MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fourth Session
March 27, 2007

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 7:42 a.m., on Tuesday, March 27, 2007, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/74th/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Bernie Anderson, Chairman
Assemblyman William Horne, Vice Chairman
Assemblywoman Francis Allen
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblyman Marcus Conklin
Assemblywoman Susan Gerhardt
Assemblyman Ed Goedhart
Assemblyman Garn Mabey
Assemblyman Mark Manendo
Assemblyman John Oceguera
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom

COMMITTEE MEMBERS ABSENT:

Assemblyman Harry Mortenson (Excused)

GUEST LEGISLATORS PRESENT:

Assemblywoman Shelia Leslie, Assembly District No. 27
Assemblyman Bob Beers, Assembly District No. 21

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Risa Lang, Committee Counsel
Danielle Mayabb, Committee Secretary
Matt Mowbray, Committee Assistant

OTHERS PRESENT:

Victoria M. Van Meter, Court Master, Family Division, Second Judicial District, Washoe County
William Gardner, Chief Criminal Deputy Prosecutor, Reno City Attorney's Office
Brenda Dizon, Executive Director, The Shade Tree/Noah's Animal House,
Nancy Hart, Representative, Nevada Network Against Domestic Violence,
Staci Columbo, Representative, The Shade Tree/Noah's Animal House
Brian O'Callaghan, Detective, Las Vegas Metropolitan Police Department
Gabriela Gandarilla, Representative, Safe Nest
Heidi Folle, Representative, Safe Nest
Ann Price-McCarthy, Representative, Nevada Trial Lawyers Association
Don Mello, Private Citizen, Dayton, Nevada
Albert Maurice, Dealer, Mirage Casino
Jesse Guest, Representative, Tip-Earners of Nevada
Marcus Hansel, Dealer, Wynn Las Vegas
Meghan Smith, Representative, Minimum Wage Tipped Employees of Nevada
Edward L. Watson, Vice President, National Association for the Advancement of Colored People
Thomas Golly, Representative, Nevada Tip-Earners
Susan Fisher, Representative, Nevada Hotel & Lodging Association
Samuel McMullen, Representative, Las Vegas Chamber of Commerce and Nevada Restaurant Association
Kim Sinatra, Senior Vice President and General Counsel, Wynn Las Vegas
Andrew S. Pascal, President, Wynn Las Vegas
Kevin Tourek, Senior Vice President and General Counsel, Wynn Las Vegas
Michael Tancheck, State Labor Commissioner, State of Nevada
Dan Silverstein, Vice President, Nevada Attorneys for Criminal Justice; Attorney, Homicide Unit, Clark County Public Defender's Office
Jason Frierson, Public Defender, Clark County
Cotter Conway, Deputy Public Defender, Washoe County
Joseph Turco, Representative, American Civil Liberties Union of Nevada
Ben Graham, Representative, Nevada District Attorneys Association

Kristin Erickson, Representative, Nevada District Attorneys Association
Tammy Riggs, Deputy District Attorney, Criminal Division, Washoe County
Josh Martinez, Representative, Las Vegas Metropolitan Police Department, Nevada Sheriff's and Chief's Association

Chairman Anderson:
[Meeting called to order. Roll called.]

Assembly Bill 353: Makes various changes concerning the restoration of parental rights. (BDR 11-851)

I am removing Assembly Bill 353 from today's agenda and I will move it to April 4th. There are some issues in the bill that need to be addressed and I want to make sure there is sufficient time for parental rights questions to be properly addressed.

Let us turn our attention to Assembly Bill 282.

Assembly Bill 282: Makes various changes to provisions concerning domestic violence. (BDR 3-105)

Assemblywoman Sheila Leslie, Assembly District No. 27:
[Read from prepared testimony (Exhibit C).]

Chairman Anderson:
We care deeply about this issue. The bond that takes place between individuals and their animals is very special. I support this bill. We should have recognized this issue a long time ago.

Victoria Van Meter, Court Master, Family Division, Second Judicial District, Washoe County:
[Read from prepared testimony (Exhibit D).]

From my experience in family court, I believe that A.B. 282 effectively addresses the issue of cruelty to animals as it relates to domestic violence. It allows judges to consider killing an animal or injuring a domestic animal as a legal basis to issue a protection order. I had one abuse case in which the adverse party forced the applicant to hold their family dog while he beat it over the head with a shovel. Also in this family there were verbal and other types of abuse. The court's decision to grant a protection order would have been significantly clearer if a provision against killing or injuring a domestic animal was in the statute at the time. Throughout our country, we have significant

evidence to indicate that a barrier to leaving an abusive relationship is the fear of threats or death to animals. The other two provisions in this statute allow judges to enjoin the adverse party from physically injuring, threatening to injure, or taking possession of a domestic animal.

