MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Third Session
March 16, 2005

The Committee on Judiciary was called to order at 8:17 a.m., on Wednesday, March 16, 2005. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4401 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. William Horne, Vice Chairman
Ms. Francis Allen
Mrs. Sharron Angle
Ms. Barbara Buckley
Mr. John C. Carpenter
Mr. Marcus Conklin
Ms. Susan Gerhardt
Mr. Brooks Holcomb
Mr. Garn Mabey
Mr. Mark Manendo
Mr. Harry Mortenson
Mr. John Oceguera
Ms. Genie Ohrenschall

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman Joe Hardy, Assembly District No. 20, Clark County

STAFF MEMBERS PRESENT:

Allison Combs, Committee Policy Analyst

René Yeckley, Committee Counsel
Carole Snider, Committee Attaché

OTHERS PRESENT:

Robert Eglet, President-Elect, Nevada Trial Lawyers Association
Joe Hardy, Jr., Attorney-at-Law
Dan Waite, Attorney-at-Law
Dan Polsenberg, Private Citizen
Ben Graham, Legislative Representative, Clark County District Attorney's Office, Las Vegas, Nevada
Don Cavallo, Public Administrator, Washoe County, Nevada
Dr. Greg Williams, President, Lightning Auctions
John Slaughter, Management Services Director, Washoe County, Nevada
Steve Zuelke, Marketing and Public Relations Director, Arundel Auction

Chairman Anderson:
Let's turn our attention to Assembly Bill 166.

Assembly Bill 166: Revises certain provisions relating to offers of judgment in civil actions. (BDR 2-564)

Robert Eglet, President-Elect, Nevada Trial Lawyers Association:
I am here today speaking in favor of Assembly Bill 166 on behalf of the Nevada Trial Lawyers Association.

First I would like to thank Dr. [Assemblyman] Hardy for sponsoring this very important amendment to *Nevada Revised Statutes* (NRS) 17.115 which I think everybody knows is the "offer of judgment" statute in Nevada. It corresponds with the same statute of the Nevada Rules of Civil Procedure 68. The purpose of the "offer of judgment" rule is to facilitate and encourage settlement of cases early in the process. It also has a penalty if an offer of judgment is not accepted. It is essentially Nevada's version of "loser pay."

There is a problem with the statute that Dr. Hardy has brought to everybody's attention. If you look at the current language in NRS 17.115, [subsection] 5(a) (Exhibit B), this is the portion of the statute that deals with the court determining who the prevailing party is. The language is to determine whether

a party, who rejected an offer of judgment, failed to obtain a more favorable judgment. Section 1, subsection 5(a) [of A.B. 166] provides "if the offer provided that the court would award costs, the court must compare the principal amount of the judgment with the amount of the offer, without inclusion of costs." In plain language, the court compares the principal amount of the judgment after trial versus the offer or the verdict. The principal amount of the judgment is essentially a verdict against the offer. This is in a situation if the offer had been accepted, the court at that time would then award appropriate pre-offer costs to the plaintiff which would be added to the offer of judgment submitted by the defendant in the case.

[Robert Eglet, continued.] The current language of [subsection] 5(b) of this statute is where the problem lies. It currently reads "If the offer precluded a separate award of costs." In other words, the offer of judgment just says this is what we are offering you and the court cannot add any costs to this. This is all the money that will be there. The court must compare the principal amount of the judgment with the sum of the amount of offer and the amount of taxable costs that the party to whom the offer was made incurred before the date of service of the offer. The interpretation of that is that you take the principal amount of the judgment versus the amount of the offer plus the amount of pre-offer costs of the offeree. This is the verdict versus the offer plus the offeree's pre-offer costs. This is where the transposition of the language occurred.

Under this circumstance, you could have a situation where you have a $100,000 verdict and there was a $95,000 offer of judgment before trial. Then the plaintiff's pre-offer costs were $10,000. If you were to add that as it provides right now in the statute, although the plaintiff rejected the defendant's offer of judgment by $5,000 at trial, when you add the plaintiff's pre-offer costs it would take that number over the verdict. Under these circumstances, there can be a verdict for a principal amount of judgment that is more than the offer of judgment that is rejected, but yet the plaintiff who obtained the higher verdict can end up having to pay the defendant's costs and possibly their fees. The plaintiff will be precluded from the award of plaintiff's costs and interest on past damages even though they won the case.

This is unfair because if the offeree, the plaintiff in this case, were to accept the offer of judgment which precluded a separate award of costs by the court, all the plaintiff would receive would be the $95,000. There would be nothing more and no costs would be added to that. In this example, the plaintiff would only receive $95,000, yet when they go to trial they receive a verdict for $100,000. The problem is the language was transposed.

The proposed language very effectively fixes this problem. It provides that if the offer precluded a separate award of costs, the court must compare the amount of the offer with the sum of the principal amount of judgment and the amount of taxable costs that the party to whom the offer was made incurred before the date of the offer. An interpretation of this now is that the amount of offer is compared to the judgment, the verdict, plus the offeree's pre-offer costs. We use the numbers I pointed out before, that puts everything on the right side of the chart. In other words, in comparing the $95,000 offer to the $100,000 verdict plus the pre-offeree's costs so you can receive $95,000 versus $110,000. The person who actually prevailed at trial under this language proposed by Dr. [Assemblyman] Hardy does actually prevail at trial. The winner is actually the winner here.

