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Judiciary Committee  
January 24, 2013

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[LB3 LB12 LB37 LB45 LB51]

The Committee on Judiciary met at 1:30 p.m. on Thursday January 24, 2013, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB37, LB3, LB12, LB45, and LB51. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Mark Christensen; Colby Coash; Al Davis; Amanda McGill; and Les Seiler. Senators absent: None.

SENATOR ASHFORD: Good afternoon, everyone. We're going to start today with LB37, and Senator Wightman is here to introduce that bill. And this must be a very complicated matter, as Senator Wightman is the introducer of it. So he'll clarify it for us and... [LB37]

SENATOR WIGHTMAN: It must be, because this is the second year I've been back with this bill. [LB37]

SENATOR ASHFORD: So everyone, I'm sure, here I see...I recognize everyone in the room pretty much, so we'll follow the light rule--three minutes. And if you'd fill out the sheets and hand them to Kyle or one of the pages we'll get started that way. John, go ahead. Welcome. [LB37]

SENATOR WIGHTMAN: (Exhibit 1) Okay. Good afternoon, Senator Ashford and members of the Judiciary Committee. For the record my name is John Wightman. Last session I introduced LB783 at the request of the Nebraska State Bar Association. At my request LB783 was not advanced from this committee so that interested parties might work on a compromise. A change in law is needed, and LB37 is a vehicle for change. A change in the law...the intent of LB37 is to provide a new and needed express authority in state law for personal representatives. As most of you would know, a personal representative is a person with the legal authority to wrap up and close the affairs of a person after their death under the probate laws of Nebraska. The personal representatives of a deceased individual must have the authority to close the accounts or message services that are considered digital assets. Under LB37 this power can be limited in the person's will or by court order. As you will learn today, the federal Stored Communications Act may not have contemplated that people die and that a personal representative needs access to stored digital data such as e-mail addresses and e-mail correspondence so that the personal representative can perform their duties owed to the decedent, beneficiaries, and creditors. The possible conflict between federal and state laws must be reconciled. After meeting with the interested parties I would offer AM9 as a compromise. On page 6, line 14, you will find the new subsection (28) to Section 30-2476 that lists the powers of a personal representative. Subsection (28) in the green copy reads as follows: to take control of, conduct, continue, or terminate any account of a deceased person on any social networking Web site, microblogging or short message service Web site, or e-mail service Web site. AM9 simply strikes the

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words "take control of or continue or." Those would be the words that would be eliminated. As amended, subsection (28) begins with the word "terminate." The result of the amendment is that a personal representative would have the express authority to terminate such digital accounts. I am advised that this change in the law would be beneficial to clarify the law for persons administering probate estates. This change can be made at this time. By adopting the amendment the issue of a possible conflict of federal and state law is avoided. More complicated issues involving the access to what kinds of stored information is available is avoided. This is an area where a uniform state law would be beneficial to all of the parties. The Uniform Law Commissioners have recently taken on the task of drafting a uniform law on this subject. This process should be used to discuss the issues and make recommendations on the many access-to-information issues that are raised. It is best to defer further changes to the probate laws on this subject, so that is the reason that we would be taking out the words other than "terminate," so we would be limiting. Last year, when we brought this bill up, we had "take control of, continue, or terminate." But at this time we would be limiting it strictly to termination on the part of the personal representative, and he would be making that decision. So it doesn't have to be terminated but could be by the personal representative. So I would ask the committee to adopt AM9 as a committee amendment and advance LB37. Thank you. If you have any questions I'll try to the best of my ability to answer them, but I am not very computer savvy, so. [LB37]

SENATOR ASHFORD: Don't give us that, John. Senator Lathrop. [LB37]

SENATOR LATHROP: Senator Wightman, I've got a question. I don't think you need to be computer savvy, or I wouldn't be qualified to ask the question. [LB37]

SENATOR WIGHTMAN: Okay. [LB37]

SENATOR LATHROP: On a Facebook account, for example, if I have a business and it's Steve Lathrop, whatever my business is, I have a partner who is...who has...I have a buy-sell with. So that person, who is...whose name is not in the business--it's in my name alone--that person has agreed to buy or pay my estate for my ongoing business, and part of which is the good will is in my name, in my Facebook account, among other places, and the PR would be terminating the account even though it may have some connection to a person who would be buying the business or succeeding me in the business. That could be a problem, couldn't it, if the only thing they can do is terminate the account? [LB37]

SENATOR WIGHTMAN: Well, first of all, I think he's got a contractual arrangement with them, and probably it would...he would still have that ability and would have to. I think he'd be...if it's an account that he was liable on, and I really don't think it would be covered by this section. But that's my opinion. [LB37]

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SENATOR LATHROP: But the PR could come and in just close the account out if we passed this, couldn't he? [LB37]

SENATOR WIGHTMAN: Well, if that's the only account he has. But I can't believe that that's the only way he had that sold that particular business. You know, I think it goes beyond that, and he would still be liable under probate law as it exists today, even leaving this section out of it. [LB37]

SENATOR LATHROP: Okay. [LB37]

SENATOR WIGHTMAN: That's my opinion at least. [LB37]

SENATOR LATHROP: Okay, thanks. [LB37]

SENATOR ASHFORD: Senator Chambers. [LB37]

SENATOR CHAMBERS: And, Senator Wightman, all of this enumeration of various duties, powers, and so forth of the representative, the word "may" precedes, and "may" means that... [LB37]

SENATOR WIGHTMAN: Right. [LB37]

SENATOR CHAMBERS: ...yes or no, but it is not a mandate. So if a set of circumstances arose where any one of these things ought not be done, the representative can make the decision not to do it. Is that correct? [LB37]

SENATOR WIGHTMAN: That's absolutely right, yeah. [LB37]

SENATOR CHAMBERS: Okay, that's all that I have. Thank you. [LB37]

SENATOR ASHFORD: Seeing no other questions, thanks, John. [LB37]

SENATOR WIGHTMAN: Thank you. [LB37]

SENATOR ASHFORD: Are you going to remain? [LB37]

JOHN WIGHTMAN: I'm really planning to go up to my committee meeting on Appropriations. [LB37]

SENATOR CHAMBERS: What did you ask him? [LB37]

SENATOR ASHFORD: Is he going to remain in the room? (Laughter) [LB37]

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SENATOR CHAMBERS: We don't...we're not... [LB37]

SENATOR ASHFORD: I know, I should complete my sentences. [LB37]

SENATOR CHAMBERS: Senator Wightman, as an attorney, I would like your opinion. We're not remains until we croak, right? (Laughter) [LB37]

SENATOR ASHFORD: I knew I had chosen the wrong...anyway, do we have any, I'm sure we do, some proponents of this particular bill? Good afternoon. [LB37]

ANDREW LOUDON: Good afternoon. Chairman Ashford, members of the Judiciary Committee, Andrew Loudon, L-o-u-d-o-n, a partner with the Baylor Evnen law firm here in Lincoln but, most importantly, a proud alumnus of the Seiler and Parker Law Firm of Hastings. Senator Seiler hired me right out of law school, and we're still really good friends, and it's great to see you, Les. I appear this afternoon on behalf of the Nebraska State Bar Association in favor of LB37 at the request of our real estate, probate, and trust law section, which represents over 700 attorneys across the state who, like Senator Wightman, Senator Seiler, and myself, specialize in trusts and estates. Digital assets are an item that are cumbersome when representing a personal representative. I have some personal experiences in that area. Last year an individual client of mine in her early 60s passed away. She was estranged from her husband, who guessed correctly at her Facebook account password and posted inappropriate items on her wall that indicated she was still alive. Now I am a Facebook junkie, and I know how these things work. And, Senator Lathrop, I know that, for Facebook, only individuals are to have accounts, and business should have pages. That's not to say that businesses don't, inappropriately by Facebook standards, have accounts, but they are routinely drummed out if they do. And I think, in answering your question, which was a good one, there should be, as Senator Wightman said, some sort of agreement in writing, whether that's a contract or otherwise, between the business owners as to which individual is in charge of a business account if it's tied to an e-mail. So I think that should be properly addressed within the business entity's documents themselves or a contract amongst the owners. But really this bill would not impact that, in my opinion, but would rather help those of us who are assisting personal representatives to terminate accounts when someone passes away. And that's the authority that you would be granting by passing this legislation. Clearly it is a problem when we...and it's not just Facebook...when accounts with passwords are in play and we don't know what the password is. Good advice to a client is to maintain a list of those passwords and maintain them with your important documents so that your personal representative has those and can properly take care of everything from Gmail to eBay to your Flickr account, your Yahoo! mail, so that things are properly taken care of after death. But oftentimes that doesn't happen, and the personal representative is in a quandary. And it would be helpful to practitioners in this state and personal representatives if they had the authority to terminate an account and easily obtain a court order to that effect that should be respected by

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companies. There are...this is a...am I done? [LB37]

SENATOR ASHFORD: Well, you can just conclude. That's fine. [LB37]

ANDREW LOUDON: Okay. This is obviously an area where a uniform law would be helpful. I know the bar association is not opposed to that. But it would be most helpful to attorneys in this state if we had a law now that gave us some guidance and help when helping our personal representatives. [LB37]

SENATOR ASHFORD: Very well. Any questions? Senator Chambers. [LB37]

SENATOR CHAMBERS: Counselor Loudon, you gave your professional pedigree. Are you any relationship to former Senator LeRoy Louden? [LB37]

ANDREW LOUDON: No, Senator Chambers. He spells his name incorrectly. (Laugh) [LB37]

SENATOR CHAMBERS: Oh. (Laugh) Well said. [LB37]

ANDREW LOUDON: He...there are...those are both...L-o-u-d-o-n and L-o-u-d-e-n are both American versions of the Scottish L-o-u-d-o-u-n, so. [LB37]

SENATOR CHAMBERS: And which one are you? [LB37]

ANDREW LOUDON: I'm an "o-n." [LB37]

SENATOR CHAMBERS: Oh, okay. [LB37]

ANDREW LOUDON: He's an "e-n," but we probably are related somewhere back in the highlands of Scotland, so. [LB37]

SENATOR CHAMBERS: Okay. Now Senator Lathrop had suggested that he's not really up on the use of the computer. Compared to...or these Facebooks and so forth. Compared to him I could be considered a quasi Luddite. I don't want to destroy technology or take away anybody's ability to use it. But it shows, based on what we're doing today, that technology and its ramifications can follow somebody to the other side of the grave. And I think, as you pointed out and Senator...what's his name? Oh, Senator Wightman. (Laugh) See, he had so many different versions of names. No...suggested some kind of uniform legislation would help because I don't think any one person, even one firm, can adequately master all of the laws that might be on state books, at the federal level, rules, and regulations that may be in existence, so I think this is going to be a project in a working state for some time. But in the meantime, something should be done. Now I don't know if you saw a letter that was written by a

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person who is opposed to this, but...and I don't know if Senator Wightman's amendment takes care of that. But are you aware of people who would be opposed to this kind of legislation? And if so, if I were such a person, without stating every point of objection, what would your general response to that be? [LB37]

ANDREW LOUDON: Well, Senator Chambers, welcome back and... [LB37]

SENATOR CHAMBERS: Oh, good to be here. [LB37]

ANDREW LOUDON: You bet. I...that's a great question, and I am aware of opposition primarily based on privacy concerns, which I understand and, you know, am sympathetic towards. I believe that, especially the way that Senator Wightman has opposed (sic) amending this by only giving the personal representative the authority to terminate the account, that that should address those privacy concerns because it is most proper for that account to be terminated at death so that nothing untoward or embarrassing could be posted. And by removing the words that appeared before which would allow them to control or change the account, all that a personal representative could do is shut it down, which I believe addresses the privacy concerns. [LB37]

SENATOR CHAMBERS: Thank you. And the reason I wanted to ask you that question: Once you testify, you can't come back after somebody else did. [LB37]

ANDREW LOUDON: Aha. [LB37]

SENATOR CHAMBERS: But that is a significant issue that was raised, and I wanted you to have an opportunity to address it. [LB37]

ANDREW LOUDON: Thank you, sir. [LB37]

SENATOR CHAMBERS: Thank you. [LB37]

ANDREW LOUDON: Thank you. [LB37]

SENATOR LATHROP: I just have a few questions. [LB37]

SENATOR ASHFORD: Yes, sir. [LB37]

SENATOR LATHROP: Do you know, since you are familiar with Facebook, how long does it take before it just gets taken down because of inactivity? [LB37]

ANDREW LOUDON: Inactivity, it won't be taken down. [LB37]

SENATOR LATHROP: So a Facebook...if the PR doesn't call Facebook and say, take it

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down, you think it will be there...? [LB37]

ANDREW LOUDON: In a...yeah, forever. [LB37]

SENATOR LATHROP: Forever. [LB37]

ANDREW LOUDON: Yeah, absolutely. [LB37]

SENATOR LATHROP: All right. [LB37]

ANDREW LOUDON: Once Facebook is aware or is made aware that someone has died, they will shut an account down is my understanding. I will tell you that when I had the situation I described before, it was helpful that my Lincoln East classmate, Jeff Gutkin, who is an attorney with Cooley law firm in San Francisco that represents Facebook, helped me out and helped us get it shut down. [LB37]

SENATOR LATHROP: Okay, that's an interesting observation. [LB37]

ANDREW LOUDON: Yeah. [LB37]

SENATOR LATHROP: So currently, if you represent a personal representative and, you know, the decedent had a Facebook account, what are the personal...what are you advising the personal representatives to do now? [LB37]

ANDREW LOUDON: Contact Facebook and tell them that the individual has passed away. But they...this is the problem is they are unlikely to listen or to communicate with someone who is not the account owner. Well, the account owner has gone to the other side, and so that's impossible. And so they won't communicate, out of concern for privacy, with someone who is not the account owner. So as a personal representative representing the person who has passed away, that...you know, and standing in their shoes, they can go to Facebook, perhaps even with a court order citing the statute, that says, we have the authority to terminate. [LB37]

SENATOR LATHROP: My question was: What are you doing now? And what I...what you...what I hear you say in answer is, first of all, Facebook will only talk to the account holder. But you would advise a personal representative to contact Facebook and, currently, that is effective in getting it shut down. [LB37]

ANDREW LOUDON: It is, because, in fact, what they do...and in looking at this, they have a form that, if you are aware that somebody has passed away, you can inform them of that, they'll investigate it and, if they determine that someone is, in fact, deceased, they will shut the account down. [LB37]

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SENATOR LATHROP: My second question is: The Uniform Law Commission is looking at this right now and working on this very subject, is that true? [LB37]

ANDREW LOUDON: It is. [LB37]

SENATOR LATHROP: Do you have any idea when they're expected to have their work completed on this subject? [LB37]

ANDREW LOUDON: No, but my guess is that it will be several years before that work is done. And I'm not opposed to uniform legislation, but I agree with Senator Chambers that something needs to happen now, in the interim period. [LB37]

SENATOR LATHROP: Okay, thank you. [LB37]

SENATOR ASHFORD: I don't see any other questions. Thank you. [LB37]

SENATOR MCGILL: Oh. [LB37]

SENATOR ASHFORD: Senator Chambers has one. [LB37]

SENATOR CHAMBERS: Senator Ashford, you know that I like to wrap up things if I can. [LB37]

SENATOR ASHFORD: Yes, sir. [LB37]

SENATOR CHAMBERS: In view of the fact that Senator Lathrop always draws me into things by his comments, when he asked you when you thought that they would be through, Johnny Mathis had a song, "The Twelfth of Never." (Laugh) [LB37]

SENATOR ASHFORD: We may not be on the committee when that happens or, at least, I won't be, certainly. [LB37]

SENATOR CHAMBERS: Or on this earth. [LB37]

SENATOR ASHFORD: Yes. [LB37]

SENATOR DAVIS: Your Facebook page might be though. (Laughter) [LB37]

SENATOR ASHFORD: Yes. Oh, boy. Okay, well, thank you. (Laugh) [LB37]

ANDREW LOUDON: Thank you, Senator. [LB37]

SENATOR ASHFORD: Thanks. Any other proponents? Opponents? Neutral? Come on

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up if you've got...if there's any other testifiers, come on up to the front and we'll... [LB37]