My one last statement is that A.B. 282 is legislative recognition of the connection between domestic violence and animal abuse. By having it in the statute it allows judges to fully appreciate that connection and recognize it when dealing with issues of domestic violence.

William Gardner, Chief Deputy Criminal Prosecutor, Reno City Attorney's Office: One of the things that I have learned in my ten years as a prosecutor is that we enjoy a fondness of animals in this country. The abuse of animals or threatened abuse of animals becomes a very powerful tool in the propagation of domestic violence by perpetrators. Perpetrators of domestic violence are aware of and understand the value of domestic animals. Perpetrators understand that domestic animals are not only family pets, but are also family members. This knowledge allows them to manipulate their victim's behavior to a disturbing degree. Unlike children who can report their abuse or whose injuries can be detected at school, animals cannot speak or show signs of their injuries to authorities. The use or threatened use of violence becomes a very powerful tool in manipulating the behavior of victims.

The most dramatic example that we have experienced in the City Attorney's Office was when the violence against a wife escalated as she took steps to protect herself. The husband was no longer able to achieve his goals because his wife was in the process of getting a restraining order against him. He took the family cocker spaniel into the kitchen, shot and killed it in front of the children. This type of domestic violence has a profound effect on the children who experience it. Several studies clearly show that when children witness this kind of behavior, they are at much greater risk of externalizing this behavior and perpetrating similar behavior.

Violence against family pets is a powerful tool because it works. You have heard the statistics. I reiterate that as many as one out of five women will not leave a relationship because they have no where for their pets to go. They can not put them in an apartment. Sometimes shelters are reluctant to take them. About 50 percent of abused women have pets.

One concern that was brought to my attention today was that perhaps cattle be included in a restraining order. Assembly Bill 282 clearly states that this type of protection extends solely to domestic animals and not livestock. Our office is strongly in support of this bill. I cannot imagine that an argument could be

made in opposition of it. It is a great bill for assisting people who are in violent relationships, and it is a great bill for protecting all members of the family. I strongly urge its passage.

Assemblyman Carpenter:
Did I understand correctly that it is your view that this bill could not apply to a horse?

William Gardner:
It could apply to a horse. It depends on what the definition of a domestic animal is. From my experience in Nevada, a horse would be somewhere in between domestic pets and traditional livestock. A horse could be considered a domestic animal more than cattle or sheep. There is typically a closer relationship between people and horses than people and cattle.

Assemblyman Carpenter:
A child can think just as much of their 4-H lamb as they do their dog. If this bill does not make provisions for cattle, sheep, or horses, I think it definitely should. We know that there are situations where those types of animals are just as significant to children and parents as other domestic animals

Chairman Anderson:
Ms. Lang, is the question of what qualifies to be a domestic animal left open for the judge's interpretation?

Risa Lang, Committee Counsel:
The way the bill is currently written, the definition of a domestic animal is open to interpretation. If it were the desire of the Committee, we could certainly put in some sort of definition.

Chairman Anderson:
I do not want to slow the passage of this bill. I was hoping we could get it passed today. Mr. Carpenter wants to clarify the definition of what a domestic animal is.

Brenda Dizon, Executive Director, The Shade Tree/Noah's Animal House:
Domestic abuse directed towards pets is an enormous barrier to both women and children in leaving their abusers. I would like for the entire Committee to know that we have brought about a new program in Southern Nevada that addresses this issue specifically. That program is called Noah's Animal House. Our phones started ringing immediately after announcing and launching our program. Our callers said, "Finally someone is doing something and I can leave."

The passage of a bill similar to this one was defeated in another state because people believed that it only protected animals. If any Committee member believes that to be the case, I ask you to reconsider. In granting protection to family pets, you also give protection to the people who unconditionally love them.

Nancy Hart, Representative, Nevada Network Against Domestic Violence:
We are in strong support of the passage of A.B. 282. I am submitting a brief fact sheet that contains some of the statistics referred to by Assemblywoman Leslie [Exhibit E]. My submission includes connections to additional stories, including a short letter in support of this legislation and evidence of the need for this bill.

Staci Columbo, Representative, The Shade Tree/Noah's Animal House:
I would like to refer back to Noah's Animal House. It is the first animal shelter built on the grounds of a domestic violence shelter in Nevada and the Western United States. We had just begun our fundraising when we started fostering the hundreds of pets that began arriving with people's increasing awareness of our services. We currently run a 1,400-square-foot kennel which allows us to foster over 24 animals with access to a localized veterinary station. Now women and children can receive protection in the same facility and on the same land as their pets.

A survey of women whose children suffered from physical and sexual abuse or other domestic violence in the household shows that 37 percent of boys and 29 percent of girls become abusive to the family pet. They imitate the behavior they have learned. By breaking this cycle, we break the future abuse that occurs when children are taught to do harm because that is what they have been exposed to most of their lives.