[Robert Eglet, continued.] This amendment corrects the error. Whenever the verdict is more than the offer, the plaintiff will never have to pay the defendant's costs and fees and the plaintiff will not be precluded from obtaining plaintiff's costs and interest on past damages. Very simply, this is the current language and this diagrams what Dr. Hardy is proposing, which is to take the current language and the proposed amended language where it says "verdict" and "offer" and you switch those two words to make sure the statute is right.

This problem was pointed out by Judge Stewart Bell in an [unpublished] opinion he wrote in Las Vegas in the Eighth Judicial District Court, *HKM II v. Swisher & Hall,* [2003 WL 24017776, (Nev. Dist. Ct., 2003)]. Judge Bell pointed out the current language is a problem in both in Nevada Rules of Civil Procedure 68 and the statute. The Supreme Court and the Legislature derived their recommendations from the Supreme Court Committee appointed to reconsider and reconcile Rule 68 and NRS 17.115, when it became apparent that they were in conflict. The committee's conclusions were that the only fair way to compare an offer of judgment to a judgment entered upon a jury verdict to determine the prevailing party for purposes of awarding costs and possibly fees would be to add any judgment rendered, the cost incurred by the plaintiff up to the time of offer of judgment, and compare that sum to the offer of judgment.

This is exactly what Dr. Hardy's bill is trying to do here and is what the committee recommended.

Chairman Anderson:
We have a handout for the members of the Committee that makes a comparison between NRS 17.115 and the Nevada Rules of Civil Procedure 68 (Exhibit C). In addition, Dr. Hardy has a handout (Exhibit D) that he prepared. Dr. Hardy, I will make the court case that we are discussing at this time part of the record. Mr. Eglet, you can continue with your presentation (Exhibit B).

Robert Eglet:
Judge Bell pointed out in his decision that the current language of both Rule 68 and NRS 17.115 was derived from recommendations in 1998 for the Supreme Court Committee appointed to reconsider and reconcile Rule 68 and NRS 17.115, when it became apparent that there were inconsistencies between the two which made application difficult. The committee's conclusions were that the only fair way to compare an offer of judgment to a judgment entered upon a jury verdict to determine the prevailing party for purposes of awarding costs and possibly fees would be to add to any judgment rendered, the cost incurred by the plaintiff up to the time of the offer of judgment and compare that sum to the offer of judgment.

[Robert Eglet, continued.] That is precisely what Dr. Hardy's proposed amendment to NRS 17.115 does. Judge Bell went on to state, "While such was clearly the intent of the committee and hence the intent of the Supreme Court in modifying Rule 68 and likewise the Legislature in amending NRS 17.115 to conform with Rule 68, the language as actually adopted is diametrically opposed to what was intended. The reason for the transposition in the statute is an error in the language of the proposed rule change in the letter of recommendation by the committee chair." In paragraph 7 of the letter, it states by the committee chair how costs are considered. To invoke the penalties of this rule, the court must determine if the offeree failed to obtain a more favorable judgment where a defendant made an offer in a set amount which precluded a separate award of costs. The court must compare the amount of the offer together with the offeree's pre-offer taxable costs with the principal amount of the judgment.

This was the language that was adopted. This is where the problem came in. Judge Bell accurately pointed out that it is absolutely clear that the committee intended the last sentence of the above portion of the recommendation to read, "Where a defendant made an offer in a set amount which precluded a separate award of costs, the court must compare the amount of judgment together with the offeree's pre-offer taxable costs with the principal amount of the judgment." The principal again is precisely what Dr. Hardy's amendments do here.

The words "offer" and "judgment" were transposed in the letter of recommendation and then became inadvertently transposed in Rule 68 and NRS 17.115. Rule 68 has this same problem. This portion of the offer of judgment rule in Section (b) is not a semantics change. This is a very important change to make rule work properly. This is a very important rule that is used by members of the Bar in Nevada to try and get these cases settled earlier. It is used both by defendants and plaintiffs to try and make early settlement offers that actually mean something and if they are rejected, they have some

penalties. So it is an effort that works very effectively. Without it, both sides just have written offers and demands with really no penalties attached to them, one side or the other. It is Nevada's "loser pay" statute and it works very well.

[Robert Eglet, continued.] In Section 1, subsection 5(b) [of A.B. 166] is the portion of the offer of judgment statute that 95 percent of the time we see. Most offers of judgments are made exclusive of costs. In other words, no cost award will be made by the court. So this is one that is applied in 90 percent of the cases.

Chairman Anderson:
I want to point out to the members of the Committee on page 8, line 16 through 17, of the District Court decision *HKM II v. Swisher & Hall* (Exhibit D). Regardless of our action, Rule 68 will end up having to be in the Supreme Court's purview. Whoever made the first change in statute is the bad guy and the other guy is a copycat. Is that what you are trying to tell us?

Robert Eglet:
I don't think either one of them are bad guys. The committee had the right intent and it was just simply a mistake in the letter. The two words were transposed, when the committee chairman sent the letters to both the Legislature and the Supreme Court and they were adopted that way. I don't think anybody was a bad guy. It was just simply human error.