STEVE DeBIANCO: (Exhibit 2) Thank you. Mr. Chairman and members of the committee, my name is Steve DelBianco, D-e-l-B-i-a-n-c-o, and I represent NetChoice. And three of my members are here today. AOL, eBay, Facebook, Yahoo! and Google are among the members, but three others accompanied us out from Washington today. And we're technically here during the opposing segment of testimony, but we're actually only asking that you hold this bill until the Uniform Law Commission finishes its work, which most of us anticipate to be later this year or early next year. However you feel about Ronald Reagan, most people think he said something wise when he said, the seven deadliest words are: We're from Washington, and we're here to help. (Laugh) And we did fly out here from Washington last night, and we really are here to help. And after Senator Wightman introduced the purpose of his bill, I'm really here to help Senator Wightman with his four objectives. Number one, a change in law is needed to address the problem that people haven't thought about what happens to their Facebook account when they die. We agree, Senator Wightman. Senator Wightman said that the personal rep needs access to the accounts, in some ways, to work out the affairs, and we agree to that. Senator Wightman said that federal and state law has to be reconciled, and it isn't today. We agree with that. And he said that a federal...a uniform state law is the best path. And, Senator Wightman, I agree completely with all of that. But with LB37, as amended, it only addresses terminate, which actually doesn't solve any of the four problems that we'd like to help with. In fact, the Uniform Law Commission is addressing that broader set of problems of access and ownership to the account, the privacy issues, the conflict of law, and how things interchange with the terms of service. Terminate alone is, as I said, a solution in search of a problem because all of the services will terminate an account when appropriate proof of death is shown. Now some services though have terms of service that have to be worked out before you just shut down an account. An example would be to complete transactions on an e-commerce site or an electronic payments site. You don't just terminate it until the payments have cleared. Services like Facebook allow me to designate that my account should be memorialized for six months. And if that were my wishes, to memorialize the account for six months, I wouldn't want my estate manager to just, willy-nilly, terminate the account. There's issues where I might want to transfer my account to others in my family or others in my business. And if those things aren't delineated in the will, where would they be delineated? Well, they'd be part of the options I've selected with my service, and they might be even in the terms of service. And I think that the Uniform Law Commission's progress on this is really telling. Between November's draft and the December draft--and we're meeting in three weeks; we're meeting in Washington, D.C. on the next round of the Uniform Law Commission, and my colleagues from industry are all part of these meetings--they changed the language upon which LB37 was originally based. Now that section for personal representative says that the personal representative can take control over digital interests, quote, under applicable law, and, quote, under the terms of any applicable

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and enforceable terms-of-service agreement. So that's an important recognition by the ULC, Uniform Law Commission, that the terms of service matter so much. We in the industry greatly appreciate the fact that Senator Wightman and others have brought this up--it's showing up in other states--because too many Americans were only concerned with, sort of, what happens when I die. And now more and more of them are saying, what happens to my Facebook account when I die? And the ULC draft is currently 18 pages long, and I do think we're moving quickly towards coming up with a solution not just to terminate but also to access to the account, right, and to who owns the digital assets that are in the account, and I think that's the right process. So again I respectfully ask that you hold off for now, let us finish the work on the ULC, where Nebraska is a participant, and hopefully this time next year we've got a bill that's a uniform bill that addresses all of the four problems that Senator Wightman delineated in his testimony. Thank you. I'll take questions. [LB37]

SENATOR LATHROP: Very good. Thank you. [LB37]

SENATOR CHAMBERS: You first. [LB37]

SENATOR LATHROP: No, no, go ahead. [LB37]

SENATOR CHAMBERS: When you read some language that you said would address what Senator Wightman is attempting to address in LB37, I didn't get all of that. Would you state it again? Okay. [LB37]

STEVE DeBIANCO: Senator Chambers, I was quoting from the latest draft from the Uniform Law Commission,... [LB37]

SENATOR CHAMBERS: Right, uh-huh. [LB37]

STEVE DeBIANCO: ...the body that both the proponents have spoken about, and... [LB37]

SENATOR CHAMBERS: Right, I understood that, but the language. [LB37]

STEVE DeBIANCO: Thank you. [LB37]

SENATOR CHAMBERS: Okay. [LB37]

STEVE DeBIANCO: So it says that a personal representative may exercise control over the decedent's interests in digital property to the maximum extent possible under applicable law and--key phrase--and under the terms of any applicable and enforceable terms-of-service agreement. [LB37]

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SENATOR CHAMBERS: Now when you say, enforceable terms of this agreement, what does that refer to? [LB37]

STEVE DeBIANCO: If on...let me give you...for instance... [LB37]

SENATOR CHAMBERS: Is it an obligation on the part of the account owner? [LB37]

STEVE DeBIANCO: The custodian of the account, let's say it's eBay or PayPal or Facebook, that custodian of the account has certain options and obligations that are laid out in the terms of service. For instance, I would not terminate my eBay account if there are still pending transactions yet to be completed, money that has to be paid, goods that have to be delivered. [LB37]

SENATOR CHAMBERS: Now, so that I won't let you say too many things that I might have a question about, if there is money to be paid or goods to be delivered and the person who owned that account is dead, how are you going to enforce whatever you're talking about, where money needs to be paid? Are you going to move against the estate of the person who has died? Is that what that enforceable agreement allows you to do? [LB37]

STEVE DeBIANCO: Senator, each of those would be different depending upon the service, right? Most of them have terms in there that allow transactions to be completed. But I don't want to focus just exclusively on the commerce side because, setting the e-commerce aside, if on Facebook, if I have predesignated my account to memorialize, it's not a money issue. But it says that my wishes are that the account be memorialized for six months and... [LB37]

SENATOR CHAMBERS: But I'm interested in what I'm asking you the question about because you came to be helpful to me, and I'm asking for your help. Now how, if there...are you saying enforceable provisions...do those provisions, as far as enforcement, relate to the person who has died? Does it mean that person has an ongoing obligation for a certain period of time even though he or she has died and, since that person has died, the estate is going to be responsible for continuing to pay whatever amounts were due and owing? [LB37]

STEVE DeBIANCO: Senator, I believe that that question will depend on each account. But if you're in the middle of an eBay transaction and unfortunately passed away... [LB37]

SENATOR CHAMBERS: Could an account say that? [LB37]

STEVE DeBIANCO: The accounts will say... [LB37]

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SENATOR CHAMBERS: If an... [LB37]

STEVE DeBIANCO: ...in their terms of service whether or not the obligations survive your death. [LB37]

SENATOR CHAMBERS: Now... [LB37]

STEVE DeBIANCO: And I believe that when those terms of service are laid out, and you knew that when you entered the account, we wouldn't want LB37 to authorize a personal rep to simply terminate and ignore the terms of service. [LB37]

SENATOR CHAMBERS: Well, I know you wouldn't. But when you started this you said, "applicable law," I believe. [LB37]

STEVE DeBIANCO: And...yes. [LB37]

SENATOR CHAMBERS: So if we do have a law, the law would trump that agreement, wouldn't it? [LB37]

STEVE DeBIANCO: Well, it says, under applicable law and under the terms of enforceable terms-of-service agreement. [LB37]

SENATOR CHAMBERS: No, it... [LB37]

STEVE DeBIANCO: So the way the Uniform Law Commission...they're way smarter than me about this. They say it's under both. [LB37]

SENATOR CHAMBERS: You're too modest. This commission comprises human beings, and you remind me of a product that either McDonald's or Burger King had. It was called a "Smoothie." (Laughter) That's you. But at any rate...and they've...they're not going to send...these big operations that you send...that you named are not going to send a tyro; they're not going to send somebody who doesn't know the terrain, who cannot anticipate the types of questions that are going to be asked, who does not know how to--what is that word?--obfuscate (phonetic)... [LB37]

SENATOR LATHROP: Obfuscate. [LB37]

SENATOR ASHFORD: Obfuscate, I think. [LB37]

SENATOR CHAMBERS: Okay. Sometimes I need help. If we have a law different from what that commission is suggesting, then the law would trump whatever is in one of those agreements, wouldn't it? If the law and the agreement conflicted, then the law would trump, or would the agreement? [LB37]

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STEVE DeBIANCO: Senator, you've pointed out the very problem. I believe that LB37 as written would trump any terms of service that the decedent agreed to before they died. [LB37]

SENATOR CHAMBERS: And now... [LB37]

STEVE DeBIANCO: And that is the problem. We believe the ULC has the right approach of recognizing that not only federal law and state law but the terms of service have to be taken into account. [LB37]

SENATOR CHAMBERS: Now back to what I was trying to ask you. Could there be a debt...and maybe there is a different word that would be more suitable, but...so you understand what I'm asking you. Could there be a debt that survives the person who now is dead and would empower that other entity, whether it's any one of the ones you mentioned who has one of these agreements, to move against the estate of the one who is dead to collect what that person who now is dead would have had to pay were that person still alive? [LB37]

STEVE DeBIANCO: And, Senator, while I don't know of a factual instance where I can cite the language,... [LB37]

SENATOR CHAMBERS: Just general. [LB37]

STEVE DeBIANCO: ...it makes completely good sense to me that the answer is yes because you have transactions that are outstanding, someone has paid money to buy something and you haven't delivered it yet, or you've purchased something and taken delivery and not yet made payment. But those are the kind of finishing up the commercial transactions which would be frustrated by an immediate, blanket termination, the personal representative terminates everything. [LB37]

SENATOR CHAMBERS: Now this language, of which LB37 would become a part, is discretionary. It is "may." Now if the personal representative is convinced that this particular account should not be shut down, that representative is not compelled to do so. [LB37]

STEVE DeBIANCO: You're right. [LB37]

SENATOR CHAMBERS: But if the representative felt that in properly representing the interests of the estate it ought to be shut down, and if by shutting it down it can cut off the hands of certain ones who could reach into that estate and reduce the value of it, then, under a law such as this, the representative could shut it down. And that would be the end of it, wouldn't it? [LB37]

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STEVE DeBIANCO: Senator, as you say, it's permissive of the personal representative, but it's preemptive of the terms of service... [LB37]

SENATOR CHAMBERS: Right. [LB37]

STEVE DeBIANCO: ...that are there. So the...and I...again, the folks at the Uniform Law Commission have revised their approach, and their latest draft says, wait a minute, let's balance this out with the terms of service. [LB37]

SENATOR CHAMBERS: But the Uniform Law Commission doesn't cut much ice with me because they're a group of people who try to see what a majority of them can agree upon. They have to reach a decision about something. And if there are a lot of these good minds working, there is a certain amount of ego involved no matter how objective a person says he or she is. And maybe, for the good of what's being attempted, a certain decision should be taken. But there are enough people on each side to have a split and they cannot arrive at a conclusion, so maybe they will compromise and not adopt what either side feels is really the best. So if they can't get the best and they want something, they will get what they can get. That's the way a commission would work. That's even the way that the King James Bible was put together. [LB37]

STEVE DeBIANCO: Consensus. [LB37]

SENATOR CHAMBERS: These scholars, and some of them were drunks, some were gamblers, some were what would be criminals who could go to jail, but they would vote on what ought to go into the Bible. Now ordinary citizens who read the Bible and take it to be the word of God think that God was directing these scribes and other people in what to write. But many things were a result of a vote and the majority decided what would be there. Now if that can happen...other people say, the Bible. You say tomato, I say to-mah-to (phonetic). I call it the "Bibble." If that can happen with the "Bibble," then certainly this commission could reach decisions the same way. And if I am the personal representative, which I've never been, I would want to do what I think is in the best interest of the estate. And my understanding of the estate would be living people also entitled to take something under that estate. My feeling would be that all of these entities in the commerce area are able to take care of themselves, fend for themselves. And if, compared to all the sources that they have of getting revenue, if my decedent is not going to be required to pay what he or she owes, it's not going to hurt them at all. But, on the other hand, if these giants can enforce their will against those who are to be beneficiaries of the estate, it could be devastating to them. It could have been an unwise decision taken by the decedent to enter that agreement. And had I been representing that person before he or she entered it I would have said, don't do it. But it's having been done. I'm in a position now where I can reduce or eliminate the damage. So here's the question I'm going to ask after all that I've said: Do you think

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some kind of injustice would be worked if the representative is entitled to terminate the account of the decedent? Do you think an inherent injustice is going to be found in that provision? [LB37]

STEVE DeBIANCO: Senator, like the ULC, I believe there is a potential for that, and I believe it has to be balanced with the terms of service. And it isn't just what you describe as claiming on the dollars in the estate. But consider the fact that I may have expressed wishes about transferring control to someone else of an account. I don't want my "DeBiancoFamily@Cox.net" to terminate. I simply want to transfer it to the rest of my family members to continue to use that e-mail account. [LB37]

SENATOR CHAMBERS: How do I know that? [LB37]

STEVE DeBIANCO: It's not a "dollars involved." There's not an injustice involved. It's a simple convenience. [LB37]

SENATOR CHAMBERS: How would I know that? Would that...would I know that from a will? [LB37]

STEVE DeBIANCO: The terms of service, it turns out, that I might have with the cable company or my e-mail service might indicate that I can designate, and I might designate it on some box I type in on the e-mail service Web site. If I had enough foresight, I would have put it in my will. But, golly, I doubt very much that a lot of us electronic media users are doing it in our will. [LB37]

SENATOR CHAMBERS: But the fact that it wasn't in the will is just taking the word of somebody who is going to benefit from it. But I'm asking you, where would the injustice be? If this language, with the amendment that Senator Wightman has offered giving the representative the permission or discretion to simply terminate an account, and we'll presume that the representative is an honest, prudent person,... [LB37]

STEVE DeBIANCO: That's right. [LB37]

SENATOR CHAMBERS: ...and in genuinely considering the best interests of the estate would determine that the account should be terminated, if that person is acting in accord with the ethical standards binding him or her... [LB37]

STEVE DeBIANCO: Um-hum. [LB37]

SENATOR CHAMBERS: ...and would terminate this account, where would the injustice be in a law that would allow that person to behave in such a way when that person's first obligation is to the estate, not to Google, not to Facebook, not to any of these others? [LB37]

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STEVE DeBIANCO: That's right, that's right. So, Senator, I think the potential for injustice is very low. However, there is a high potential to disregard the interests of, actually, the one person we're supposed to be focusing on, the decedent,... [LB37]

SENATOR CHAMBERS: Okay. [LB37]

STEVE DeBIANCO: ...that before they died they set up their account to memorialize... [LB37]

SENATOR CHAMBERS: And I think I'm taking... [LB37]

STEVE DeBIANCO: ...and then we're going to...we're allowing, not requiring, I understand that. We're allowing the personal representative to disregard the wishes of the decedent, if they were actually wishes that were expressed in options that they selected with their e-mail service, with their Web site provider, or with their Facebook page. [LB37]

SENATOR CHAMBERS: Well, I'm willing to do that because I'm more concerned for those who are on top of the ground than those who are under the ground (laughter) because the "Bible" says, the dead know nothing, but the living not only know, they experience and they can suffer. And my job, as I perceive it, is to eliminate suffering wherever I can. And if I have to make a choice between David and Goliath, I will take the side of David. [LB37]

STEVE DeBIANCO: That's great. And, Senator, I would invite you to take that side and, along with the things that Senator Wightman was concerned about--it's access to assets, access to getting divulging of the e-mails--there's a lot of new, giant issues that we have to discuss other than just whether you terminate or not. So whether I have access to your e-mails after you're dead--I'm among the living--whether I have access to your iTunes account and the movies you bought, those are really the issue that have driven the Uniform Law Commission to 18 pages and counting. That's the broader scope of this. It isn't just terminate; it's that access and control and sharing. And that's... [LB37]

SENATOR CHAMBERS: My final question. We could, as a Legislature, amend any legislation that we enact. [LB37]

STEVE DeBIANCO: That's right. [LB37]

SENATOR CHAMBERS: So if something came from this commission that we thought had validity, we could take that into consideration and modify. [LB37]

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STEVE DeBIANCO: Absolutely, absolutely. [LB37]

SENATOR CHAMBERS: But in the absence of that or any other law that I'm aware of that relates to what we're talking about, what kind of provision do you think ought to be in place, without giving me 18 pages, when Senator Wightman has left only possible termination as an alternative for the representative, not controlling, not conducting, not continuing? [LB37]

STEVE DeBIANCO: So, Senator, by dropping "control, conduct, continue, and access," we've failed to address the four problems that Senator Wightman laid out. By leaving "terminate," it becomes the thing about which there is least concern. And the reason there is least concern of terminate is that virtually all of the services, when given proof of death, allow the person providing proof of death to suggest that they terminate the account. [LB37]

SENATOR CHAMBERS: But you... [LB37]

STEVE DeBIANCO: There are options. There are options. [LB37]

SENATOR CHAMBERS: You understand that, as a legislator, I'm not bound by the way Senator Wightman lays out the issue,... [LB37]

STEVE DeBIANCO: No, (inaudible)... [LB37]

SENATOR CHAMBERS: ...just as the Supreme Court is not bound by the way that a plaintiff or a defendant postures the case. In using my judgment, in listening to you, I do have a lot more to think about than I did at first. But I'm not convinced that we should do nothing while waiting for that commission to act. And even though I asked you a lot of questions, I assure you, I was paying attention to what you were saying and, to the extent that I can understand what you're talking about, I think it had great value. But I'm not convinced that we ought to do nothing until that commission finishes its work because I'm not as confident as you are that this will be done. You say it will be done by next year, the work of that commission? [LB37]

STEVE DeBIANCO: Yes. Yeah, my estimate is later this year or early in 2014. [LB37]

SENATOR CHAMBERS: And if your belief is mistaken and it's five years away, then would you agree that maybe we should consider doing something ourselves? [LB37]

STEVE DeBIANCO: The answer is yes, but I would beg to honor, at least, the promise of trying to make the states as consistent as we possibly can because, as you know, all of these services operate without borders, and they serve residents of Nebraska and residents of all 50 states. So it's extremely difficult to have to honor a patchwork of laws,

