will not be used to support that program. That process is in full compliance with Keller and the cases that have been decided since Keller. And so a long answer to a short question is, yes, we are in compliance with Keller. [LB908]

SENATOR LAUTENBAUGH: We may disagree on that, but I think you'll...we don't send the money back if you say I don't want my funds used for lobbying. Members don't get a refund. That's not correct, is it? [LB908]

WARREN WHITTED: Neither Keller nor any of the cases decided under Keller require a refund of dues that are segregated. [LB908]

SENATOR LAUTENBAUGH: And it is your belief you're applying Keller consistently regarding all the bills you appear upon. [LB908]

WARREN WHITTED: It is my belief that the Bar Association is in full compliance with Keller and the cases that have been decided since Keller. [LB908]

SENATOR LAUTENBAUGH: As you know, this has been something that's kind of simmering with me, and since you're here on my bill, I'm just going to say it. I hope...and you must not be, but I hope you're cognizant of the message it sends to me when we have a number of paid staffers and lobbyists here for this entire hearing for this bill and I just wish you'd be a little cognizant of the message you're sending to me and other attorneys, who are forced to pay for the bar, when you have this show of force. Doesn't have to be against one of my bills. I think it is just...it's leading to something that is probably not going to be desirable from the bar's standpoint and I don't feel like you're cognizant of that. That's not really a question so I probably shouldn't be saying it, but I wouldn't be fair if I wasn't giving voice to it. [LB908]

WARREN WHITTED: I respect your opinion, Senator Lautenbaugh. [LB908]

SENATOR LAUTENBAUGH: Thank you. [LB908]

SENATOR ASHFORD: Okay. Thanks, Warren. Any other testifiers? Hopefully not. No. (Laughter) With that, Senator Lautenbaugh. [LB908]

SENATOR LAUTENBAUGH: I'll waive closing. [LB908]

SENATOR ASHFORD: Okay. Thank you. I think we are going to have a little Exec Session, Rich, so why don't... [LB908]