Assemblyman Joe Hardy, Assembly District No. 20, Clark County:
The credit for the fix to this problem goes to my son who also has the name of Joseph Hardy but he is a junior. He can answer any of your questions.

The way this came about, as Mr. Robert Eglet has so illustratively shown us, is my son stated there is a problem. I said I want to fix it. I think the evenhandedness of this was the original intent and having spoken with representatives of the Supreme Court, who are very capable of fixing their own rule, will follow that legislative process and be able to do their own fix for what they need to do with Rule 68.

Additionally, I am not going to get into the intricacies of the law, the settlements or the offers of judgment, but I would say I have been very appreciative of Mr. Eglet's assistance as well as his presentation. In going through this, the committee that was appointed to fix this, fixed it inadvertently and words were transposed. But in fixing the "fix," we have become aware that there may be another benefit added to this for the citizens of the state of Nevada. We and the bill are at your disposal to have an opportunity to look at something else that may come forward between here and your work session.

There are parties that have other concerns that I think are reasonable and ought to be addressed. With that, I am appreciative for those who have come forward, namely Dan Waite and Joe Hardy, Jr. They will be able to answer any questions you may have.

Chairman Anderson:
For those of you that are unaware, the fact that we have a bill draft in front of us that opens NRS 17.115 gives us the golden opportunity to fix other problems in that particular section of the statute other than the ones that Dr. Hardy has brought forward. It seems to be clear cut, even though the issue is extremely complicated in terms of drafting and comparisons of Rule 68 and NRS 17.115. What you are indicating is that there is a possibility that there may be other issues. You are not objecting to us using yours as a "horse to ride?"

Assemblyman Hardy:
That is correct. There is probably a way to phrase this in the bill and Mr. Waite and Mr. Hardy, Jr. can address those issues for an easier flow for understanding purposes in the bill itself. I would be amendable to using this as the "horse."

Assemblyman Carpenter:
If the Legislature fixes this and the Supreme Court does not fix its case, which one controls?

Robert Eglet:
That is a very good question. None of us anticipate that the Supreme Court is going to do nothing here. As we pointed out, this was clearly a mistake that needs to be rectified. As a matter of fact, in this particular case, Judge Bell essentially ignored the language and realized the language was incorrect. He applied the rule correctly. That is what the remainder of this order provides. I don't think there is any doubt that the Supreme Court is going to fix this problem. If a case came up in between when the Legislature fixed it and the Supreme Court fixed it, I don't have any doubt that the other judges would follow Judge Bell's lead and use the amended language by Dr. Hardy.

Chairman Anderson:
Let me mention in speaking with the Administrative Officer of the Court, they have no objection with the bill and felt it did alleviate a problem that was of some level of concern.

Assemblyman Carpenter:
What if I made an offer and we haven't been to court yet, are all the other judges in the state aware of what has happened so they would apply it correctly, or would they apply it incorrectly until the Supreme Court rules? In a

grandfather situation of cases that are out there now, how is it going to be applied?

Robert Eglet:
The *HKM II v. Swisher & Hall* case is the only case I am aware of where the issue has come up where the verdict was actually higher than what the offer was with the costs added. So I believe Judge Bell is the only one who has addressed this. Although the statute is incorrect, for this to occur the verdict has to be relatively close to where the offer was and then the costs added to the offer would have taken it over the verdict. It is not something that commonly occurs. This is the only case I know of. I'm confident that our judges throughout the state would understand what the legislative intent was and apply this properly.

Chairman Anderson:
Assembly Bill 166 has a normal deadline and we can amend it to make it effective on passage of approval. That would still leave the Court's rule dependent upon the Court's statute. But we would be sending them a very clear message that we want this effective now. The chair would be willing to accept such an amendment if that is the will of the Committee.

Robert Eglet:
The other thing that may occur, if there is a delay between when the Supreme Court makes their changes and the Legislature acts, is if the bill becomes effective immediately the language of NRS 17.115 and Rule 68 are essentially parallel now. Many attorneys who used to offer a judgment pursuant to Rule 68 and NRS 17.115 probably would be wise to serve the offer of judgment pursuant NRS 17.115, until the Supreme Court makes their change.

Assemblywoman Buckley:
I do support this bill and the backup material was interesting to read.

Joe Hardy, Jr., Attorney-at-Law:
I don't have much to add to Mr. Eglet's presentation. I think he did a wonderful job explaining why the statute needs to be changed. It was, as he said, not anything that anybody did poorly but was just a transposition in the wording. Although the issue is somewhat complicated, the fix of the statute as set forth by Dr. [Assemblyman] Hardy is fairly simple and to the benefit of all litigants.

Dan Waite, Attorney-at-Law:
Mr. Eglet presented the issues very well. I think I would just underscore the points he made and that is, this is a very important issue. It's a very easy fix. There are some other things that we would like to look at in a little bit more

time. Mr. Eglet and I were discussing it this morning. He has come up with a resolution that probably would work in regards to some other issues that were alluded to.