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especially if they conflict with a federal law and bump into the terms of service. [LB37]

SENATOR CHAMBERS: Well, don't you have to do that when there are countries that say, we're going to shut down this particular service or shut down that one unless you do such and such? [LB37]

STEVE DeBIANCO: Absolutely. That's exactly right. [LB37]

SENATOR CHAMBERS: And some will do the such and such, so they have a patchwork already that they're living under and with, so that's not a persuasive argument to me. But thank you for your indulgence. [LB37]

STEVE DeBIANCO: Thank you. [LB37]

SENATOR CHAMBERS: I appreciate it. [LB37]

STEVE DeBIANCO: Thank you for your questions. [LB37]

SENATOR ASHFORD: Senator Davis. [LB37]

SENATOR DAVIS: You'll have to bear with me. I'm not an attorney, so it gets a little over my head. But, first of all, what companies do you represent again? [LB37]

STEVE DeBIANCO: Senator, I'm not an attorney either. I'm a business guy and a programmer. But the companies that are involved in NetChoice are companies like AOL, eBay, PayPal, Facebook, LivingSocial, Yahoo!. Google is here as well today. [LB37]

SENATOR DAVIS: So a lot of the big Internet players is what we're talking about. You say, provided with proof of death, most of those services will take that down now. So what would that be, death certificate? [LB37]

STEVE DeBIANCO: Proof of death could be the obituary page with a copy that came from newspaper. "Proof of death" is written generally enough that almost all the services will take a look at a piece of paper or something that looks official, try to identify which account that belongs to. So to do proof of death you don't have to know my ID and password. You send in the proof of death, and the service--Yahoo!, Google, or Facebook--will figure out which account that relates to. And then they have...the terms of service, in almost all cases, suggest they will terminate the account. Now some are giving options because terminating a Facebook page when I die is not really what a lot of people wanted to have happen. [LB37]

SENATOR DAVIS: Right. I was going to use that...I'm going to...follow-up question with

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that. But once we get through the uniform process, which I am assuming is the...is a national law and this is...correct? Would we then have to go to... [LB37]

STEVE DeBIANCO: It's a national standard for the states to follow. [LB37]

SENATOR DAVIS: Would we have to go to a global standard? Are we going to have to take that step next? Because the Internet is global. [LB37]

STEVE DeBIANCO: Gosh, God will it, I wish it were so. I really do, Senator. But it isn't, and all of my companies have to operate on a global platform, and we deal with that patchwork issue all the time. [LB37]

SENATOR DAVIS: But we're not going to be looking at a global standard on how to deal with this issue, you don't think? [LB37]

STEVE DeBIANCO: Very doubtful, very doubtful. [LB37]

SENATOR DAVIS: So I have a number of friends who have...I have a Facebook page myself. But I do have a number of friends and relatives who have passed on, and the pages are still there. That is a...when...let's just say that Senator Seiler sent in a death certificate or an obituary on somebody that asked to keep it up, then they would keep that up, Facebook would keep that? Because Facebook is very hard to reach. [LB37]

STEVE DeBIANCO: It would...when you contact Facebook with a proof of death, there are two options: to take the account down, terminate it immediately, in which case it goes dark; and the second option is to memorialize, and for six months this page stays alive, but only friends that you had in life... [LB37]

SENATOR DAVIS: Existing friends. [LB37]

STEVE DeBIANCO: ...are allowed to see it. [LB37]

SENATOR DAVIS: Um-hum. [LB37]

STEVE DeBIANCO: And only friends that you had before you died can post memories, maybe, photos, or funny photos about it. But nobody can get in there and post as if you are still alive, and that lasts for six months. And on day sixth month plus one, it goes dark. [LB37]

SENATOR DAVIS: So does Facebook monitor that at all? A memorialized page, is that monitored by Facebook? [LB37]

STEVE DeBIANCO: By turning off the ability for new friends and turning off the ability

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for posting, I believe that that is monitoring the activity of the page. But I don't think that Facebook actively takes a look at what your friends are saying about you, if that's what your question is, Senator. [LB37]

SENATOR DAVIS: Okay, and then other question then would be: Supposing people have sort of financial-specific questions that might be in an e-mail account that would be necessary for the PR to obtain, how are they going to do that? [LB37]

STEVE DeBIANCO: Under federal law the contents of e-mail cannot be divulged to a third party unless we have evidence of consent from the person who died, from the account owner. Alternatively, if there is any kind of court order/warrant, these companies turn it over immediately. And, of course, if there is an immediate threat to life, in situations like that, these companies will turn over the...divulge the contents. There's a second element to it that says if there's a need...if you needed Gmail, Google, to turn over all the people with whom I had corresponded without showing you the contents of every e-mail, there is an avenue in the federal law to allow that to a nongovernment entity. And that might be used from time to time to help understand where were his bank accounts, where was he banking, where was his insurance companies. And you can look through the people with whom he has corresponded and then approach those banks or insurance companies to work things out. And I guess, in increasingly digital life, that might be the only way to learn where their bank account is. [LB37]

SENATOR DAVIS: But a PR would not be able to actually access the... [LB37]

STEVE DeBIANCO: If the PR can show evidence that they have your consent because it was in your will, in some other document, and they have your consent, the federal law allows them to have full access to the contents of the e-mail since you've shown that you've filled the consent. The Uniform Law Commission work, they've dedicated their work to trying to define what is consent for purposes of that federal law. So they're all over that, of trying to address consent to get access to the contents. And again this is a much bigger issue than just the notion of terminate. It's about accessing the information in your e-mails. [LB37]

SENATOR DAVIS: Okay, thank you. [LB37]

STEVE DeBIANCO: Did that help? Thank you. [LB37]

SENATOR ASHFORD: Yes, Senator Seiler. [LB37]

SENATOR SEILER: Senator Ashford. I'd like to go a little different direction. If John is correct and took out that "control, conduct, and continue," it seems to me like, if you only leave termination, you've blindsided your PR and he has no authority to act except

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to terminate because a personal representative is only bound by his statutes and given the authority of those statutes. And if we take that out and he has no authority, he can't do anything but terminate. So even if he had directions, the worst...and I'm not against attorney fees, of course, but he would have to make an application to the county court. And the county court could well say, you don't have authority to act in that area, so I'm not granting you authority to do that. So I'm not so sure John's motion to strike doesn't limit what we're trying to get accomplished, looking at it from a statutory authority for a personal representative. [LB37]

STEVE DeBIANCO: Well, Senator, you make a very valid point, and I don't know the law well enough to understand that. And again, I'm not a lawyer, but the "terminate" was not really the aim of LB37 when initially introduced. As Senator Wightman indicated, there was notions of access to the account and digital assets. "Terminate" was left as the least objectionable concern when businesses raised concerns with the senator. But that doesn't mean that it is actually empowering the personal representative. As you say, it may well limit the personal representative. [LB37]

SENATOR SEILER: I think it does. I have nothing further, Mr. Chairman. [LB37]

SENATOR ASHFORD: I don't believe it...thank you, Les. I don't have any questions. But I would say we have a lot of Internet-type bills here, primarily in the criminal area. Are you available to come back at a moment's notice to tell us how this (laughter)...you're the most informed guy on these issues I've ever listened to. [LB37]

STEVE DeBIANCO: No, Senator, I... [LB37]

SENATOR ASHFORD: And we've listened to a lot. Where do you live? [LB37]

STEVE DeBIANCO: I live in Washington, D.C., and as...apart from what... [LB37]

SENATOR ASHFORD: Okay, well, that's a...there are nonstop flights. [LB37]

STEVE DeBIANCO: ...apart what Senator Chambers said, I'm much less like a McDonald's "Smoothie" and more like a Diet Coke. You know, I will get on a plane and be at this...at the call of the committee should you have other issues for our industry. [LB37]

SENATOR ASHFORD: No, I'm serious. I mean, I think sometimes when we make decisions in this arena, you know, we just don't have that kind of comprehensive knowledge. We kind of pick and...we pick at it, as you've suggested we're doing, that we may be doing. So anyway, I appreciate your testimony. [LB37]

STEVE DeBIANCO: Thank you. [LB37]

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SENATOR ASHFORD: Thank you very much. Any other opponents? Neutral? Okay, Senator Krist. Oh, neutral, okay. More neutral? One more neutral, okay, two more neutrals, truly neutral now. [LB37]

STEVEN WILLBORN: Neutral. [LB37]

SENATOR ASHFORD: Yep. [LB37]

STEVEN WILLBORN: (Exhibit 3) Thank you. Mr. Chairman, Senators, my name is Steve Willborn. I'm a faculty member at the university. [LB37]

SENATOR ASHFORD: Yes. [LB37]

STEVEN WILLBORN: But I'm here primarily today in my role as one of Nebraska's commissioners on the National Conference of Commissioners on Uniform State Law. It's the Uniform Law Commission. As you may know, the other current commissioners are the Honorable C. Arlen Beam, Jill Robb Ackerman, Joanne Pepperl, Harvey Perlman, and Larry Ruth, who should be here today but he's in Arizona instead. I speak today for the other commissioners as well. We're neutral on the bill but have information that you've already heard about. I have to do a little pitch. The Uniform Law Commission is in its 120th year. It produces laws of the highest technical quality. There are about 200 uniform laws. This state has adopted about 40 of them, including things like the Uniform Commercial Code, the Uniform Probate Code, the Uniform Prudent Investor Act. The Unicameral has supported us for decades, so...and we are very appreciative of that. LB37 is an amendment to the Nebraska Probate Code, which is based on the Uniform Law Commission's Uniform Probate Code. It deals with a very important, timely issue. According to a 2011 survey, American consumers valued their digital assets, on average, at about \$55,000 each. These assets range from on-line gaming avatars to photos to digital music to bank accounts and bill-paying sites. Some service providers have explicit policies on what will happen when an individual dies. I'm informed that others do not. The law on the topic is sparse, uneven, and inconsistent. As you've heard this morning, the Uniform Law Commission is in the process of drafting a more comprehensive uniform law concerning fiduciary access to digital assets. It's called the Digital Access...the Fiduciary Access to Digital Assets Act. The law is more comprehensive than the bill you're considering today because it deals not only with access by a personal representative at death, but also with access by three other types of fiduciaries: conservators, agents acting under power of attorney, and trustees. It's also more comprehensive in a couple of other respects that are detailed in the written comments that I handed out. The Uniform Law Commission provides bills that are very well drafted and highly technically competent. One corollary of that is that we do not operate with lightning speed. The digital...the Fiduciary Access to Digital Assets Act may be approved by the conference at its next meeting this July and, therefore,

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available in time for your next session; or it may take another year and not be approved until the summer of 2015. You can see a current draft of the act, if you prefer, at the site that's listed in the materials. Again, we're neutral on this. This is an important topic, and if...be perfectly understandable if you wanted to act on it now. On the other hand, we just wanted you to know, as you heard, that we are working on a more comprehensive bill. [LB37]

SENATOR ASHFORD: Thank you very much. Any questions of Steve? Seeing none, thank you. [LB37]

STEVEN WILLBORN: Thank you. [LB37]

SENATOR ASHFORD: Next neutral testifier. [LB37]

DWIGHT WININGER: Senator Ashford, members of the Judiciary Committee, my name is Dwight Wininger. I'm vice president of governmental relations for Pinpoint Holdings and also representing today the Nebraska Telecommunications Association. Pinpoint is a company headquartered in Cambridge, Nebraska, that has telecommunications companies around the country that we serve on a wholesale level and also provide direct Internet service ourselves, testifying neutral. We were opposed to LB37 initially because of our concern of the potential conflict between the state and federal laws. We have certain things that we already do in situations, and we don't provide...we're not the conduit to Facebook or any of these national companies. We provide local e-mail services, maybe some local Web pages, some things like that, that we provide. And the Stored Communications Act at the federal level gives us certain restrictions on how we allow access to these types of accounts. And our concern was that LB37, our reading, conflicted with those federal accounts. Senator Wightman's amendment is...does clear that up, and we're no longer in opposition to the bill if the Wightman amendment is attached to LB37. With that, I'd be happy to answer any questions. [LB37]

SENATOR ASHFORD: Any questions? Yes, Senator Seiler. [LB37]

SENATOR SEILER: By the amendment, doesn't that take away the discretion of the personal representative? [LB37]

DWIGHT WININGER: It takes, yes, the discretion in those areas other than termination, yes. [LB37]

SENATOR SEILER: So he has no choice but to terminate,... [LB37]

DWIGHT WININGER: The... [LB37]

SENATOR SEILER: ...even though it says "may." [LB37]

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DWIGHT WININGER: That's correct. You still would be able to... [LB37]

SENATOR SEILER: He can't continue it... [LB37]

DWIGHT WININGER: ...utilize the Stored Communications Act from the federal level. But, yes, that would be more cumbersome and, certainly, long term, we would not be supportive of... [LB37]

SENATOR SEILER: ...because he can't continue and he can't conduct any business on it. [LB37]

DWIGHT WININGER: Correct. And our interest is in making sure that we only have one set of rules to follow. Speaking on behalf of the companies that actually provide the e-mail service, in a lot of cases--or the Web pages--we're looking for a simplified way of allowing access to that, understanding that it may cause problems on the back side for the personal representative testifying here on behalf of the companies that actually provide access to that information. Senator... [LB37]

SENATOR ASHFORD: Senator Chambers. [LB37]

SENATOR CHAMBERS: This will not be lengthy. And since you're neutral I can ask you these questions very straightforward, in a straightforward manner. If the person who has the account wants to modify that account any way or terminate it, that can be allowed the way it is now? [LB37]

DWIGHT WININGER: While the person is alive, yes. [LB37]

SENATOR CHAMBERS: Yes. [LB37]

DWIGHT WININGER: Yes. [LB37]

SENATOR CHAMBERS: Does the personal representative stand in the shoes of the person who is dead? [LB37]

DWIGHT WININGER: I would say yes. [LB37]

SENATOR CHAMBERS: So just one point. [LB37]

DWIGHT WININGER: But that's a layperson's interpretation. [LB37]

SENATOR CHAMBERS: You're still dealing with just one person. [LB37]

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DWIGHT WININGER: Yes. [LB37]

SENATOR CHAMBERS: And that personal representative would be able to do no more than what the dead person could do were he or she still alive, is that true? [LB37]

DWIGHT WININGER: Yes. [LB37]

SENATOR CHAMBERS: So what I'm asking you now because you don't have, as they say, a dog in the hunt: What difference does it make if you're dealing with the personal representative or the person if you're not going to look at this discussion of privacy interests? I'm trying to remove something so I can get right at a particular issue. When you're still dealing only with one person, the personal representative cannot do what the living person could not do. [LB37]

DWIGHT WININGER: Okay. [LB37]

SENATOR CHAMBERS: Okay. Now if Senator Wightman's amendment had not been adopted, would you have the same concerns that have been expressed earlier about privacy and the wishes that may have been expressed by the living person? [LB37]

DWIGHT WININGER: That's not the point of our concern. Our concern was having a different set of standards in the Stored Communications Act at the federal level and this state law. [LB37]

SENATOR CHAMBERS: What would be different between what this state law says and what is contained in the federal standards that you're mentioning? [LB37]

DWIGHT WININGER: Okay, our reading of the Stored Communications Act is that that person doesn't have the access to be able to change or access any of the personal information without some type of an order from the court. [LB37]

SENATOR CHAMBERS: Okay, thank you. [LB37]

DWIGHT WININGER: Um-hum. [LB37]

SENATOR ASHFORD: Thanks. Okay. [LB37]

AMY PRENDA: Good afternoon. My name is Amy Prenda, it's A-m-y P-r-e-n-d-a, and I'm here today representing the Nebraska Cable Communications Association. And I'd like to say ditto to what Mr. Wininger said. Our association members were opposed to the legislation until the amendment was offered by Senator Wightman. And so as long as that amendment is adopted, then we are neutral on that legislation. And I'd be happy to try to answer any questions that you might have. [LB37]

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SENATOR ASHFORD: I don't see any. Thanks, Amy. I believe Senator Wightman has waived, so we'll now go to Senator Krist's bill, LB3. [LB37]

SENATOR KRIST: (Exhibit 4) I have the ability to clear out a room. [LB3]

SENATOR ASHFORD: My goodness. [LB3]