Brian O'Callaghan, Detective, Las Vegas Metropolitan Police Department:
Domestic abuse directed towards family pets is a powerful technique for control. Assembly Bill 282 provides another layer of protection for victims of domestic violence and we fully support it.

Chairman Anderson:
How many cases of domestic violence that you respond to involve animals or pets being used as a means of taking control?

Brian O'Callaghan:
I have had a few such cases, although I do not know the specific number of cases. Currently our domestic violence units handle cases involving the use or threatened use of violence towards animals. Typically we call Animal Control and they remove the animal from an abusive environment.

Gabriela Gandarilla, Representative, Safe Nest:
I would like to share with you the impact of domestic violence and pet abuse in my life. I am a survivor. Unfortunately, none of my pets made it. By age four I had seen my mother not only raped, beaten, and emotionally tortured, but I also saw the pets that we held dearly tortured. My mother taught us to confide in our dogs. We used their ears as handkerchiefs because we could not show emotion in front of my father. I had seen my pets hacked with a machete, suffocated, and even sexually abused, and we had no one to ask for help.

I want to share something that sticks out. Most of us feel that pets do not necessarily feel love. We think that they simply react based on instinct. We had a Labrador retriever mix that stood between my father and mother when he threatened to hack my mother with a chainsaw. The dog was the one who took the blow. She did not make it. I was only four years old at the time.

I felt so much guilt and shame growing up. I felt that I was selfish because I kept bringing pets home. I even had a pet hen that I named Spartacus who I taught to walk on a leash. There was also Napoleon, my pet goose; Minerva, my Lab; Osito; none of them made it.

All of these incidents took place in Los Angeles during the mid1980s. We come across many children who experience what I have gone through. My experiences have made me very passionate about what I do within this movement.

Heidi Folle, Representative, Safe Nest:
We have submitted two drawings from children that show the effects that violence towards animals has on kids (Exhibit F).

Ann Price-McCarthy, Representative, Nevada Trial Lawyers Association:
The Nevada Trial Lawyers Association is in support of this bill. I understand the concern about the word "domestic." I really do not want to slow down the passage of this bill, but I am suggesting that we reconsider some of the wording contained in it. Many families these days do not necessarily have married people in them. Couples may not have communal property. There are mixed families consisting of people who live together. This bill does not protect a pet belonging to the adverse party.

A woman came to me who had been married to a man for two years. He owned a young golden retriever from previous relationship. Although the dog did not belong to her, her nine-year-old son had bonded with it. The woman's husband would frequently come home ill-tempered and outraged during the week. He would make the woman and her son stand at the open patio door while he tied the golden retriever up with electrical cords. He would proceed to beat the dog, intending for them to listen repeatedly to its screams and yelps, and it was his dog.

We want to stop this type of abuse and remove the barrier that people encounter when they are unable to leave because of their pets. In order to make this bill effective, we need to add the words "adverse party" in Section 2, page 3, line 11, before "applicant." It would read, "owned or kept by the adverse party, applicant, or minor child." If you are concerned about domestic animals or about any animals that are treated as pets—horses especially—remove the word "domestic."

Chairman Anderson:
Ms. McCarthy, you would have to meet both criteria. It would have to be the adverse party's pet or one owned by either person in the couple. Or would it protect both pets? We are trying to prevent the torture or killing of pets, so do your criteria accomplish that?

Ann Price-McCarthy:
Subsection (e) would keep perpetrators from injuring any animal, including ones that belong to them. It would keep him from injuring his own animal. Here we have "domestic animal that is owned or kept by the applicant or minor child." We are interested in the abuse of animals and the effect that it has on victims.

Chairman Anderson:
Is there anybody opposed to the passage of this bill? We will close the hearing on A.B. 282.

We have written testimony from Michael Sprinkle that needs to be placed on the record for today in support of the legislation (Exhibit G).

Ms. Lang, would the solution suggested by Ms. McCarthy conform to our language?

Risa Lang:
I do not think that it will be a problem to remove the word "domestic" nor to add the words "adverse party."

Assemblyman Conklin:
I am in support of this bill. In reference to changing the word "domestic" on page 2, line 24 and page 3, line 10, I am concerned that if we leave the word "any" we may be changing the wording to include any animal and it may affect hunting statutes. Would the rewording of "domestic" affect cattle ranchers who slaughter their cows?

Chairman Anderson:
Ms. Lang, we may have to work with the wording before we move this bill. We will move it to the work session after the next. Let us move our attention to Assembly Bill 357.

Assembly Bill 357: Revises provisions governing tips and gratuities received by employees. (BDR 53-1166)

Assemblyman Bob Beers, Assembly District No. 21:
I brought A.B. 357 forward because I was contacted several months ago by several constituents who work as dealers in one of the strip resort casinos. A change in the established policy had occurred in their workplaces. Fifteen to twenty-one percent of their tips were being taken from them and were applied to the salaries of their various floor managers.