[Dan Waite, continued.] I would like to address the concern of Mr. Carpenter of how the judges might interpret this. There is a rule of statutory construction, if you will, that laws have to be interpreted in a manner that will avoid an absurd result. That's exactly what Judge Bell did in this case. He could read the rule and the statute but he realized enforcing it, as drafted, would create an absurd result. So he drew upon, if you will, that principle of law. He didn't just turn a blind eye to what the rule and statute said, he invoked another rule of law that empowered him to come up with the right result. I also agree with Mr. Eglet that in the near term until the Supreme Court changes the rule, attorneys would be wise to make the offer of judgment only under the statute if that is changed first. Finally, in my 15 years of practice, to underscore what Mr. Eglet said, I have never seen an offer of judgment under the [subsection 5](a) section of this rule. The changes are only to the [subsection 5](b) section and every one of the offers of judgment I have seen have been under the [subsection 5](b) section of the rule or its counterpart at the time.

Chairman Anderson:
This is a nice piece of legislation and I understand there are other issues that need to be in front of this Committee.

Dan Polsenberg, Private Citizen:
I was the chairman of the committee that wrote this rule and I am vice-chairman of the Supreme Court's committee on the Rules of Civil Procedure. This original rules committee was a makeshift committee empowered for 15 days to come up with a way to make joint offers of judgment. While we were looking at the rule, we also realized that the rule is unfair to plaintiffs when there is a lump sum offered for judgment. As Mr. Eglet says, 90 percent of the offers are lump sum. In the short time we had as a volunteer committee without staff, apparently we transposed two words in the rule. We apologize. Dr. Hardy's bill absolutely corrects that problem and I think Mr. Eglet's presentation addresses that.

Chairman Anderson:
It is always nice to see a member of any of the subcommittees of the State Bar or of the Supreme Court who appear in front of us. Occasionally, their bills appear in both this Committee and other committees when no one shows up to testify about mistakes that are made. So it is nice to see somebody who is raising their hand and saying yes, I'm the guy who made that mistake. We appreciate that.

Dan Polsenberg:
If you are going to address other issues, I think just as the rule tried to fix the inequity to plaintiffs about how to handle costs, I still think the rule is unfair to plaintiffs in how it handles interest. If the Committee is going to address this overall concept, I think we need to take that up as well.

Chairman Anderson:
Do you have some suggested language?

Dan Polsenberg:
Not today. I could get together with Mr. Eglet. It would be an approach that would be very similar to the approach that the rule tried to embody when it addressed costs.

Robert Eglet:
I would be more than happy to get together with Mr. Polsenberg. You had asked me about the additional changes we were working on. I can tell you the first change is simply a minor change to subsection 5(a) of the bill. You will see under subsection 5(a) when the language, as interpreted, is the principal amount of judgment versus the offer or the verdict versus the offer, the verdict is on the left side.

Chairman Anderson:
Are you referring to page 3, Section 5, lines 15 through 17 of the bill itself? I want to make sure we are all on the right page.

Robert Eglet:
Yes, that is correct. When you get to the proposed changed language of Dr. Hardy's bill, you will see that the amount of the offer and the principal amount of judgment where the offer on the left and the verdict is on the right of the chart. Mr. Waite suggested to me this morning it might be appropriate to make sure in subsection 5(a) the verdict on the right side and the offer of the judgment is on the left side as well. It is simply a semantics change and would make the bill easily understood.

Chairman Anderson:
Let me indicate that would depend upon our bill drafter.

Robert Eglet:
The second area, if you look at subsection 5(b), subparagraph (2), lines 22 and 23 of page 3, the way the bill reads, "The amount of taxable costs that the party to whom the offer was made incurred before the date of service of the offer." The only problem with that is if you read that language literally, it is the

plaintiff who makes the offer then the defendant becomes the offeree. Then you would be adding the defendant's pre-offer cost to the verdict to determine whether the plaintiff's verdict was higher.

[Robert Eglet, continued.] Rule 68 says if the plaintiff makes the offer of judgment, it strictly applies to plaintiffs and, therefore, clarifies that we are looking at plaintiff's costs. There is probably a simple way to fix this if we can all agree on this. My impression is to take out the words "party to whom the offer was made" in the subsection 5(b)(2) and simply place the word "plaintiff" in. I think that would cure it.

Chairman Anderson:
Mr. Polsenberg, is there other information that you feel is necessary for us to be looking at in this section of the bill? It sounds as if looking at the effectiveness in processing this bill that we are going to try and do it on passage and approval and hopefully the Governor will sign this piece. But we also want to take up several of the problems that are raised in Section 1, subsections 5(a) and (b) on page 3, lines 15 through 23. Is there any other section of the law that you can identify you feel needs dealing with?

Dan Polsenberg:
I think Mr. Eglet's suggestion about changing the "party to whom the offer is made" is a good one. He points out one application of this rule that would be inconsistent with the intent. The problem is he is looking at it from a simple case where there is a plaintiff suing a defendant. You can also have a defendant suing a third party defendant or making a counterclaim, so we have to be very careful with the language when we apply this to commercial cases as opposed to personal injury cases. His idea is a good one and I'd be happy to work with him on any of those changes. I think all the ideas suggested today have been good ones. In fact, it seems like this Committee is going to have more time to consider this than my original committee had, which was 15 days.

Ben Graham, Legislative Representative, Clark County District Attorney's Office:
Moments ago I was asked to indicate to the Committee that Clark County District Attorney's Office, Civil Division, the Henderson City Attorney's Office, and possibly Washoe County District Attorney's Office would like to participate with these people in drafting this language. I already spoke to Dr. Hardy that they would like to be involved.