SENATOR KRIST: Nobody wants to stick around. Good afternoon, Senator Ashford and members of the Judiciary Committee. For the record, my name is Bob Krist. That's B-o-b K-r-i-s-t. I represent the 10th Legislative District in northwest Omaha, along with the north-central portion of Douglas County, which includes the city of Bennington. I appear before you today to introduce...and support of LB3. LB3 requires a person who files a nonconsensual lien to provide the county recording office with a postage-paid envelope that is addressed to the property owner. The county recording office will mail a certified copy of the nonconsensual lien to the owner of the real property, allowing them an opportunity to be notified of the lien at the time of the filing. This bill does not apply, does not apply, to mortgages, deeds of trust, or any encumbrance where all parties have knowledge of the encumbrances. The postage-paid envelope has nothing to do, in my opinion, with the validity of the nonconsensual lien. The envelope merely ensures the lien filer has complied with all of the filing requirements by law. So providing the envelope is simply a function of administrating the actual file of lien. At the present time, without passage of this law, it is unreasonable for a property owner to be left completely in the dark, perhaps for years, and only made aware of the lien when it comes time for the...to check or dispose of the property. Notification of a nonconsensual lien being officially filed is what the bill accomplishes. There are some news accounts of IRS agents having false, nonconsensual liens placed on their property. We have a circuit judge in Cass County who has been filed upon with no recourse. The news indicates that tax protestors, while claiming to act in the interest of freedom of personal liberty, used the nonconsensual lien filing as a way to harass private individuals in their private lives as part of the taxpayers' protest campaign. Other news accounts have relayed disturbing details of prominent elected officials, which I talked about--a judge, a lawyer, a doctor--or others who are targeted with frivolous practice liens, which clearly is a means to harass and intimidate those individuals. Merely asking for the lien filer to provide a postage-paid, preaddressed envelope at the time of the filing is another requirement before the county recorder office can file the person's consensual lien will allow the property owner to be promptly notified that there is a lien in place on their property. Ultimately this bill is being introduced to prevent two words: paper terrorism. It's too easy to file a nonconsensual lien on someone. I want to thank Karen Rainwater for coming forward. The Rainwaters are the victims of this kind of...and I think you'd be interested to hear their story. I want to thank your discretion, Chair, for giving her a little extra time in presentation. I intend to bring no other witnesses to you in support. I'd be happy to close and ask any...answer any questions at the end. I am aware that the bar

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association and others do not think that this is the proper fix, and I am willing to work with anyone who wants to fix it properly if I have not done so. But this is a problem. If we have citizens that are filed upon and they do not know that...and I'll tell you one very quick story as a way to introduce. I had an elderly lady, a friend of the family's, who passed away. The couple went to dispose of her property and her estate. They found out five nonconsensual liens were filed by the same general contractor. They were miniscule. They were \$500, \$1,000, \$1,500. They had no way of proving it one way or another. She never knew of it. She never told her son that they were filed upon her. They had no choice, basically, but to pay so that they could release the property. I think that is of great consequence both to families who are left holding the bag at the end of someone's very successful life as well as the individual not knowing that it's there. So thank you, and I'll...again, any questions at the end, or if you have some for me now. [LB3]

SENATOR ASHFORD: Senator Chambers. [LB3]

SENATOR CHAMBERS: I just have one, and there might be two or three parts if I can't get it all into one. The envelope with the address of the person who is being "liened" upon must accompany the filing of the lien. Would the address be the same on the envelope as the address on the property that is involved? Because what I want to be sure of is that a person is not allowed to put a bogus address on the envelope and can say, well, I did what was required. How does that work in terms of the address that will appear on the envelope? [LB3]

SENATOR KRIST: That is actually one of the discussion points for the bar association, to make sure that the notification is done correctly; and also what statute, what section in law, whether it's commonplace or others is part of their objection or their suggestion as well. [LB3]

SENATOR CHAMBERS: So then their opposition isn't to giving the notice but the method by which the bill would say the notice is given? [LB3]

SENATOR KRIST: And what I would call a "feedback loop,"... [LB3]

SENATOR CHAMBERS: Okay. [LB3]

SENATOR KRIST: ...ensuring that it's going to the right place and that there is a response from the person who it's being sent to. [LB3]

SENATOR CHAMBERS: Okay, that's all that I had. [LB3]

SENATOR KRIST: But I won't speak for them. But that, in a nutshell, is what they would do. [LB3]

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SENATOR CHAMBERS: Thank you. [LB3]

SENATOR KRIST: Thank you, sir. [LB3]

SENATOR ASHFORD: Yes, Senator Lathrop. [LB3]

SENATOR LATHROP: Just briefly, can you tell us an example or give us an example of a nonconsensual lien? Because you just described a contractor's lien because the contractor, presumably, thought he hadn't been paid. That would be a consensual lien, wouldn't it? [LB3]

SENATOR KRIST: No. [LB3]

SENATOR LATHROP: Okay, what's a nonconsensual lien? [LB3]

SENATOR KRIST: Anything that is not a contract between two individuals or two entities that the encumbrance is not known and acknowledged by both individuals, and there are many examples of that. Actually, Karen Rainwater can give you a great example of how that happened. [LB3]

SENATOR LATHROP: Okay. Fine. Thanks. I appreciate that. [LB3]

SENATOR KRIST: Thank you. [LB3]

SENATOR ASHFORD: Thanks, Bob. Okay, how many...just one second. How many are here in opposition to this bill? Okay. Karen, why don't you come on up? And I've indicated to Senator Krist that you can have up to ten minutes. [LB3]

KAREN RAINWATER: (Exhibit 5) Okay, thank you very much. Karen Rainwater, K-a-r-e-n R-a-i-n-w-a-t-e-r. I prepared my remarks yesterday evening before I knew about the bar's opposition. On behalf of myself and my husband, who could not be here today because he's out of town on business, I want to thank Senator Krist and his staff for continued work on their commitment to trying to achieve some kind of change with the nonconsensual lien. They're liens that are filed then recorded. Larry and I also want to thank Attorney General Bruning's staff, himself and his staff, for their interest and attention and suggestions on how to deal with nonconsensual liens. We had one placed on our home in Omaha January 2, 2008, without our knowledge and without any valid purpose for doing so, and we'll walk through that today. We appreciate the Judiciary Committee for its interest in LB3 and the opportunity to speak before you today. We learned, my husband and I, that it's far too easy for someone to file a fraudulent lien and have the register of deeds office place the lien on our property. Likewise, it's far too expensive to get the fraudulent lien removed. We're speaking in support of LB3 since its

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intent is to notify the homeowner that a lien is filed on the property at the time it's filed. It does provide the homeowner with notice because, if you're ready, if you learn about it--and I'll talk about how we learned about ours--if you learn about it at the time of the sale of the property, you risk losing the property, the buyer of the property, and that's problematic. My husband and I strongly feel that there should be a 30-day wait period from the time the notice of lien is mailed to the property owner until the lien is recorded on the property. The owner can then take action to prevent the lien from being filed. In Colorado, in order to preserve any lien for work performed, there must be a notice of intent filed with the county clerk and the recorder and providing at least 10 days' notice to the property owner. So in January of 2010 we set about to sell property in Manhattan, Kansas. We received...I received a call from the title company that said, we've run into a problem, there's a lien on your property, we can't move forward with this sale. So that's how we learned about the lien. Oops. Excuse me. So what was this all about? You have some materials in front of you. They are numbered. Number 1 is the claim of lien in Omaha. The last page of that set of materials is the lien that was actually filed on the Manhattan, Kansas property on February 8...or 6, 2008. And I'll walk you through the document that was...accompanied it, and we have the same document filed here in Omaha, which will be number 7 in your documents. The lien stated, in accordance with the final court order entered with...by the United States Court of Appeals for the Tenth Circuit, Rockefeller, et al v. Klay, et al, docket numbers--and there were four--on the following real property in Riley County, Kansas--our property description--that the lienor served notice to the owner on September 30 (sic--20), 1984, by a final order entered with and served by the United States Court of Appeals for the Tenth Circuit upon the defendants and aggregate defendants by the United States Postal Service. That's what the lien says. You have it as number 18 in your materials, in Exhibit 1. We were extremely shocked by this and very upset. We were never served any notice in 1984 or any time thereafter. We were puzzled by the name "Sandra J. Rockefeller." I work in human resources, and I've been with the same company since 1971. Was it someone who I dealt with as a part of my position? Was it somebody that had it out for me? I could not find any connection, and we tried. We couldn't find out anything about Sandra J. Rockefeller. To this day we do not know who she is or if that's who it really was that took the action. Her addresses were all dead ends. The notary who signed the lien was not a current notary in Colorado in 2010, when we tried to find that out as well. But we wanted to get the Kansas property sold, so the only way to do that was to hire an attorney, to go before a Kansas judge, to get the documents that would enable the title company to pass title on to the buyer. That took four months and over \$2,000. Next I suggested to my husband, well, you need to go down to the register of deeds and see if we have one on our Omaha property. We've lived in our house since 1974. He went there. On February 3, 2010, he found the very same lien recorded on our property. That's your Exhibit number 1, very same person, very same case. Following that discovery, we met with Ms. Battiato, the register of deeds, and asked her if there was anything we could do to prevent this. She said, no. So if Sandra J. Rockefeller comes along again and does the same thing, you'll record it? Yes, if the lien is in the proper

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form and notarized, it will be filed on the property. You have copies of the correspondence in your Exhibit number 1, labeled 1, that shows the correspondence between Sandra J. Rockefeller and Diane Battiato from October 27, 2007, until late in December of 2007. And when Senator Krist talks about paper terrorism, I say this is an exhibit of that. October 7, 2007, Sandra J. Rockefeller wrote to the register of deeds asking how to record the final court order entered by the U.S. Court of Appeals. Exhibit labeled 3 is the fee sheet that was mailed back to her: Here is the rules you have to follow. November 3, 2007, Sandra J. Rockefeller letter attempting to record the final court order, the case, the motion to dismiss, the recording fee, the motion to dismiss. You have copy...you have Exhibit number 7, which is the document that supports the Tenth Circuit Court of Appeals case, Sandra Mooney, a/k/a Sandra Gale Jarrell, Plaintiff-Appellant, Michael Oliver Rockefeller, Plaintiff, a long list of defendants including doctors, the FBI, the Social Security Administration, Eastern Airlines, etcetera. I wrote the Tenth Circuit and asked for a copy of this case. I wanted to read it. How could this possibly be connected to us? They couldn't find any records; it was too old. They sent me my money back, my check back, so that was a dead end. November 7, 2007, a letter again to Ms. Battiato, a returned money order...or a letter from Ms. Battiato. This is Exhibit 10. There was no Douglas County legal description in the documents. There was no proper underlying security interest to support the filing, so it was denied. December 10, 2007, Exhibit number 11, Sandra J. Rockefeller letter with a claim of lien and the check, again the case, and the motion to dismiss. December 21, 2007, the letter from Ms. Battiato, we cannot grant your request for the filing, and why. Then, in...December 29 of 2007, Sandra J. Rockefeller's letter back to Ms. Battiato, in which she threatened her with prosecution for obstruction of justice if she didn't file this lien. And in this particular letter, paragraph two, the last sentence, it says, the court order was entered against the appellees and the aggregates, which Karen L. Rainwater and Kimberly R. Rainwater--who is my daughter, who was four in 1984--state of Nebraska, all of the counties and cities within the state of Nebraska are part of. [LB3]

SENATOR ASHFORD: Mrs. Rainwater, I'm going to ask you to kind of sum up. [LB3]

KAREN RAINWATER: I'm getting there. I'm getting... [LB3]

SENATOR ASHFORD: Okay. [LB3]

KAREN RAINWATER: I'm coming to the end. [LB3]

SENATOR ASHFORD: Okay. [LB3]

KAREN RAINWATER: This is ludicrous. I mean, it's absurd. [LB3]

SENATOR ASHFORD: No, I...we get that. And the good... [LB3]

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KAREN RAINWATER: Not you, not you. [LB3]

SENATOR ASHFORD: And, trust me, we have these documents, and there may be some questions. So if you... [LB3]

KAREN RAINWATER: Right, right, and I...okay. So as I appear today, with the fraudulent liens still on our property, we did file an affidavit at the direction of the Attorney General's Office, showing that it was a fraudulent lien. So that is on our property. We don't know whether that will be successful if we would go to sell the property. My husband and I thank the Judiciary Committee for your attention and your appreciation of what you are able to, hopefully, do with this topic of fraudulent liens. While Larry and I support LB3, it does not go nearly far enough to protect the innocent property owners. We strongly recommend the 30-day wait period from the time the notice of lien is mailed to the property owner until the lien is recorded on the property. This provides the property owner with the opportunity to take action and prevent the lien from being filed. We think the Colorado lien statute has some merit. And again, I wrote these comments last night, prior to hearing the opposition from the Nebraska Bar Association. We strongly recommend serious consideration and your support and the Legislature's support to provide protection to the property owner. No one else should have to go through what we've gone through, and it's still there today. Thank you so much for your attention. [LB3]

SENATOR ASHFORD: Well, thank you so much as well. You may want to sit back down... [LB3]

KAREN RAINWATER: Okay. Okay, sorry. [LB3]

SENATOR ASHFORD: ...in case someone has a question for you. But I don't see any, so thank you. [LB3]

KAREN RAINWATER: You're welcome. Thank you so much. [LB3]

SENATOR ASHFORD: All right, thank you. Do we have any...that's it for the proponents, Senator Krist? Opponents? [LB3]

JOHN DAUM: Good afternoon, Senators. My name is John Daum, D-a-u-m. I'm employed by Stewart Title Guaranty Company, which is one of the large national title insurers. I am from Omaha, and I'm employed as a senior underwriting counsel for the company. I'm also here representing the Nebraska Land Title Association. It's great to hear a war story told by a person who has actually suffered from these things. I've been in favor of beating these things down for years, and they just...there seems to be nothing that anyone can do to beat them back. I came today originally to oppose the bill as written, and we still do. I've been handed an amendment, in the hallway just before

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the hearing began, which begins to cure some of the concerns that we have with the bill as written. But I think we need some time to work with the bar and get this into a better procedural stance. I also chair the real estate practice guidelines committee of the State Bar, so I think we can all work together with the staff and with the senator to try to get this thing into a little bit more feasible form. But I would be happy to entertain any questions anyone might have. [LB3]

SENATOR ASHFORD: Oh, just...go ahead, Senator Lathrop. [LB3]

SENATOR LATHROP: I just wanted to get a little understanding, John. When these liens are filed, are they typically construction liens of some sort or another? [LB3]

JOHN DAUM: They can be any number of things. There are various Web sites where someone can go and get documentation that's sold by people of the posse comitatus ilk, the minuteman ilk, which shows people documents that they say they can fill out and file to goof up the title of someone who may have crossed them in the wrong way. They take citations from the English common law, they take federal court citations, any number of things, and they mix them all up in a blender, and they come out with what you have in front of you, the handout. [LB3]

SENATOR LATHROP: So in a very real way the...this isn't an isolated occurrence. This is a very real problem. [LB3]

JOHN DAUM: It's a very real problem. It occurs...it's not all that frequent a problem, but it occurs a lot more than anyone wants it to. [LB3]

SENATOR LATHROP: Okay. [LB3]

JOHN DAUM: And it causes profound difficulties for people, as you've heard. [LB3]

SENATOR LATHROP: If I take...if I'm one of these people that want to do this and I want to mess up somebody's property or their title to their property...and I can see where it would take a long time to sort out while your buyer is getting away from you if you don't know about it. [LB3]

JOHN DAUM: Right. [LB3]

SENATOR LATHROP: You file one of those right now. Does the law require that the person filing the lien or the register of deeds notify the property owner? [LB3]

JOHN DAUM: No, it doesn't. As a matter of fact, the law right now requires that the register of deeds is to refuse to accept that for recording. The problem with that is, how does the register of deeds really know that they're supposed to be rejecting that

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particular thing? There are present statutory definitions for a nonconsensual, common-law lien. [LB3]

SENATOR LATHROP: Okay. [LB3]

JOHN DAUM: But... [LB3]

SENATOR LATHROP: Are there other states that have dealt with this, found an effective way to deal with this? [LB3]

JOHN DAUM: Not that I'm aware of. This has kind of been an industry-wide problem for us. And the main reason is that the people who file these things sometimes file them based on occurrences that happened years ago. They can't be reached. I think probably the only remedy someone has right now is to go to court to quiet title based on slander of title. [LB3]

SENATOR LATHROP: The solution proposed in this bill does only one thing. It doesn't prevent the filing. It doesn't prevent...even if you gave 30 days' notice and said, Lathrop, somebody just filed one of these liens, I couldn't sort that out in 30 days, so it's going on there, right? [LB3]

JOHN DAUM: That's right. [LB3]

SENATOR LATHROP: The only thing is, I can start working on it long before I try to sell my home. [LB3]

JOHN DAUM: That's correct. [LB3]

SENATOR LATHROP: That's the only thing we're getting from this bill,... [LB3]

JOHN DAUM: That's correct. [LB3]

SENATOR LATHROP: ...even after it gets fixed. [LB3]

JOHN DAUM: That's correct. [LB3]

SENATOR LATHROP: Are we going to...are you going to be able to come up with a solution? [LB3]

JOHN DAUM: I believe we will be able to. [LB3]

SENATOR LATHROP: Okay. [LB3]

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JOHN DAUM: The way the amendment is written, it kind of gives some legs to these things that we don't want them to have, so we want to go back and kind of work on that. [LB3]

SENATOR LATHROP: This year? [LB3]

JOHN DAUM: This year, yes, this session. [LB3]

SENATOR LATHROP: All right, good. Thanks, John. [LB3]

SENATOR SEILER: Mr. Chairman? [LB3]

SENATOR ASHFORD: Yes, Senator Seiler. [LB3]

SENATOR SEILER: Go back in history with me a little bit, back in the '70s and '80s. The posse comitatus was filing liens all over against anybody--banks, bankers, judges. Did we correct that at that time, or was it the Supreme Court that corrected that and said they were just void? [LB3]

JOHN DAUM: There was a string of about four or five Attorneys' General Opinions, from the early-to-mid '80s and as late as 1993, which all indicated that these sorts of things should not be accepted for recording. The Attorneys' General Opinions, unfortunately, don't have the force of law, so... [LB3]

SENATOR SEILER: Right. But we never did anything with statutes on that. [LB3]

JOHN DAUM: No, sir. [LB3]

SENATOR SEILER: Okay, thank you. [LB3]

SENATOR ASHFORD: What I...John, thanks for...what I might suggest though is that...and there are other testifiers. But this is...we need to correct this, and what I would suggest is that we take about two weeks, two to three weeks, and see if we could work with Senator Krist and come up with some language that we can agree on. This can't be true. I mean, I'm amazed that in all the years that I was sitting here on the Judiciary Committee...well, I didn't sit on this committee too long. But back in the '80s...and I do remember the posse comitatus liens. And I do remember having bills on this of some kind, but apparently we didn't do it. So if you could work...and apparently the bar is going to testify. But let's see if we can get this one resolved. [LB3]

JOHN DAUM: If I could tell a short war story, with your leave? [LB3]

SENATOR ASHFORD: Yeah. [LB3]

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JOHN DAUM: In the late '80s, early '90s, there was a gentleman in Omaha, whose name you would recognize immediately if I mentioned it,... [LB3]

SENATOR ASHFORD: Oh, go ahead. No, that's all right. (Laughter) [LB3]

JOHN DAUM: ...didn't like the way the city was handling the development of the property at 13th and I-80 down by the Henry Doorly Zoo. [LB3]

SENATOR ASHFORD: Yes. [LB3]

JOHN DAUM: He filed notices of lis pendens, notice of pending suits, against the properties of every single member of the Omaha Planning Board, I believe, the mayor himself,... [LB3]

SENATOR ASHFORD: Yeah, I remember that. [LB3]

JOHN DAUM: And that was great. That was crazy times, but, yeah, those are the things that happen. [LB3]

SENATOR ASHFORD: Yeah, but I think Mrs. Rainwater...that should not happen to a citizen of our state. [LB3]

JOHN DAUM: Right, right. [LB3]

SENATOR ASHFORD: I mean, that's... [LB3]

SENATOR LATHROP: John, is it a crime to do any of this? [LB3]

JOHN DAUM: Under the real estate code, there's a thing called slander of title,... [LB3]

SENATOR ASHFORD: Yeah. [LB3]

JOHN DAUM: ...which is the filing of documents in order to vex, annoy, or harass someone. Your remedy is to go to district court and quiet title to extinguish that, whatever the heck it is. And you can get your attorney fees and costs, plus your actual damages. Well, that's, you know,... [LB3]

SENATOR LATHROP: From somebody that probably has nothing. [LB3]

JOHN DAUM: ...from somebody who is going to be either judgment proof or impossible to reach and... [LB3]

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SENATOR LATHROP: But that's the remedy in the civil court. But it's not against the law to do it? In other words, it's punishable as a Class I misdemeanor, for example. [LB3]

JOHN DAUM: If it is, I'm not aware of it. [LB3]

SENATOR LATHROP: Okay. [LB3]

SENATOR ASHFORD: Thanks, Senator Lathrop. Thanks, John, very much. [LB3]

JOHN DAUM: Thank you. [LB3]

SENATOR ASHFORD: Good to see you again. Bill. [LB3]

BILL MUELLER: Mr. Chairman, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today on behalf of the Nebraska State Bar Association. This is one of those unusual situations where the bar is opposing the bill as introduced, but it is not because we disagree that there is a problem. And it's not that we are not sympathetic to Mrs. Rainwater's situation. This situation is currently addressed in Nebraska law, in Section 52-1901 to 52-1904, and these are statutes adopted in 2003. And what they provide is that these nonconsensual, common-law liens are not to be filed; they're not to be accepted by the register of deeds. But, as you heard previously, it really puts that register of deeds in a tough situation where they have to decide whether they should or should not file something that is provided to them. So once these are filed, your remedy, as you heard, is to go to court and have a court look at it and decide that it's not a valid lien and it will be stricken. We've talked about this the last two years to try and figure out how to address this once they're filed. And I have been floating around an amendment, that I've shown John Daum and other lawyers who practice in this area, that does provide that, once one of these things is filed, Mrs. Rainwater could, under this amendment, give notice to the person who filed it and demand that they file a lawsuit to enforce the lien. And they have 30 days to do that. If they don't file a lawsuit to enforce the lien within 30 days, the lien is void and of no legal effect. [LB3]

SENATOR ASHFORD: Are we offering that? Do you have that amendment dropped? [LB3]

BILL MUELLER: Well, I mean, I have it with me. The concern is...and John Daum has forgotten more about real estate law than I know. [LB3]

SENATOR ASHFORD: No, he knows a lot. [LB3]

BILL MUELLER: He knows the stuff. [LB3]

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SENATOR ASHFORD: I know he does. [LB3]

BILL MUELLER: And not to put words in John's mouth, but John's fear is: Do we really want to give validity to these liens? These liens are not valid liens. So if you do what I'm talking about doing, we do give some validity to these. The question that I have... [LB3]

SENATOR ASHFORD: Only for 30 days though. [LB3]

BILL MUELLER: I'm sorry? [LB3]

SENATOR ASHFORD: Only for 30 days. [LB3]

BILL MUELLER: You're right, you're right. But, I mean, couldn't we amend the current statute by just saying that the clerk shall not accept them and, if they do, they are void and unenforceable? [LB3]

SENATOR ASHFORD: Well, how does the clerk know whether it's fraudulent or not? [LB3]

BILL MUELLER: Well, that's the problem. The clerk can't know that. Then...I mean, we're working. [LB3]

SENATOR ASHFORD: I mean, the clerk has an overriding duty that says to...if someone has a fee and someone comes in and files a lien... [LB3]

BILL MUELLER: Yes. [LB3]

SENATOR ASHFORD: And, I mean, Les--Senator Seiler--knows this stuff better than I will ever know too. [LB3]

BILL MUELLER: Well, that's important. [LB3]

SENATOR ASHFORD: And I guess the answer is, then they're...you're putting them in a conflicting situation. [LB3]

BILL MUELLER: You are. [LB3]

SENATOR ASHFORD: Yeah. [LB3]

BILL MUELLER: You are. [LB3]

SENATOR ASHFORD: So... [LB3]

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BILL MUELLER: I'd be happy to answer questions the committee may have. [LB3]

SENATOR ASHFORD: Senator Seiler, do you have any? [LB3]

SENATOR SEILER: I have a question. On your proposed amendment, how do you propose to give notice? I don't think the mailing of the self-addressed envelope to the place where...is sufficient. I think you almost have to have personal service by a sheriff. [LB3]

BILL MUELLER: Well, and again, in this language, another part of it would say that when...that within ten days of filing this lien you have to give notice to the person against whom the lien is filed and, if you do not provide that or you do not file proof of giving notice, the lien is void. But, I mean, you're right. How do you... [LB3]

SENATOR SEILER: Yeah, except I send it to the...Mrs. Rainwater's last known address,... [LB3]

BILL MUELLER: Yes, yes. [LB3]

SENATOR SEILER: ...certified mail, and there it sits. [LB3]

BILL MUELLER: Yeah. [LB3]

SENATOR ASHFORD: Right. [LB3]

BILL MUELLER: And that's really the...and, I mean, I...Senator Krist has been about this for three years. [LB3]

SENATOR ASHFORD: Really? [LB3]

BILL MUELLER: And, frankly, I've not been as responsive as I should have been. But his bill is great. But at the end of the day there's still this lien filed. [LB3]

SENATOR ASHFORD: Bill, has...Senator Krist has been working on Mrs. Rainwater's case for three years? [LB3]

BILL MUELLER: Well, two years, yeah. [LB3]

SENATOR ASHFORD: We need to get this thing buttoned up. I mean... [LB3]

BILL MUELLER: We do, we do. And I've talked to Senator Krist and others, and we will certainly work with... [LB3]

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SENATOR ASHFORD: Can we make this a high priority? [LB3]

BILL MUELLER: Yeah. [LB3]

SENATOR ASHFORD: Because... [LB3]

BILL MUELLER: Yeah. It's a problem. [LB3]

SENATOR ASHFORD: And it's really a problem for Mrs. Rainwater. (Laugh) [LB3]

BILL MUELLER: It's truly a problem. It is, it is. [LB3]

SENATOR ASHFORD: And that shouldn't happen to anybody that lives in Nebraska. [LB3]

BILL MUELLER: Yeah, well, the nice thing about having John Daum involved in this... [LB3]

SENATOR ASHFORD: John is helpful. [LB3]

BILL MUELLER: John is in the title insurance business. [LB3]

SENATOR ASHFORD: Yes. [LB3]

BILL MUELLER: And he deals with underwriters. [LB3]

SENATOR ASHFORD: I get it. [LB3]

BILL MUELLER: And I'm not sure that he's an underwriter. But at the end of the day, they're going to decide what the effect is of one of these liens. [LB3]

SENATOR ASHFORD: Right. Well, I... [LB3]

BILL MUELLER: So yeah. [LB3]

SENATOR ASHFORD: Well, I mean, I don't want to speak for everyone, obviously, on the committee. But I...this stuff comes around once in a while, where one of our citizens has been really wronged by a... [LB3]

BILL MUELLER: Yes. [LB3]

SENATOR ASHFORD: And it's systematic. I mean, the system has to change to make sure that she gets taken care of, and so... [LB3]

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BILL MUELLER: Yes. [LB3]

SENATOR ASHFORD: And there are lots of others like Mrs. Rainwater because, gosh, I remember the posse comitatus thing... [LB3]

BILL MUELLER: Yes, it was a big problem. [LB3]

SENATOR ASHFORD: ...and those liens and... [LB3]

BILL MUELLER: Yeah. [LB3]

SENATOR ASHFORD: But anyway, let's see if we can... [LB3]

BILL MUELLER: We will work on it. [LB3]

SENATOR ASHFORD: ...get it done so...okay. [LB3]

BILL MUELLER: Thank you. [LB3]

SENATOR ASHFORD: Thanks, Bill, yeah. Bob? [LB3]

BOB HALLSTROM: Neutral. [LB3]

SENATOR ASHFORD: Neutral, okay. [LB3]

BOB HALLSTROM: Chairman Ashford, members of the Judiciary Committee, my name is Robert J. Hallstrom. I appear before you today as a registered lobbyist for the Nebraska Bankers Association, in a neutral capacity on LB3. As Mr. Mueller suggested, there is state law that tries to address this. I believe Senator Quandahl would have had this bill that put forth Section 52-1901 to 1904. Those particular provisions allow for a duty or a filing officer to refuse to accept the liens. But, as has been suggested, the filing officer is going to be a little bit reluctant and apprehensive about rejecting a filing. And we are sensitive, in the banking industry, to the rejection of filings on what... [LB3]

SENATOR ASHFORD: Well, if you reject one of these and then the property is sold... [LB3]

BOB HALLSTROM: And it was valid. [LB3]

SENATOR ASHFORD: ...and it's valid,... [LB3]

BOB HALLSTROM: Yeah. [LB3]

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SENATOR ASHFORD: ...then the clerk is liable. [LB3]

BOB HALLSTROM: Yeah, then somebody else is. [LB3]

SENATOR ASHFORD: Yeah. [LB3]

BOB HALLSTROM: Yeah, somebody else is out. [LB3]

SENATOR ASHFORD: Right. [LB3]

BOB HALLSTROM: So we're concerned about that. The other problem with the existing law is that it provides for the option to get attorney fees, and it also provides that, if that filing was not rejected and is filed of record, that you can go in and get a court order to have it removed. Well, that's all fine and dandy, except you have to go through the civil process and the time involved to get there. I have, very briefly, reviewed the bar association's amendment. I think it's on the right path. I would note for the committee, and one thing that may be able to be worked together, there is a bill that's before the Banking Committee that addresses almost the identical issue with regard to UCC filings on personal property. And we've put in quite a bit of time to try and address the same bogus lien or fraudulent lien types of situation, so those two issues could be melded together. I think one of the issues that Senator Seiler and Senator Lathrop and others have duly noted is the mailing notice has got to be strong. You've got to have some valid proof of service. If I'm willing to file a bogus or fraudulent lien, I'm certainly, probably, not going to be dissuaded if all I have to do is file an affidavit that says, yeah, I sent it to them. So there should be something more to verify and confirm, before that lien takes effect, that the notice has been received. [LB3]

SENATOR ASHFORD: And my concern is there would be more of this. Any questions of Bob? Senator Lathrop. [LB3]

SENATOR LATHROP: Just this: Isn't the solution to require that they file some...put the burden on the filer, and give them 30 days from the date the lien is filed to institute some proceeding to foreclose on the lien... [LB3]

BOB HALLSTROM: Well, one of the aspect... [LB3]

SENATOR LATHROP: ...and put the burden on them? And if they haven't it expires or... [LB3]

BOB HALLSTROM: Two things, Senator. Again, the one thing I think we have to be sensitive to is that if it is a valid lien--depending upon if it's cast as a nonconsensual common lien or a nonconsensual lien of any nature--if, at the end of the day, it's valid

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and you have delayed the filing of that for 30 days, you may have some interaction between subsequently filed liens and priority issues that come into play. I know the amendment that is out here at least provides for an expedited process that, within 30 days, somebody can force that person to go and institute judicial proceedings to realize on that lien. So if it's not valid, you're at least getting into court and the burden is on the filer of the lien to institute and recover on that lien, which I think is at least a... [LB3]

SENATOR LATHROP: So in that process, the lien gets filed, Battiato takes it, then they have...the filer has X number of days to institute some legal proceeding to... [LB3]

BOB HALLSTROM: To enforce the lien if it's valid. [LB3]

SENATOR LATHROP: ...to enforce the lien. [LB3]

BOB HALLSTROM: And that's why the notice... [LB3]

SENATOR LATHROP: And if it's not instituted within that frame of time it just gets extinguished. [LB3]

BOB HALLSTROM: Yeah, it's lapsed and of no effect. And that's why the notice is important because, otherwise, if the affidavit says I sent the notice but it went to the wrong address or it was never received, then Mrs. Rainwater doesn't find out until she goes to sell her property that the lien is a file of record. [LB3]

SENATOR LATHROP: Right. Okay. [LB3]

SENATOR ASHFORD: I mean, this is a scam, and so, you know, we do need to...and my concern is that we need to get a bill out before we get too clogged up with priority bills so we can get...and it may become a priority bill. But if it isn't, we want to be able to get this out early so we can get it debated and... [LB3]

BOB HALLSTROM: It's an important issue, but it needs to be done right. [LB3]

SENATOR ASHFORD: It's got...it has...okay, I agree. It's just two years Senator Krist...I mean, you know, that's enough time, so. [LB3]

BOB HALLSTROM: Yeah. [LB3]

SENATOR ASHFORD: Okay, thanks. [LB3]

BOB HALLSTROM: Thank you. [LB3]

SENATOR ASHFORD: Yeah. [LB3]

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BETH BAZYN FERRELL: Good afternoon, Chairman Ashford, members of the committee. For the record, my name is Beth Bazyn, B-a-z-y-n, Ferrell, F-e-r-r-e-l-l. I'm with the Nebraska Association of County Officials. I'm appearing here neutral today because our board has not yet met to take a position on the bill. If our position would change we'll share that information with the committee and Senator Krist. The registers of deeds really submitted technical comments about the original copy of the bill. A lot of those reflect the comments you've heard today about the mailing and if there are processes that the register of deeds would need to look at to make sure that the mailing would go to the right place, some of those kinds of things, perhaps, a clarification that the person who is filing would pay the fee for the certified copy, things along those lines. I think the amendment that we've been talking about here addresses a number of those things because it takes the register of deeds out of some of those decision-making processes. We would offer our support or any help we can be of to try and get this worked out. [LB3]

SENATOR ASHFORD: Yeah, I'd really like to get this resolved, and I'd like to get it resolved in the next couple weeks so we can get it out on the floor. So if Bill and you guys and John, as John's got great knowledge of this, so...and Senator Krist's team. Let's get this done, and let's take care of Mrs. Rainwater's problem and protect our citizens. So, okay, thanks very much. Senator Krist, you have the next bill. Or do you want to conclude on this bill? Or how would you...? [LB3]

SENATOR KRIST: Yeah, I'd like to just... [LB3]

SENATOR ASHFORD: Okay, yeah. [LB3]

SENATOR KRIST: ...couple of quickies. As you research and look through this...and I want to thank John and the others and Bill who have come forward. I have been working on this for three years and, thankfully, this year...and Senator Lathrop isn't here to take a pat on the back. [LB3]