Chairman Anderson:
Can you do that here in the north or wait until you're all in the south to take care of it down there, then come back and tell us what your work product is?

Robert Eglet:
It would depend upon Dr. Hardy's availability. I was hoping to do some of it today. Otherwise, I am scheduled to return home today so then it would probably be down in the south.

Chairman Anderson:
Would you say ten days is a sufficient amount of time?

Robert Eglet:
It is if I can get together with these gentlemen before the end of the week.

Chairman Anderson:
The problem is the district attorneys now want to be involved in this discussion.

Ben Graham:
If the district attorneys and the city attorneys want to be involved in this, they are at the beck and call of these people because of the lateness in coming into this.

Robert Eglet:
I think Mr. [Dan] Waite, Mr. [Joe] Hardy, and I can work this out today. We are all on the same flight home and we can work on the language then. Once we get it worked out, I don't have any problem with Mr. Hardy and Mr. Waite meeting with the district attorneys without me, or I can get another member from the Nevada Trial Lawyers Association to participate.

Chairman Anderson:
I am anticipating a work session on March 28, 2005, so if you could complete this by the end of the week and then share with the district attorney's office, that timeframe should work. The hearing on Assembly Bill 166 is closed. Let's turn our attention to Assembly Bill 79.

Assembly Bill 79: Authorizes award of reasonable expenses, including attorney's fees, in certain contempt proceedings. (BDR 2-72)

Assemblywoman Buckley, District No. 8, Clark County:
Assembly Bill 79 makes a change to our contempt statute. Basically, if a person is found guilty of contempt, it would allow the court to consider whether to require the person to pay the attorney's fees as a result of the contempt for the person who was forced to hire an attorney to bring it before the court to seek lawful compliance with a lawful court order. That's all it does. It was

brought to me over the interim by some attorneys saying the playing field wasn't level.

[Assemblywoman Buckley, continued.] If two parties went to court, one followed the rules and the other didn't, and the other had to spend attorney's fees to get the person to follow the rules, they had an opportunity to litigate it and they chose not to. Why was it fair for that person to have to pay the fees? That's it in a nutshell. I have heard from no one with any opposition to the bill and would be happy to answer any questions.

Assemblyman Carpenter:
The only thing I am wondering about is on page 2, lines 1 and 2, where it has been crossed out in regard to imprisonment.

Assemblywoman Buckley:
The elimination of the 25 days wasn't part of my request. I assume it was a drafter's issue.

Allison Combs, Committee Policy Analyst:
I believe what occurred was with the exception language that is crossed out on the top of page 2, lines 1 and 2, "except as provided NRS 22.110". If you look on page 1 of the bill at line 6, it states "Except as otherwise provided in NRS 22.110." I think it was a drafter's choice.

Chairman Anderson:
It is clearly a drafting provision moving it from the ending part of subsection 2 to the beginning of subsection 2. It doesn't change the question for those who are not familiar with NRS 22.110, which is an imprisonment until performance if contempt is omission to perform an act for penalty or failure to testify. So that question becomes primary in that subsection.

Assemblywoman Buckley:
The language about the 25 days is still carried forward in line 8 so I think when this was in drafting, they just did not want to repeat it in the exception language.

Chairman Anderson:
It emphasizes it from that point to the other so it applies to both sections.

> ASSEMBLYMAN HORNE MOVED TO DO PASS ASSEMBLY BILL 79.
>
> ASSEMBLYMAN CONKLIN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

Chairman Anderson:
This bill belongs to Ms. Buckley and Mr. Oceguera is backup.

Assembly Bill 78: Makes various changes concerning administration of estates. (BDR 12-592)

Chairman Anderson:
Mr. [Don] Cavallo, we were concerned about this piece of legislation. You were not able to be here on the day we had it in work session. While we did get it out of Committee by a very narrow vote, nine in favor and four in opposition, much of the opposition rested with the question of auctioneering in Section 2, where you had advocated the auctioneer's fee be without a cap which was the current statute relative to the commission for sale of personal property except manufactured homes. So we are back to square one.

Don Cavallo, Public Administrator, Washoe County, Nevada:
We are here to discuss the one section of the bill again dealing with the sale of personal property. I have supplied some documentation and facts and figures for the Committee (Exhibit E). I supplied a synopsis of some auctions to Ms. Buckley. I've also handed out a letter from Lightning Auctions (Exhibit F).

I'll let the auctioneers speak for themselves about the possibility of a cap or placing a higher figure in this bill. I think I would like to change my hat for a moment and speak as a member of the public. When my parents passed away a number of years ago I had that daunting task of having to step in and organize all their personal property. It had to be inventoried and arrangements made for my siblings to receive the items they wanted. At that point, I had a houseful of 50 years of living to deal with, so for me as a family member, it was a great relief to call an auctioneer in and arrange to take those items and place them into auction and taking that burden off of me. The other option would have been to have held a garage sale, which would have been very emotional for me but time-consuming as well. So I am a supporter of the auction companies in this aspect in liquidation of property.

Assemblywoman Buckley:
Since their last hearing, I had an opportunity to review all of the documents. I also had an opportunity to email Dan Ahlstrom, Public Administrator, Clark County and talk what their experience has been and learn a little bit more about

it. I think there is a great deal of work involved with this. I didn't know about auction companies until my husband's parents passed away. We did the work ourselves, packed, inventoried and gave away. It is very hard work. I support having the mobile homes and cars treated differently. I'm a little surprised the probate commissioner felt we needed this. For the small estates, the market has been 20 to 25 percent. I think that is probably fair.

[Assemblywoman Buckley, continued.] I also understand the buyers pay a 10 percent premium as well and from the documents you have supplied, I see sometimes pickup is an extra fee. The other thing I learned is, even though we passed this law in 2003 no one has followed it, so they have been charging 20 to 25 percent regardless of the state law, which I thought was interesting. The other comment I learned was even if we pass this, probably the auction companies would just add on a pickup fee, a storage fee, and not follow the law anyway, which I don't like to hear.

My only remaining concern is for the really large estates, if that fee is reasonable. This doesn't affect just public administrators where the large estate is an exception rather than the rule. I do worry a little bit because this law applies to everybody and whether that is reasonable in those cases.

Dr. Greg Williams, President, Lightning Auctions:
I will try and outline the auction business for you. The thing to keep in mind is that there are many levels of quality of auctioneering. I grew up in the auction business and I am familiar with the auction business as it is conducted in the farm states of Illinois, Iowa, and Indiana where the auctioneer shows up on auction morning and the sale has been set up by the farmer or heirs of the estate. The items are held up one by one. If there is no bid, they put something with it until the item is sold. At the end of the day, the checks are all made out to the heirs. The cash goes in the auctioneer's pocket and the auctioneer goes onto the next house the next day. Ten percent is very reasonable in a situation like that.

That is not the way we conduct business here in Nevada. Those of you that do come to my auctions know that we display items in a sense that you might see them in a store. In other words, we have bedrooms set up and office arrangements. It takes time to do that. We clean the merchandise and catalog it. We do everything we can to optimize the item to bring the best price. We also photograph all the items for inventory and we offer them for sale online with online bidding, which is an expensive situation but it does optimize our sale price.

[Greg Williams, continued.] We feel we have a fiduciary responsibility to require the highest sale price for the items that we can. Sometimes that means we have to spend more money, but if we can acquire a higher price, that's what we must do. I could imagine that there might be situations where 50 percent commission might not be unusual or out of line. It could happen where you had a $1 million situation where it took a half million to get a half million for that property. If you didn't spend the half a million you might only get $200,000 for it. There are situations I'd have to invest a large sum of money to get a return. It is not common but it could happen.

I find it also interesting that there is no cap on legal fees in this state. Yet there is a cap on auctioneer fees. That seems interesting to me. You have my letter in front of you (Exhibit F). I have tried to delineate our costs, what we do to try and put on a successful auction, the work that is involved, and the record keeping that is involved. I know Don Cavallo provided you with some auction results and I found it interesting when I saw his recaps on how closely they were in tune with the letter I had written.

Assemblywoman Buckley:
You make the argument about the million dollar estate and 50 percent may not even be reasonable if you put in $500,000 worth of work to try to get the higher price. I guess I am not concerned about that situation for a great deal of work to get a higher price. If that kind of work isn't required even for a private sale, what we are talking about is trying to preserve assets and resources for someone else's funds. What would you say to safeguarding the assets and not depleting them unnecessarily?

Greg Williams:
That, I believe, rests with the Office of the Public Administrator. Wouldn't that be his responsibility?

Assemblywoman Buckley:
But this law applies for all situations and not just public administrators.

Greg Williams:
All those people have a fiduciary responsibility. It would seem to me whether they were a trust officer, the bank, a public administrator, appointed by the court, or an attorney, each one of those has a fiduciary responsibility to the estate. If they fail to uphold that, then they are subject to court action or liability.

Assemblyman Conklin:
Do you operate in Washoe County?

Greg Williams:
That is correct.

Assemblyman Conklin:
How many other auctions do you compete with? I'm trying to get a feel for the marketplace.

Greg Williams:
Probably eight.

Chairman Anderson:
Don't you occasionally go out to other counties to conduct auctions?

Greg Williams:
That is correct. We conduct auctions all over.

Chairman Anderson:
It seems to me that I've seen your advertisements for at least four or five other counties besides Washoe County.

Greg Williams:
That is correct.

Chairman Anderson:
When heard, you say just Washoe County, and I wanted it recognized that your experiences are in a broader range.

Greg Williams:
We are licensed in Storey County, Churchill County, Lyon County, and Carson City. There is not a state auction license law. You have to be licensed in each municipality. Mr. Conklin, you asked how many auction houses I compete against. I can compete against anyone who walks into the Sparks City Clerk's Office and purchases an auction license. There is no license law other than the purchase of a license.

Assemblyman Conklin:
My concern is that I'm personally inclined to let the market decide the price. But my colleague brings up a very important point. This public body has a responsibility to the state to make sure they have the ability to get the most that they can or asset protection. It is possible in some counties where there is only one auctioneer and we are allowing them to set a price because there is only one. If we open this up, maybe we are allowing them to set a price that is unreasonable. In a market where you have 25 auctioneers, that price is going

to set itself somewhere reasonable with every auction. Every auction would be different. If you had an estate with $5 million of large items, your commission is probably going to be relatively small.