SENATOR ASHFORD: Oh. [LB3]

SENATOR KRIST: But we referenced this bill to the right committee this time. It went to Banking and Insurance. [LB3]

SENATOR ASHFORD: Well, we are a committee that does... [LB3]

SENATOR KRIST: And... [LB3]

SENATOR ASHFORD: That goes a long way, Senator Krist, to... [LB3]

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SENATOR KRIST: And, (laughter) you know, you catch more with honey than vinegar. No, the point is though that it is egregious. I mean, there are things that are happening to our citizens based upon...I would reference you to...in your...I think it's attachment 1, part 19, there is there...and I don't always want to copy what Coloradoans do. But number 3, in order to preserve any lien for work performed or labors, etcetera, etcetera, they do a very nice job of laying out a process whereby a person who is "liening" would have to send it out ten days prior to the person who is "liened" upon, and there has to be the feedback loop that I described with Senator Chambers. That's what's going to be important to solving this issue. [LB3]

SENATOR ASHFORD: Right. And maybe that's the solution. It...boy, the quicker we can get this out, Bob, the better it will be, so. [LB3]

SENATOR KRIST: Absolutely, and I'd really appreciate your help. The other thing is that I think, and just in reference, in last year's testimony--and I'll make this available to you as well--Mr. Rainwater cited Section 52-1903 of the Nebraska statute that says, and I quote, "Secretary of State, county clerk, register of deeds, or the clerk of any court shall refuse to accept for filing any nonconsensual common-law lien," and we assume terms, etcetera. And I think that's what John was referring to a little bit as well. So we'll get this done with your help, and I appreciate it. [LB3]

SENATOR ASHFORD: Thanks, Bob. You have the next bill, LB12. [LB3]

SENATOR KRIST: I do. [LB12]

SENATOR ASHFORD: Boy, you got these things in early, didn't you? [LB12]

SENATOR KRIST: I'm going to be brief on LB12. And I'm going to apologize to begin with because this bill, although it was done early on, you get a lot of help once they get filed, you know? I mean, and it...and thankfully. It's not ready for prime time, but I'll go through, again, the introduction. And I think Don Wesely has some backup that I'd like to have him do before or after. Again, good afternoon, Senator Ashford and committee. My name is Bob Krist, B-o-b K-r-i-s-t, and I represent the 10th Legislative District in northwest Omaha, along with the north-central portion of Douglas County, which includes the city of Bennington. I appear before you today in introduction and support of LB12. LB12 amends the Nebraska Revised Statute 25-224, which currently states, all product liability actions, except one governed by section (sic--subsection) 5 in this section, shall be commenced within four years following the date of death, injury, or damage complained of occurs. This bill allows product liability action to commence within the period of time commensurate with the product's written warranty, or eight years. So I've increased the time from four to eight. Exceptions to this length of time are presently defined in statute, but another exception is being added in this bill. That addition relates to the warranty recall notifications and a company or manufacturer's

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failure to provide such notifications or warranty recall. I'm going to tell you my own personal story. A little girl goes down to a drier. The drier is four-and-a-half years old. She opens the door to get the Barbie clothes out. The Barbie clothes are going around with the sheet. She reaches in to grab the Barbie clothes, and the drier, still operating, twists her around, breaks both of her arms. The parents, in a legitimate fashion...to say, that switch did not function, did not turn off, you the manufacturer need to make sure that other people know that it's an issue, because the manufacturer did not send out any warranty or recall information on the drier. The drier switch was deemed to be defective, and it was based upon heat. That's the one thing, I guess, you'll want to make sure of is, if there's a switch that cuts things off in a drier, it shouldn't be affected by heat. The parents only wanted the manufacturer to send warranty information out to warn people of the issue. Nebraska state law says, four years, we're done, we don't have to do anything, thank you very much for your time. And that was it. They didn't go after them for monetary or any kind of compensation. They just refused to send any warranty information out. Don has an example of other...another product problem, and I'd like him to cover that with you. Again, this may not be in final form. I'd be happy to work with the committee to do this. But it's an area where I think, again, we need to apply some attention to help the citizens of Nebraska. With that, I'm done. [LB12]

SENATOR ASHFORD: Thanks, Senator Krist. Yes, Don. [LB12]

DON WESELY: Mr. Chairman, members of the Judiciary Committee, my name is Don Wesely, D-o-n W-e-s-e-l-y, representing the Nebraska Association of Trial Attorneys, which supports LB12 and commends Senator Krist for introducing the bill. Conceptually, we support the bill. And if a product has a warranty that it will last for a period of years, it should safely last that long, and that's just common sense. So it seems to us that Senator Krist's intent makes absolute sense. But the bill does have some drafting problems, and those are primarily with respect to making sure that the statute of repose has exceptions for any increase in the statute of limitations that would extend out beyond the statute of repose as it is currently written. So there is that technical problem that we see needing to be addressed. And we certainly do have, at NATA, attorneys who are very interested in this issue and would be happy to work with you on resolving some of those technical issues. The example...we don't have a specific example. But conceptually, what we're suggesting here is that if you have a warranty on a roof that says a roof will last 20 years, 25 years, 30 years, and there's a failure, the roof doesn't work, the warranty holds, you replace the roof. But what happens if the roof then, because of his inadequate...damages contents inside the house--your electronics, your furniture, whatever--maybe even the house itself, structurally? You know, the ability to recoup that could come through your homeowner's insurance. But if it doesn't, you should have the ability to go back and collect not only having the roof replaced but the damages that result from the roof failing. That's the concept here. We realize we'll need to work with those who are concerned about the legislation, but we're willing to do that and see if we can't work something out. Thank you. [LB12]

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SENATOR ASHFORD: Thank you, Don. Do we have any questions of Don? Seeing none, thank you. Any other comments or questions or testifiers? [LB12]

SENATOR SEILER: I have one question. [LB12]

SENATOR ASHFORD: Les. [LB12]

SENATOR SEILER: Excuse...Don, just a second. In the case that he, that Bob, or Senator Krist, gave was a child. [LB12]

DON WESELY: Um-hum. [LB12]

SENATOR SEILER: Does this affect the statute of limitations? And I'll defer to Steve Lathrop on this: Does this defer the...where the common law...or the statute was that you get your statute of limitations attached to when that child becomes an adult? Does this have any effect of repealing that? [LB12]

DON WESELY: I'll defer to Senator Lathrop too. (Laughter) [LB12]

SENATOR ASHFORD: Senator Lathrop, would you like to comment or respond in this matter? [LB12]

SENATOR LATHROP: I think, generally, those statutes, that provision, deals with minors--injuries or claims, cause of action, for minors. [LB12]

SENATOR SEILER: Yeah, and that was the example he used. [LB12]

SENATOR LATHROP: Yeah. And for a minor, generally, it says, whatever the statute of limitations is, it's the period of their minority plus the applicable statute,... [LB12]

SENATOR SEILER: (Inaudible)...okay. [LB12]

SENATOR LATHROP: ...which is a separate provision than the statute of limitations, typically. [LB12]

SENATOR ASHFORD: Good. Any other testifiers on this bill? Oppose or...for or against? [LB12]

STEVE GEALY: Opposed, opposed. [LB12]

SENATOR ASHFORD: Okay, go to opposition then. [LB12]

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STEVE GEALY: Senator Ashford, members of the committee, my name is Steve Gealy. I, like Mr. Loudon before me, am a partner at the Baylor Evnen law firm here in Lincoln. I appear here today as a volunteer for the Nebraska State Chamber of Commerce and Industry. I oppose this bill for a couple of reasons. Principally, I think that the unfortunate issue described by Senator Krist is not really a warranty issue. And the products liability law of the state of Nebraska, as I think Senator Lathrop will agree with me on, would be the appropriate remedy to seek redress for this little girl's injuries. The statute of limitations in a products liability action in Nebraska is four years from the date of the injury or death, and that...I have not done a survey of state laws, but I believe that is one of the longer statutes of limitation across the country. There are a lot of states that have statutes of limitation that are two years, even a year. And eight years may, in fact, be unprecedented. But the fact of the matter is the warranty issue and the products liability issue are, to some extent, mutually exclusive. The...if there is to be redress for injuries sustained as a result of a defectively designed and unreasonably dangerous product, the products liability law and the four-year statute of limitation does allow that redress regardless of whether there was, at the time of the injury, in effect, an express warranty or not. That really doesn't bear on it. Now there are, oftentimes, in a products liability action, separate theories of recovery based on breach of implied and express warranties of merchantability and of use for a particular purpose. But the ability to recover from the manufacturer of a dangerous product that causes injury is not borne upon by that product's warranty. And it seems to me that this bill is unnecessary given the current state of the law, particularly since this august body took up the issue of the statute of repose 10 or 11, 12 years ago and basically borrowed the statute of repose of the state of...domicile of the manufacturer, which I think, frankly, was a real good idea. But... [LB12]

SENATOR ASHFORD: Thanks. Thank you, Steve. Do you have any...anybody have any questions of Steve? Seeing none, thank you. [LB12]

STEVE GEALY: Thank you. [LB12]

SENATOR ASHFORD: Any other neutral, or opposition first, or then neutral testifiers? Okay, seeing none, thanks. Senator Krist, do you wish to close this? [LB12]

SENATOR KRIST: No, thank you. [LB12]

SENATOR ASHFORD: Okay. [LB12]

SENATOR KRIST: I'll waive closing. [LB12]

SENATOR ASHFORD: All right, thank you. [LB12]

SENATOR KRIST: Thank you. [LB12]

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SENATOR LATHROP: Another Senator Ashford bill. [LB45]

SENATOR ASHFORD: Yes, this is a... [LB45]

SENATOR LATHROP: Welcome to Judiciary Committee. [LB45]

SENATOR ASHFORD: Thank you, thank you. I'm rarely here, so I... [LB45]

SENATOR LATHROP: This might have something to do with the Supreme Court?  
[LB45]

SENATOR ASHFORD: This first one does. I think it has to do with the Court of Appeals.  
[LB45]

SENATOR LATHROP: Okay. [LB45]

SENATOR ASHFORD: (Exhibit 6) And I'm Brad Ashford, representing Legislative District 20. LB45 is a bill that requires, at least, as written, requires that the...a member of the Court of Appeals is on the--it's self-explanatory--he is, on the effective date of appointment, a resident of the Supreme Court judicial district to be served and remains a resident, so they would have to remain a resident. The judges would have to remain as a resident of, well, where they lived when they were appointed. The amendment that Janice is going to offer on behalf of this court, and she can explain it, but again, self-explanatory. A judge's residence on the effective date of appointment shall be considered the judge's residence while he or she serves on the Court of Appeals. So there you go, pretty straightforward. Either it's...they...as written, the judge must reside in the district where he or she lived when appointed. As amended, and Janice is going to explain why we're going to...why it should be amended to this other language, but that the judge would...the effective residence would be the residence of the date of appointment but, applicably, I guess, could live anywhere else. But we'll see what Janice has to say about the amendment. [LB45]

SENATOR LATHROP: Senator Seiler. [LB45]

SENATOR SEILER: I have one question. If they change the districts, wouldn't the judge, even if they changed it so he wasn't in the same district, would he have to remove himself from his home and buy another house in that district, or could he...or would he remain in the district like Senator Louden did,... [LB45]

SENATOR ASHFORD: Yes. [LB45]

SENATOR SEILER: ...representing, I think,... [LB45]

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SENATOR ASHFORD: Gretna. [LB45]

SENATOR SEILER: I want to make sure we don't have two rules, one for the Legislature and one for the court. [LB45]

SENATOR ASHFORD: Right. That's a good question, and again I'm going to defer to Janice and Justice Cassel here. But I don't know. I think we need to get a little background from Janice to understand it. [LB45]

SENATOR SEILER: Okay. [LB45]

SENATOR ASHFORD: But yeah. [LB45]

SENATOR LATHROP: I see no other questions. You want to waive or...? [LB45]

SENATOR ASHFORD: Yep. [LB45]

SENATOR LATHROP: Okay. [LB45]

JANICE WALKER: Good afternoon, Senator Lathrop and members of the committee. My name is Janice Walker, and I'm the State Court Administrator. And thank you, Senator Ashford, for introducing this bill on behalf of the Supreme Court. [LB45]

SENATOR ASHFORD: You're welcome. [LB45]

JANICE WALKER: It's very simple, actually. LB45 is intended to clarify the eligibility requirements for a Court of Appeals judge. That requirement is that a person, on the effective date of appointment, must be a resident of the judicial district to be served. The current language of 24-1102 does not make that requirement clear, and it isn't consistent with the eligibility language for Supreme Court and trial court judges. The amendment that we are requesting is to remedy a concern that was raised since LB45 was introduced. And the concern is that the drafted language seems to indicate that a Court of Appeals judge could not move to and live in Lincoln, where the Court of Appeals' primary courtroom is located, and that is not what we intended. The amendment, we hope, makes clear that Court of Appeals judges can live and office in Lincoln, if they choose to do so, after the effective date of their appointment even though they retain residency within the district for which they serve. In other words, we're trying to clarify, not make more confusing. That's our intention. [LB45]

SENATOR ASHFORD: My only question on this is: How often does the Court of Appeals meet? [LB45]

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JANICE WALKER: The Court of Appeals meets once a month. [LB45]

SENATOR ASHFORD: For how many days? [LB45]

JANICE WALKER: Four to five days, and there are two panels of the Court of Appeals. [LB45]

SENATOR ASHFORD: Right. [LB45]

JANICE WALKER: So one panel meets in the morning, one panel in the afternoon of those days. [LB45]

SENATOR ASHFORD: Right. Senator Lathrop. [LB45]

SENATOR LATHROP: I do have a question, and it has nothing to do with what you're trying to accomplish here but may be something we ought to fix at the same time. We recently moved the boundaries around, didn't we? [LB45]

JANICE WALKER: Yes. [LB45]

SENATOR LATHROP: And so what if you have a judge who is in--and I'm going to make up something--District 1, and let's say that includes West Point, and then we...so that's where they're located. District court judge...or a Court of Appeals from District 1 lives in West Point at the time. Whether he lives there or moves to Lincoln, we rearrange the boundaries now, and West Point is now in District 2. So can we, as we redistrict or change the boundaries of the court districts, can we essentially squeeze somebody out? Or do we need to address that, or is it not a problem and I'm...are you tracking with me? [LB45]

JANICE WALKER: I am tracking with you, yes. [LB45]

SENATOR LATHROP: We move the boundaries around on these districts. [LB45]

JANICE WALKER: Um-hum. [LB45]

SENATOR LATHROP: And if we put somebody outside of their district and we say, you're presumed, or essentially presumed, to be living where you were at the time you got appointed,... [LB45]

JANICE WALKER: Um-hum. [LB45]

SENATOR LATHROP: ...you might even have moved into the other district, we changed the district boundaries, but you're, for purposes of the statute and your qualifications,

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now outside your district. [LB45]

JANICE WALKER: I understand your question. I don't know the answer. Justice Cassel is here, and he was most recently...has looked at these statutes, and he may want to respond to that question. [LB45]

SENATOR LATHROP: Okay. [LB45]

JANICE WALKER: Okay? [LB45]

SENATOR LATHROP: It just seems, to me, if we're working on it...I get...this is a simple fix. But the other... [LB45]

JANICE WALKER: This is... [LB45]

SENATOR LATHROP: The next question is going to be, as soon as we put somebody outside of their district when we redistrict, then... [LB45]

JANICE WALKER: And I wish I could just say I knew the answer to that. [LB45]

SENATOR LATHROP: Okay, okay. [LB45]

JANICE WALKER: Other questions though? [LB45]

SENATOR ASHFORD: Senator Christensen, yes. [LB45]

SENATOR CHRISTENSEN: Thank you, Chairman. With your amendment, aren't you basically saying that if they're appointed from West Point, in this example, they can move to Lincoln and become a permanent Lincoln resident and never go back to West Point, and they're still considered a West Point resident? [LB45]

JANICE WALKER: I believe that is the case, Senator Christensen, that you are considered to be a resident of your district that you serve for the time that you are on the Court of Appeals or the Supreme Court. For example, Justice Wright is from Scottsbluff. I believe he continues to be a resident of that district for the entire time that he's...and he represents that district while he's on the Supreme Court even though he has moved here to Lincoln. [LB45]

SENATOR CHRISTENSEN: But I guess this just seems the opposite of what we do as senators. I have a residence here in Lincoln, but that doesn't mean...I still have to have a residence in my district. [LB45]

JANICE WALKER: Right. [LB45]

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SENATOR CHRISTENSEN: And the way I read this is they could give up their residence in West Point or Scottsbluff and now just be a Lincoln resident. [LB45]

JANICE WALKER: I believe that is the case today. [LB45]

SENATOR CHRISTENSEN: Is that what we really want? [LB45]

SENATOR ASHFORD: Judge Cassel nods in the affirmative. (Laugh) [LB45]

JANICE WALKER: Yes. (Laugh) Yes. [LB45]

SENATOR SEILER: You only work 60-90 days; they work 365. [LB45]

SENATOR CHRISTENSEN: (Inaudible) six months, five months. [LB45]

SENATOR SEILER: They work 365. [LB45]

SENATOR ASHFORD: Just for the record, so everybody understands, yeah, I...Senator, yeah. Go ahead, Senator Christensen. [LB45]

SENATOR CHRISTENSEN: Four or five days a month, she said. [LB45]

SENATOR ASHFORD: Yeah. [LB45]

SENATOR SEILER: No, that's when they meet. They write Opinions the rest of the time, so. [LB45]

SENATOR CHRISTENSEN: Well, I just want to know more about it because it just seems to me like it's... [LB45]

SENATOR SEILER: Yeah. [LB45]

JANICE WALKER: It does seem odd. [LB45]

SENATOR ASHFORD: It seems odd, to be honest. I mean, I...and it doesn't require Lincoln. It just says any other...does it say Lincoln? It's any other place, I guess. [LB45]

SENATOR CHRISTENSEN: No, it doesn't. [LB45]

SENATOR ASHFORD: They could go live in...they could live in Omaha, I suppose. [LB45]

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SENATOR SEILER: Sure. Let... [LB45]

SENATOR ASHFORD: I mean, no, I know why, but yeah, go ahead, Senator Seiler. But do you provide an office in their home? [LB45]

JANICE WALKER: For the Court of Appeals, they can choose to have an office here in Lincoln, or they can have an office in their home district where they reside. [LB45]

SENATOR ASHFORD: And how often...and Justice Cassel can answer this, but how often do they meet in Lincoln? I know in the Supreme Court they meet all the time. But on the Court of Appeals, is that the case? [LB45]

JANICE WALKER: Yes. [LB45]

SENATOR ASHFORD: I don't...it is? [LB45]

JANICE WALKER: Yes. [LB45]

SENATOR ASHFORD: How often do they come to town? [LB45]

JANICE WALKER: Well, the Supreme Court...or, excuse me, the Court of Appeals has oral arguments every month. Now sometimes those arguments are held in other parts of the state. [LB45]

SENATOR ASHFORD: No, no, I know. I'm talking about the Court of Appeals. Do they just come to town for four or five days? [LB45]

JANICE WALKER: Yes. [LB45]

SENATOR ASHFORD: Okay. Senator Seiler. [LB45]

SENATOR SEILER: But I think they have conferences and work on their cases. [LB45]

JANICE WALKER: Oh, certainly. [LB45]

SENATOR SEILER: And so that...I think the purpose was...and I remember Bill Connolly, when he had an office in the courthouse at Hastings, when he was on the Court of Appeals. [LB45]

JANICE WALKER: Yes. [LB45]

SENATOR SEILER: But I think they still spend a lot more time, year round, here than we allegedly do as senators. [LB45]

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SENATOR ASHFORD: Well, I guess that's the question that Justice Cassel can clarify because I do think there is a difference between the Supreme Court and the Court of Appeals. [LB45]

JANICE WALKER: There is. [LB45]

SENATOR ASHFORD: Well, I know there's a difference, but I mean a difference as far as their...the necessity of being in Lincoln. And I think Senator Christensen makes a good point. I'm a little bit concerned--we can clear...Judge Cassel can clear it up--but I'm a little concerned that they are representing a particular part of the state. [LB45]

JANICE WALKER: Yes. [LB45]

SENATOR ASHFORD: Their expenses are paid when they're here, I assume, if they come from Scottsbluff, if they would...their expenses would be paid here if their residence was in Scottsbluff. They could do a lot of things by telephone or by teleconference. [LB45]

JANICE WALKER: Right. [LB45]

SENATOR ASHFORD: I'm a little concerned about giving up the residence in the...they are up for retention? [LB45]

JANICE WALKER: Yes. [LB45]

SENATOR ASHFORD: And they may not even be living there, in effect. So anyway, I, you know, I'm sure there's a good reason for it, but I think Senator Christensen raises an excellent point that maybe...yes, Senator Davis. [LB45]

SENATOR DAVIS: I just want to know how you define the word "residence." What does that really mean? Is that where you vote? Is that where you spend most of your time? [LB45]

JANICE WALKER: It is where you vote, and I think Justice Cassel can answer that better for you because he was formerly on the Court of Appeals and is now on the Supreme Court. But I believe you are correct that that is where you vote, that where you (inaudible). [LB45]

SENATOR ASHFORD: So you'd be voting in Lincoln. [LB45]

JANICE WALKER: No, where your residence is. [LB45]

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SENATOR ASHFORD: Oh, you'd be...vote back in, I'm sorry, West Point or wherever and...okay, yeah. But they live in...okay. Senator Lathrop. [LB45]

SENATOR LATHROP: The one thing it does do is it allows for the selection of judges with some diversity across the state. [LB45]

SENATOR ASHFORD: Yeah. [LB45]

SENATOR LATHROP: And the risk is, if you don't have a bill like this or a statute like this, then a Governor could choose to populate the entire Court of Appeals with Omaha guys and, at least initially, he's going to choose somebody from Norfolk, somebody from Scottsbluff, somebody from Hastings and, while they may end up all living in Lincoln, they're going to come from different parts of the state and bring that with them. [LB45]

SENATOR DAVIS: Or that Governor could say, move out to Scottsbluff for two weeks, declare your residence out there, and I'll appoint you. [LB45]

SENATOR LATHROP: I think that could happen too. We may blow this whole thing up. (Laughter) We won't do it until we hear from the judge though. [LB45]

JANICE WALKER: This is... [LB45]

SENATOR ASHFORD: No, no. Let's hear from Judge Cassel. [LB45]

JANICE WALKER: This was very simple. (Laughter) [LB45]

SENATOR LATHROP: It was. [LB45]

JANICE WALKER: It was. [LB45]

SENATOR LATHROP: That's what I thought about some of the stuff I've taken to the Court of Appeals too. (Laughter) [LB45]

JANICE WALKER: Well, I guess that's fair then, isn't it? [LB45]

SENATOR LATHROP: Yes, it is. [LB45]

JANICE WALKER: Okay. [LB45]

SENATOR ASHFORD: Okay, thanks, Janice. [LB45]

JANICE WALKER: You're welcome. [LB45]

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WILLIAM CASSEL: (Exhibit 7) Good afternoon, Mr. Chairman and members of the committee. My name is William Cassel, that's C-a-s-s-e-l. I'm one of the judges of the Nebraska Supreme Court, but I don't appear on behalf of the court this afternoon. I'm just interested in this bill as a former judge of the Court of Appeals and a former district court judge. I've been listening to this discussion with interest. The purpose that the bill was drafted was to make explicit what was always implicit, and that is that a judge of the Court of Appeals would be, as of the effective date of his or her appointment, a resident of the district from which he or she is being appointed. That was implicit because of the language that was in and is in the original version of the bill being stricken from Section 24-1101 that talked about, for purposes of that section, a judge's residence on the effective date of appointment remains his or her residence while he or she serves on the Court of Appeals. I think everyone and, without fail in the history that I'm aware of, every judge has been, at the time he or she took the oath of office, has been a resident of the district to which they were appointed, whether it's the Supreme Court or the Court of Appeals. Now it certainly is true that--and it's true with all the trial court judges as well--that you do not have to be a resident of the district at the moment that you apply for the judgeship. You can be appointed as long as you clear the nominating commission and the Governor chooses you. You can be appointed no matter what your residence happens to be at the time you apply. It's your residence at the effective date of appointment that controls. I think what was happening and what prompted the Chief Justice and Janice Walker to proceed with the bill as it was originally introduced is they would frequently get calls from potential applicants asking about not...sort of confused about, do I have to be a resident of the district? And it wasn't as particularly clear; as I said, it was implicit but not explicit with respect to the Court of Appeals. I was the one who raised the dickens after the bill was introduced because the language as introduced would have required the judge to stay in the residence in the district and not have the opportunity to move to Lincoln. And the Court of Appeals is kind of a strange creature in the sense that it certainly is not a trial court. It is like the Supreme Court in that it is an appellate court. Now with the Supreme Court the...it's constitutional that we have the authority to reside in Lincoln, and that doesn't affect our residence. And this bill would not affect me in any way, shape, or form because my residence is controlled by the constitution. But the thinking was and, I think, remains at...when the Court of Appeals was created is that the desire was to give the flexibility to the judges to either stay in their district, if they thought that was practical, or to move to Lincoln. Now some judges...and in the very beginning Judge Wright, who was on...one of the original members of the Court of Appeals, Judge Hannon, one of the original members of the Court of Appeals, came to Lincoln. I had forgotten. I wasn't sure whether Judge Connolly stayed in Hastings... [LB45]

SENATOR SEILER: He did. He had an office in the courthouse. [LB45]

WILLIAM CASSEL: ...and then moved to Lincoln when he was appointed to the Supreme Court. [LB45]

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SENATOR SEILER: He did. [LB45]

WILLIAM CASSEL: So thanks for refreshing my recollection there. The notion was that you wanted to maximize the pool of applicants that would be available and to give them the opportunity...either stay in your residence, if that's practical, and it is for people who live in Omaha. I can tell you it's not practical for someone from O'Neill, which is my situation, because you can't induce law clerks to come live and work in O'Neill, Nebraska. That simply isn't going to happen. So with the amendment, the bill essentially puts the law back to where it was but makes it explicit rather than merely implicit that the judge must be a resident of the district on the date of his or her appointment, but he or she can choose to move to Lincoln or, I suppose, theoretically, anywhere else, although no one has ever attempted to exploit that, to my knowledge. I would, if...with the Chair's indulgence, address the question about redistricting that was... [LB45]

SENATOR ASHFORD: Well, let me do this. [LB45]

WILLIAM CASSEL: Okay. [LB45]

SENATOR ASHFORD: Would you address the question of redistricting that was brought up by...(laughter) [LB45]

WILLIAM CASSEL: I'd be glad to do that. [LB45]

SENATOR ASHFORD: Thank you. [LB45]

SENATOR CHAMBERS: But--excuse me a second--before that, may I pose a question? [LB45]

SENATOR ASHFORD: Yes, you may, Senator. [LB45]

SENATOR CHAMBERS: I just came in. You're the member of the Supreme Court. [LB45]

WILLIAM CASSEL: I am a member of the Supreme Court. [LB45]

SENATOR CHAMBERS: Have they changed the rule with...relative to the lights telling you that, when this light comes on, it's over? (Laughter) Because I've argued before the court and, at the time, I did, but I always complied. When that light came on, it's over. [LB45]

WILLIAM CASSEL: I understand, Senator. With the... [LB45]

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SENATOR CHAMBERS: Did they explain the lights in here? (Laughter) Are...is... [LB45]

WILLIAM CASSEL: I'm old enough I actually remember this committee before the lights, so. (Laughter) [LB45]

SENATOR CHAMBERS: So then do you think that the courts now, and the other judges, would grant to ordinary citizens the same leeway that they're granted when they go places? Or should judges be treated differently from the way common, ordinary, garden-variety people such as myself are? [LB45]

WILLIAM CASSEL: I think they should be treated the same. But I would tell you, Senator Chambers, that in both the Court of Appeals and the Supreme Court, the light is not as mandatory as...it's enforced rather liberally, not strictly. [LB45]

SENATOR CHAMBERS: Oh. They must have done that after I stopped arguing. [LB45]

SENATOR LATHROP: And me too. [LB45]

SENATOR CHAMBERS: Without you? Oh, okay. [LB45]

SENATOR LATHROP: Me too. [LB45]

SENATOR CHAMBERS: But that's all that I had at the moment. [LB45]

SENATOR ASHFORD: It's a new day on the Supreme Court. But you could most certainly...or, Senator Lathrop, would you like to ask that one? [LB45]

SENATOR LATHROP: I do. You know what? Two things struck me, and one is the question about...if the focus is on the judge's residency on the date of appointment, it brings up two questions, and one is: If that is, let's call it, O'Neill, Nebraska, and whatever street you...Elm Street. You lived on Elm Street, and now we've changed the boundaries. And you are serving as an appointee from a particular district, and that district now moves to a different district. That residence that you had, even though you're living in Lincoln, that residence is your residence for purposes of your appointment and your qualification. If we redistrict the boundary, move the boundary, as we do from time to time, and put you outside of it, shouldn't the bill talk about a judge's residence within the district on the effective date of the appointment shall be considered the judge's residence within the district, so the focus...once you're in one, you're in one, regardless of what we do to the boundaries? [LB45]

WILLIAM CASSEL: I certainly would have no objection to such language. But my answer is, candidly, I don't know what would have happened had the Legislature, in its decennial redistricting, adjusted the boundaries so as to move a judge or end up with

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two judges in the same district. What I can tell you is that, in practice, the Legislature has gone to extraordinary lengths to accommodate the sitting judges so that that has never happened. [LB45]

SENATOR LATHROP: Okay. The other one I have is a point Senator Davis was making, I believe, which is: What's the point in doing this if the Governor can say to somebody who's a friend of his, hey, listen, I've got to appoint an Appeals Court judge from Scottsbluff, run out there on the date of the appointment, register to vote, get an apartment for a month, do this, do that, you know, get your mail rerouted to Scottsbluff, appoint him, and then he moves to Lincoln? [LB45]

WILLIAM CASSEL: The Governor certainly can say that. But there is also another step in this process that I'm sure you're not forgetting about, which is the nominating commission. And if the nominating commission views this person as a---... [LB45]

SENATOR LATHROP: Carpetbagger? [LB45]

WILLIAM CASSEL: ...that would be the appropriate term--as a carpetbagger, the odds of that person getting out of committee would be very slim. [LB45]

SENATOR LATHROP: Okay. [LB45]

WILLIAM CASSEL: My own situation is a good example. I was, as a district judge, a judge of the 15th Judicial District which merged into the 8th District. My district court boundaries, which were 15 counties in size and 25 percent of the land area of the state of Nebraska, straddled the boundaries of the Supreme Court and Court of Appeals districts. Although I happened to be in Ainsworth--and that's where my home was, where my wife lived at the time--I applied for the Court of Appeals. I spent a lot of time in O'Neill, and I had an office that I spent approximately 50 percent of my time there. And the committee that reviewed...the nominating commission that reviewed me and the other applicants apparently did not consider that a problem. But, as I said, I thought it was implicit that you had to be a resident. And when the Governor called, I moved to O'Neill, and that, 804 East John Street in O'Neill, remains my official residence, first, through the Court of Appeals statute and now pursuant to the constitution. [LB45]

SENATOR LATHROP: Even though you don't live there? [LB45]

WILLIAM CASSEL: Even though I don't live there and haven't since, roughly...let's see, I went on the Court of Appeals in 2004, so...and probably, by February of 2004, I haven't lived there. It is sort of a nuisance for the election commissioner, who is the county clerk, but there's only...you know, I'm a special case, and Judge Hannon was a special case before me. He also retained his residence, which I think was on Kildare Street (sic) even though he came to Lincoln. It does lead to the unusual situation that I am a voting

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resident of O'Neill, but my wife who, bless her now, lives in Lincoln is a voting resident of Lincoln. [LB45]

SENATOR DAVIS: So you still own your home at 804... [LB45]

WILLIAM CASSEL: No, no, I don't. No, it's... [LB45]

SENATOR DAVIS: No, you don't. [LB45]

WILLIAM CASSEL: We...those are gone. [LB45]

SENATOR DAVIS: I have one other question. I can see that this committee could just be lots of fun. But reading through this, and we talked about the residency issues, is there...I don't see anything in there that once you're not...you're appointed, at least in this, that you couldn't live in Council Bluffs. [LB45]

WILLIAM CASSEL: Oh, it's...in the constitution it's clear, for judges of the Supreme Court, that you have to reside in the state of Nebraska. And I certainly have no...if the committee wishes to parrot the language of the constitution about remaining a resident of the state of Nebraska, I certainly don't have a problem with that. And we have had no one that's... [LB45]

SENATOR DAVIS: Well, I...it's a hypothetical. [LB45]

WILLIAM CASSEL: Right. [LB45]

SENATOR DAVIS: It talks about the appointment that you have to be a resident, but there's nothing in here that says you have to remain one, so. [LB45]

WILLIAM CASSEL: Right. [LB45]

SENATOR ASHFORD: Well, and how about the Court of Appeals? There's no constitutional prohibition... [LB45]

WILLIAM CASSEL: Correct. [LB45]

SENATOR ASHFORD: ...against living in Aspen or... [LB45]

WILLIAM CASSEL: Because the Court of...the Supreme Court is created by the constitution; the Court of Appeals was authorized by the constitution but created by the Legislature. And so the provisions of the constitution that speak to the Court of Appeals are very limited; virtually everything that regulates the Court of Appeals is in statute. [LB45]

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SENATOR ASHFORD: Right. It's not constitutionally mandated that they be a resident of the state of Nebraska. [LB45]

WILLIAM CASSEL: Correct. [LB45]