Greg Williams:
That's correct.

Assemblyman Conklin:
If you have $45,000 worth of goods and a lot of items, the cost is going to be quite large. I recognize that. In Storey, Elko, or White Pine County, what is that cost? That is what makes this particular piece of legislation difficult for us because you are operating in different, multiple counties.

Greg Williams:
I'm not sure that there is a county that is not fairly well represented in regard to auction services. Certainly the Elko area is well represented by several auctioneers out of Idaho and Utah. Winnemucca as well uses auctioneers out of Idaho, as well as from the Winnemucca area itself. The Fallon area has several auctioneers located there. There are auctioneers in Tonopah. I'm not familiar with the southern end of the state but I would assume they would be populated there as anywhere.

Don Cavallo:
Certainly as Mr. Williams points out, those large auctions for me are rare. As they get into a larger size, I certainly would call more than one auctioneer to give me a bid on their percentages and essentially have them compete among themselves for my business. We talk about the smaller counties having one auctioneer there. As it has been brought up by Assemblywoman Buckley, we have gone through our courts with this issue and have spoken with them. Ultimately, the statute requires that we have the sale of both personal and real property approved by the district judge and the court in a petition that goes before the court. When we do those petitions, those petitions have those auction documents attached to them so that the court is fully aware of what the commission costs in advance.

Certainly in my position as the public administrator, I have approached our judges and have discussed the possibility of the caps and the necessity to continue to function to be able to sell those assets. I think there is, by the statute, already a safe check and balance system for the administrator of any estate or the personal representative of any estate to have to get court approval to do that.

Greg Williams:
In the U.S. Federal Bankruptcy Court system, the U.S. bank trustee gets approval from the court prior to the sale. The commission is approved prior to the sale by the U.S. Federal Bankruptcy Court, which might be a solution to your problem if you consider that the public administrator or the trustee of the estate were to require permission or approval of the commission prior to the sale.

Chairman Anderson:
The statute does not currently require that.

Don Cavallo:
I don't believe it does. It does say you are required to get court confirmation of the sale. Realistically, that is on the end of the process. You have gone before the court, although a number of my petitions to the court ask the permission in advance to sell. If you are selling real property without the approval of a will giving you that authority, you have to do a notice to the court for that sale. But we are not here for real property, we are here for personal property today. It is vague in that area.

Chairman Anderson:
Ms. Buckley, maybe the solution is, as Mr. Williams suggested, that we amend the statute to court approval on the personal property area.

Assemblywoman Buckley:
I like that idea. Maybe if it is under a certain amount, you don't need approval. The Committee last time said for 20 percent you wouldn't need court approval. But if you were seeking a higher amount, you'd have to justify to the court. Let's say if it is $1 million estate, you would need approval for a higher fee. I think it provides some more checks and balances.

Chairman Anderson:
I note that in Mr. Cavallo's statement to the Committee that the percentage of auctions currently seems to be in the area of 25 percent and that would indicate we set the rate too low relative at 20 percent and that we might want to be looking at 25 or 30 percent.

Assemblyman Carpenter:
It looks like right now they are getting 25 percent and I figure that's fair.

Chairman Anderson:
Mr. Williams, you had signed in as in opposition to the bill. Are you opposed to the bill as a whole?

Greg Williams:
I was opposed to the 10 percent.

Don Cavallo:
I would agree with the 25 percent figure even in the statutory scheme of things. I agree if the amount were to exceed that, to go back and petition the court for approval would be a perfect scenario. Our intent is to save the funds in the estate to be distributed for the beneficiaries. Each and every time I have to file a petition with the court, it runs up fees and costs, so I would support the 25 percent plus some verbiage that if it exceeds the number, it has to be pre-approved by the court.

Chairman Anderson:
And also dependent upon the size of the estate, so that it doesn't apply in certain dollar amount estates because you would be diminishing that cost because of your additional costs in administrating it.

John Slaughter, Management Services Director, Washoe County, Nevada:
I just wanted to state that we had previously talked about an amendment in Section 2, which is on page 2 of the bill. In discussion with the banks, it talks about the charge for bank statements not to exceed $2. We still support that particular amendment.

Chairman Anderson:
I don't believe that the Committee was going to change the fact that the banks needed their $2 charge. Mr. Cavallo, I believe you had agreed to this amendment.

Don Cavallo:
Yes, I did.

Steve Zuelke, Marketing and Public Relations Director, Arundel Auction:
[Submitted Exhibit G.] I certainly am only in opposition to the 10 percent cap that is placed on the liquidation of personal property. I do agree with Assemblywoman Buckley's and Assemblyman Conklin's observations that the intent purpose of this bill originally was to protect the assets of an individual's estate whether it be passed through the hands of an administrator or through an executor.

I would like to believe that public administrators and executors are exercising their responsibilities in the best interest of that particular estate. All of us are familiar when we walk into a home or someone's property and see a wide variety of lovely items, that the items are probably highly valued. Only

instances where you bring in trained professionals can you absolutely recognize the worth of an item. We recently handled an estate here in Carson City. It was a privately transferred estate and consigned through our company. The executor of the estate said we have some art work here. He did not recognize on the wall of this particular home was a painting done approximately in the 1930s. When asked what they thought the painting was worth, their response was approximately $50. We did a little research on the item. The item should bring, if it marketed correctly, somewhere in the neighborhood of $5,000 to $7,000. We see this all the time.

[Steve Zuelke, continued.] All of us are familiar with the "The Antiques Roadshow", eBay, and the occasional stories of the unusual item that brings a significant amount of money. By setting a cap too low, a liquidator can be paid in relation to the estate, but you are actually encouraging some estate liquidators to back out of the market. In other words, there are fixed costs, labor costs, advertising costs, storage and flooring costs that are fairly inflexible. As Dr. Williams can tell you, he rents on a month-to-month basis or he may own as I'm not familiar with his circumstances, a building that is a fixed cost to him. If he cannot continue to make this flooring, cannot pay his labor, cannot pay his storage, his rent, his insurances, obviously he is going to leave the business or stop handling that type of business.

What happens then is individuals come into the business who have less knowledge, less recognition, and less ability to handle these. Ultimately what you end up doing is hurting the value of that estate simply because you no longer have experienced professionals who are able to bring and realize the best dollar. If the estate if valued at $1million and you have a professional who can come in and receive $1 million, his fee is 25 percent and you pay him a quarter of that estate. You bring in a nonprofessional who does not recognize the value of that estate, he realizes $100,000 for that estate. Ultimately what you have done then is hurt that particular value for that estate in the passing of money along to the decedent's family. That is an unintended consequence of placing a value too low.

I don't know if I agree with requiring a fee structure to be approved by a court prior to a sale if it exceeds a certain level. I would like to think that public administrators are elected in the public interest and executors are the same who are appointed in the estate's best interest. I think there would be a reasonable meeting of minds. Also addressing the circumstance where there are smaller numbers of companies that may be in the business of handling an auction in a particular area. If one company comes in and will do it for 70 percent and the other company recognizes that there is value there, they may very easily come in and drop their percentage. You may have a reverse auction as a result to

where they are bidding, where they can see they can make money, remain in business, and still realize a value for the estate.

Chairman Anderson:
Your auction house also participates on the Internet, relative to the sale of these products?

Steve Zuelke:
Yes, that is correct. Our service does utilize a worldwide market in regards of taking select items and placing them on eBay, whereas there may be a larger available market. There is also in that regard a considerable paper trail where the value of an item can be established and presented back to that estate.

Chairman Anderson:
I presume the bank still stands by its position. It is the Committee's intent, I believe, to include the reference to the $2 that was suggested. The hearing on A.B. 78 is closed to bring it back to Committee. What is the pleasure of the Committee? Do you want to hold it for a work session or do you want to take action on the bill? Ms. [Allison] Combs could prepare another document for us for Monday's work session which would outline the 20 or 25 percent and adding the possibility of a reference, if they are going to exceed that amount in the use of personal property and other materials, that we have already seen outlined in the previous amendments that we had adopted when dealing with this legislation.

Assemblyman Carpenter:
It would be my feeling that we raise it to 25 percent and if it's over 25 percent they get permission of the court.

Assemblywoman Buckley:
To clarify, would cars and mobile homes still be as we decided last time? The change would be to 25 percent for personal property and if more, seek prior approval of the court.

Chairman Anderson:
The intention would be that the chair would entertain a motion that manufactured homes and/or automobiles as sold would be in the ten percent range. Other personal properties would be kept at 25 percent except as provided in NRS 14. The commission for the sale of any other personal property shall not exceed 25 percent. If they are going to exceed 25 percent, they have to go to the court in advance to get permission to do that.

The Chair will entertain a motion relative to: the manufactured home is sold pursuant to the sections including the automobile at 10 percent, and the $2 commission be effected in sections NRS239A.075, for such statements of a bank shall not exceed $2. That would change the "without charge" of the bill as written on line 26 of page 2. We would also put the prohibition, if the 25 percent is to exceed in reference to NRS 148.105(3) that it would require court permission before the public administrator would be able to proceed.

ASSEMBLYMAN CARPENTER MOVED TO DO PASS ASSEMBLY BILL 78 AS AMENDED.

ASSEMBLYWOMAN ANGLE SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

Chairman Anderson:
I will give this bill to Ms. Gerhardt and either myself or Mr. Horne will take care of the amendments. [The meeting was adjourned at 9:59 a.m.]

RESPECTFULLY SUBMITTED:

_____
Carole Snider
Committee Attaché

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 16, 2005 Time of Meeting: 8:00 a.m.

Bill	Exhibit	Witness / Agency	Description
	A	Agenda	
AB 166	B	Robert Eglet	Power Point Presentation concerning Offer of Judgment Rules.
AB 166	C	LCB	Comparison Study
AB 166	D	Assemblyman Joe Hardy	Rule 68
AB 78	E	Donald Cavallo, Washoe County Public Administrator	Letter to Assemblywoman Buckley
AB 78	F	Dr. Greg Williams, President, Lightning Auctions	Letter to Donald Cavallo, Washoe County Public Administrator
AB 78	G	Steve Zuelke, Marketing and Public Relations Director, Arundel Auctions	Statement to Assembly Judiciary Committee