SENATOR ASHFORD: I mean, I...it's not going to happen, I don't suppose, but somebody, if you could...would get the...you could do most of your conferences by telephone or whatever, but...and teleconferencing, but you could live in Arizona in the winter. [LB45]

WILLIAM CASSEL: There is...with modern technology, a lot of the way that we do our work can be done from virtually anyplace. [LB45]

SENATOR ASHFORD: Yeah, and that's all I'm...was getting at, is---I think Senator Christensen was, too--is that we kind of want everybody to live in the state if they're going to... [LB45]

WILLIAM CASSEL: And I... [LB45]

SENATOR ASHFORD: Yeah. [LB45]

WILLIAM CASSEL: I firmly agree with that. [LB45]

SENATOR ASHFORD: Yeah. [LB45]

WILLIAM CASSEL: And as...because the constitution says it, I certainly will be. [LB45]

SENATOR ASHFORD: Yes. I think...and I have no reason to believe you wouldn't anyway. But thank you, Judge. [LB45]

WILLIAM CASSEL: Unless there are any... [LB45]

SENATOR ASHFORD: And congratulations on your appointment. [LB45]

WILLIAM CASSEL: Thank you very much. Thank you. [LB45]

SENATOR ASHFORD: And thank you. Okay, I guess I'm up again, another very simple matter. [LB51]

SENATOR MCGILL: (Laugh) A very simple matter. [LB51]

SENATOR LATHROP: Noncontroversial. [LB51]

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SENATOR MCGILL: I'm sure. [LB51]

SENATOR LATHROP: Okay, that brings us to LB51 and Senator Ashford. [LB51]

SENATOR ASHFORD: And maybe...actually, Senator Chambers probably isn't going to like this one, to be honest. Anyway, LB...Brad Ashford, Legislative District 20. The bill, LB51, would amend current statute to allow the Opinions of the Supreme Court and the Court of Appeals to be published electronically at their discretion. That's it. [LB51]

SENATOR CHAMBERS: Senator...oh, I... [LB51]

SENATOR LATHROP: Go ahead. No, no, no. [LB51]

SENATOR CHAMBERS: Okay. [LB51]

SENATOR LATHROP: Go ahead, Senator Chambers. [LB51]

SENATOR CHAMBERS: And, Senator Lathrop, if I look at Senator Ashford when he's testifying, I don't mean to be disregarding you as the Vice Chair. [LB51]

SENATOR LATHROP: Not at all, not at all. [LB51]

SENATOR CHAMBERS: It's been a long time since I was here, so old habits die hard, as old former senators. [LB51]

SENATOR LATHROP: All right. [LB51]

SENATOR CHAMBERS: But, Senator Ashford, I read the bill before I came. [LB51]

SENATOR ASHFORD: Right. [LB51]

SENATOR CHAMBERS: And it said, in addition to or as an alternative to. [LB51]

SENATOR ASHFORD: Right. [LB51]

SENATOR CHAMBERS: They can do away with print Opinions altogether. [LB51]

SENATOR ASHFORD: Correct. [LB51]

SENATOR CHAMBERS: I won't support this bill. [LB51]

SENATOR ASHFORD: I didn't think you would, Senator Chambers. [LB51]

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SENATOR CHAMBERS: Okay. [LB51]

SENATOR ASHFORD: And that's why I... [LB51]

SENATOR CHAMBERS: Then I'm not going to ask a lot of questions. [LB51]

SENATOR ASHFORD: That's why I suggested, when I got up here, that you might have an objection to it. [LB51]

SENATOR CHAMBERS: And I think it's too much discretion to leave in the hands of a court. [LB51]

SENATOR ASHFORD: Okay, thank you. [LB51]

SENATOR LATHROP: Any other questions? [LB51]

SENATOR ASHFORD: No. [LB51]

SENATOR LATHROP: Okay. Judge Cassel. [LB51]

WILLIAM CASSEL: (Exhibit 8) Mr. Chairman and members of the Judiciary Committee, I'm William Cassel, C-a-s-s-e-l, a judge of the Nebraska Supreme Court and the chair of the court's electronic publications committee. I appear, with the approval of the court, in support of LB51. And I should first, on behalf of the court, thank Senator Ashford for introducing the bill on our behalf. The proposed amendments to these statutes change provisions relating to the format and distribution of judicial Opinions. Specifically, the official reports of judicial Opinions are currently required to be published in print format, and these amendments would allow the official reports to be published in electronic format, as designated by the Supreme Court, either in the alternative or in addition to print format. As Senator Chambers asked and Senator Ashford correctly answered, this would purely be discretionary by the court and would allow the court to go entirely electronic if the court so elected. I have included in the written testimony what I think are relatively compelling statistics about what has happened to the dissemination of court Opinions since the development of the Internet. The subscriptions to the Supreme Court's Advance Sheets have declined by approximately 79 percent. In the case of the Court of Appeals Advance Sheets, the subscriptions have declined by 77 percent, approximately. And why would anyone really, in this day and age, subscribe to a print publication that you can get for free by simply going to the computer every Tuesday or Friday? There would be a relatively small number of people in this day and age that would not have access or be able to be provided with access free of charge. The numbers on the bound volumes are not quite as stark, but they are significant. The sales of the hardbound volumes of the Supreme Court reports have declined

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approximately 63 percent. The sales of the hardbound Nebraska Appellate Reports have declined approximately 46 percent, but they were actually smaller in real numbers from the very beginning. Electronic publishing is a reality, and the reporting of the decisions must adapt to the evolving needs and expectations of the legal community and the public. The court is committed to making the access available, to preserving these documents, and authenticating them, so that any user can determine that they have a true and authentic copy of the Opinions. Obviously, my written statement goes on considerably longer, but I will be glad to respond to any questions. [LB51]

SENATOR ASHFORD: Yes, Senator Coash. [LB51]

SENATOR COASH: Thank you, Chairman Ashford. Thank you, Judge. Do...with the Advance Sheets that you were describing that the requests have gone down, does the court charge for that? [LB51]

WILLIAM CASSEL: Oh, yes. There is a subscription. It's a subscription-based mail service. There are a number of them that are provided free within government but, otherwise, they're subscribed to by law firms and lawyers. And those are the folks who candidly tell us they don't subscribe anymore or they...if they do subscribe they maybe take one where they used to take 20 or 30 because they get it on the Internet. [LB51]

SENATOR COASH: Okay, and... [LB51]

WILLIAM CASSEL: May I help... [LB51]

SENATOR COASH: ...a couple hundred bucks to get the...I mean, the bound copy is probably expensive. But the little...you know, ever since I got here I get the Appeals Court Opinions in my box every time. [LB51]

WILLIAM CASSEL: Since I became a judge, 20-some years ago, I get them for free, and so I don't pay the subscription. It used to be around \$120 a year for the subscription. Am I close? [LB51]

JANICE WALKER: I think you're close. [LB51]

WILLIAM CASSEL: Okay, it's something like that. It's probably more because everything else in the world has gone up since. [LB51]

SENATOR COASH: So the attorneys that want these will sign up for the subscription. When the Opinions are out or the bound copies are done, you send them out with a bill, and then they... [LB51]

WILLIAM CASSEL: No. The Advance Sheets are the ones that come out every week,

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and those are done on a subscription basis. The hardbound books are not on a subscription basis; they are simply paid for as a new volume is released. If you want it, you write a check and pay for it. [LB51]

SENATOR COASH: Okay, thank you, Judge. [LB51]

SENATOR ASHFORD: Thank you, Senator Coash. Yes, Senator Chambers. [LB51]

SENATOR CHAMBERS: Judge Cassel, unfortunately, this particular castle does not have an unbreachable moat surrounding it, so I have to ask a question or two. If the statistics indicate that the sales have dropped to a certain level, why don't they simply publish fewer? [LB51]

WILLIAM CASSEL: Well, there are a number of them that are mandated to be published under the statute. And the cost, even if we print fewer, the costs of production do not go down. There is a basic minimum cost for the print run. [LB51]

SENATOR CHAMBERS: Excuse me. Are these volumes published for the benefit of the legal profession and practitioners or for the public at large? [LB51]

WILLIAM CASSEL: Both, both. [LB51]

SENATOR CHAMBERS: So the public has not been consulted but, rather, the legal profession, and they've said, we're not interested in these printed documents anymore. [LB51]

WILLIAM CASSEL: We have not consulted the legal profession in the sense that there has been no proposed...we have not proposed any rules that would implement a change to a purely electronic system. We have not sought public comment from either the legal community or the general public at this stage. What we are seeking is enabling legislation that would give us the flexibility to do that in the future. [LB51]

SENATOR CHAMBERS: Now, Judge, because I'm so much older than you, I could refer to you as "Sonny." But because you're a judge and I respect your position, I won't do that. But here's what I'm looking at. And I mention that because you could say I'm "old school." Not everybody has access to these electronic means of communication. And if there are too many of any of these publications being mandated by statute, I'd be willing to consider altering the statute so that the number printed might be left up to the discretion of the court. And I'd wonder about that because, if we allow them discretion, they might just say, well, we're not going to print them. I've never felt that the cost of operating the judicial system should be paid for by user's fees or anything else. Since the judiciary is one of the three branches of this tripartite government, it should be supported by General Fund appropriations. The Legislature does not have to go out

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here and hustle money to fund the Legislature. We raise taxes. The Governor might beg for campaign contributions, but running the essential aspects of the Governor's Office will come from General Funds. I have always opposed increased fees to operate the judiciary. Whether I ever set foot in a courtroom/courthouse myself, what happens in that courthouse impacts me and everybody else whose life or affairs may fall within the parameters of a particular decision. So if these books and the Advance Sheets have a benefit to the public and the courts are designed to benefit the public, I cannot support a bill such as this because, if we give the courts the discretion to do this, they will do it. When I'm looking at legislation, I don't just look at what it says can be done and trust that judges and others are going to do thus and so. And I'm going to say that a different way now. I'm not going to just look at what those who support it tell us will be done by the legislation; I look at what the words of the legislation say can be done. And my view, which may differ from everybody else's here, has to go to what the outer reaches of that authority will be and conclude that those outer reaches will be arrived at and even exceeded, if possible. If...I think it was Madison who said something like: If men were angels, we wouldn't need all these laws. If the court did not intend to use electronic publication as an alternative to the print format, they wouldn't ask for that. The court intends to do that. And if it's not the court's intention to do it right now, don't ask me right now for it. If water is in short supply and you're not thirsty, don't come to me and ask for a drink of water when there are thirsty people. If there is water in abundance, a lake, then I say, go drink as much as you want, because, no matter how much you consume, you don't deprive others. But through the operation of this broad, open-ended authority, the courts can cut off access to certain people and say, well, if we're doing this for most of the people, that's good enough. And maybe it is, and maybe it should be that way. But it's not good enough for me, and I don't think it should be that way. But in this Legislature I'm only one vote, and I only have my voice. I'm like the poor little cricket that was caught by a king, and the king has absolute authority. And as his fingers tightened around that little cricket, the cricket, by Mother Nature or whoever endows crickets with the ability to do what they do, gave that little cricket a voice in the same way that God gave a jackass a voice to keep a prophet from going under an archway where the angel of death stood with a sword. The jackass had more vision than the prophet. So the jackass saw the angel with the sword and tried to stop, but the prophet kicked him on and the beast was given the power of speech to tell him. Well, this little cricket was given the power of speech. And with its little voice it said to the king, why will you take my life, all I have is my song, it doesn't hurt anybody, why will you kill me? The king let him go. All I have is my voice. I have a vote. And I don't want you to think that I'm disparaging the judiciary. Because of the respect that I have for the judiciary, I think that its Opinions should be available to everybody. And here is what I'm leading up to: Is it your understanding that the court does not intend to use that authority given by this statute to go to a strictly electronic format? [LB51]

WILLIAM CASSEL: I cannot say that it is my understanding the court does not intend, but neither can I say that it is my understanding that the court does intend. At this point

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the court has not taken a position on this. All that the court has done thus far is create its electronic publications committee, charged to investigate and make a recommendation to the court. I would concede, speaking now not for the court but just for myself, that I think the electronic dissemination of Opinions is the way of the future and will be most beneficial to those people who have not had access to the Opinions in the past. And the reason I say that: There are very few library resources, very few libraries that subscribe. In fact, in terms of the public libraries, I think almost none of them take...have the hardbound volumes or even, for that matter, the Advance Sheets of either of the appellate courts. But virtually every library that I know of nowadays has a computer and people to assist their library patrons in using the computers to access these resources. [LB51]

SENATOR CHAMBERS: Then would you consider a compromise? Because the language is already in the bill, as proposed, "in the alternative or in addition to," how about if, for my sake, we strike the word "in the alternative" and, for your sake, we keep "in addition to?" [LB51]

WILLIAM CASSEL: Well, I think that would defeat the economic purpose of the bill, which is to prevent a drain of state funds publishing books that most folks aren't looking at. [LB51]

SENATOR CHAMBERS: Then why don't they just say, the Supreme Court is hereby authorized to adopt a strictly electronic means of distributing its Opinions and whatever else it intends to publish? Why don't they just say that? [LB51]

WILLIAM CASSEL: This...the...well, we...from my standpoint, that would have been perfectly fine. This one...bill was actually modeled on legislation that was introduced and passed a few years ago having to do, as I recall, with the Legislative Journal. Is that correct, Terry (phonetic)? [LB51]

AUDIENCE MEMBER: That sounds familiar. I wouldn't (inaudible). [LB51]

WILLIAM CASSEL: It was modeled on legislation that's already been passed that I think...my recollection is that it had to do with the publication of the Legislative Journal or, perhaps, it was the session laws. I don't recall exactly which one it was, but we used this. And of course, in that instance, I realized that the selection of the ultimate choice in the bill that we were using to model would remain within the Legislature. And to that extent, I certainly would concede that there is a difference that here we're asking you to let the judicial branch make the ultimate decision about what format to publish in, whereas, in the legislation that we used as a model, we...the...it was the legislative branch. [LB51]

SENATOR CHAMBERS: My final question. [LB51]

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WILLIAM CASSEL: Yes, sir. [LB51]

SENATOR CHAMBERS: Do you equate an importance, not denigrating the Legislature, the publication of the Legislative Journal with the publication of court Opinions which are binding on the public and will govern our life from the maternity ward to the mortuary? In other words, for my part, I think the Opinions of the court have a much higher status and significance to the society than the Legislative Journal. [LB51]

WILLIAM CASSEL: I wouldn't quarrel with your judgment, Senator. But if you changed your question to compare the decisions of the Supreme Court and Court of Appeals with the session laws, I think we're on a pretty equal plane there. Those...that work product of the legislative branch that is represented by the session laws that are published by the Legislature, I think, rests on the same sort of plane that the work product of the Supreme Court and Court of Appeals does. [LB51]

SENATOR CHAMBERS: But I don't believe the session laws will ever be published only electronically and, as you said, we have it within our authority to determine that that will... [LB51]

WILLIAM CASSEL: Right. [LB51]

SENATOR CHAMBERS: ...that they will always be published a certain way. But this gives to the court a power that I think the court will exercise, and I don't think it will take forever for them to do it. I'm just giving my opinion, but that's all that I... [LB51]

WILLIAM CASSEL: I appreciate that, Senator, and I respect that. [LB51]

SENATOR ASHFORD: Yes, Senator Davis. [LB51]

SENATOR DAVIS: Judge Cassel, there's no fiscal note with this bill here, but do you have any idea what the publishing costs are currently? [LB51]

WILLIAM CASSEL: I didn't bring any hard numbers with me on that. The short answer is: I've seen the numbers in past that my recollection is it costs, I want to say, around \$300,000. I'm just...I don't recall. [LB51]

SENATOR ASHFORD: We can get that though, Janice, correct? [LB51]

JANICE WALKER: Yes. [LB51]

WILLIAM CASSEL: Yes, we can provide... [LB51]

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SENATOR DAVIS: So we could look at the cost versus the subscription fees and figure out what the deficit is? [LB51]

WILLIAM CASSEL: And if you...if the committee would like, I'd be glad to have...Janice Walker would volunteer to respond in writing with those numbers. [LB51]

SENATOR ASHFORD: She's good at that. [LB51]

WILLIAM CASSEL: Yes, she is. [LB51]

SENATOR ASHFORD: So I...we're... [LB51]

SENATOR DAVIS: I think that would be worthwhile looking at. [LB51]

WILLIAM CASSEL: Yes, we'd be glad to provide that information for the committee. [LB51]

SENATOR ASHFORD: Thanks, Judge Cassel. I don't see any other questions. [LB51]

SENATOR SEILER: Thank you, Judge. [LB51]

WILLIAM CASSEL: Thank you. [LB51]

SENATOR ASHFORD: Do we have any other testifiers? [LB51]

WILLIAM CASSEL: Thank you. [LB51]

SENATOR ASHFORD: I don't see any. That will conclude the hearings. [LB51]

SENATOR CHAMBERS: For the day? [LB51]

SENATOR ASHFORD: For the day. [LB51]

SENATOR CHAMBERS: Oh, okay. (See also Exhibit 9.) [LB51]