The dealers showed me a bill that was written in the early 1970s which originally intended to prevent this from happening. The change in tip policy was clearly a violation of that statute. Judicial decisions made after the bill was introduced changed the way the statute read so that it no longer had any meaning. That is why I decided to put this bill together. This bill amends the statute so that the definitions are stated more clearly (Exhibit H). This legislation would make future judicial editing of the law much more difficult.

Don Mello, Private Citizen, Dayton, Nevada:
Before 1971, employers had to post a sign stating that tips and gratuities would be applied to their employees' minimum wage. Without this sign, employees could not apply the tips. In 1971, a bellman working at the Mapes Hotel and Casino in Reno asked to meet with me. He had kept a log of his tips and wages for weeks. His tips for each week were more than his wages; therefore, he owed money to his employer. Many of his fellow employees were in the same situation. Then I introduced the original tip legislation in 1971.

This legislation is needed considering that the middle-income bracket is shrinking, wages are declining, and food and gas prices have had sharp increases. It is difficult to make ends meet without tips for people who earn minimum wage. Gaming and mega-resorts bring tourists to Nevada. Without

the hard-working men and women serving them, there is a good chance many of them would not return.

This bill was brought about because judges have ruled that tips did not have to be applied as the law read. Nevada became a state 143 years ago, but still has a part-time legislature that meets only 4 out of every 24 months. Nevada has a Judicial Branch that waits for the legislators to go home so that they themselves can start legislating. As soon as you have gone home, the Executive Branch starts writing regulations that have the effect of law. It is time that this Body becomes a serious branch of government. The *Nevada Constitution* says that legislators will be paid for 60 days of a regular session and 20 days of a special session and not while you serve on an interim committee. The answer to these problems is to have an annual session. I recognize that this has been tried before and the press has said that they will support annual sessions. This Committee should seriously look at the Missouri plan. It is a plan that will keep money out of judge's races.

Chairman Anderson:
Mr. Beers, I noticed that in your packet you submitted several letters of support and three of the 100 affidavits that you received (Exhibit I). I will have all of these entered into the record for today.

Assemblyman Oceguera:
Mr. Beers, could you explain what this amendment does?

Assemblyman Beers:
This amendment answers a concern that was raised to me by people who are involved in tip law. There was an established tradition in tipping; then a change occurred and tips began to go through payroll for taxation purposes. They were concerned that the original Section 1, subsection (a) would cause problems with the IRS. This amendment removes that section without weakening the intent of the law, and solves a federal problem. It was also brought to our attention that there could be retaliation if this law passes. We would add a section to prohibit the posting of signs stating that you could not tip in areas where that practice had previously been customary.

Assemblyman Conklin:
How would the practice of business take place? If I owned a casino or a large facility and I had 1,000 service employees who garner tips, it is my understanding that any group of employees could enter into a written, contractual agreement for tips with the business owner. Potentially just two people could enter into an agreement and the owner could have up to

500 different tip agreements in their establishment? Is that what you intended in this bill?

Assemblyman Beers:
That would be an unintended consequence.

Chairman Anderson:
There are a wide variety of different kinds of games and opportunities for the pooling of tips. For our purposes, what is the difference between the busboy, the kitchen, and the waitresses? Do you intend all restaurant staff to be in one tipping group? How do you determine who is or is not in the tipping pool? Is it going to be entirely up to employee groups to determine?

Assemblyman Beers:
That was the original intent that the employees determine their own tipping groups. One of the reasons for this hearing was so that we could find ways to avoid unintended consequences. The original intent of this law as well as this bill was to prevent the confiscation of tips to help businesses to profit from their employees' tips. If we need to adjust or add definitions to avoid confusion down the line without affecting that intent, I have no problem with that.

Assemblywoman Allen:
I am trying to understand the breadth of this bill. When my younger brother was in high school, he worked at Winner's Corner Carwash. During his first year he vacuumed with no tips. The person who washed the car at the end was the person who earned all tips. My brother worked his way up until he became the person at the end who received all of the tips. He worked and collected tips for about six months until management changed their policy. The people at the end who received tips were then required to share it with everyone. I am concerned that businesses have disregarded their employees when they decided that this was the best solution. Is it your intent that we affect small businesses?

Assemblyman Beers:
My intent is not to affect small businesses. In some small businesses, such as small diners and casinos, the owner is also manager, pit boss, dealer, and may also maybe even a server. I am trying to find a way to accommodate different tip issues that may arise for those types of businesses. It would be different for a business of over 30 employees. This bill is intended to prevent management from arbitrarily making tip decisions without the consent of those who have earned the tips. If the people who collect tips want to enter into an agreement where they all share equally, that should be their choice.

Assemblywoman Allen:
In the carwash example that I gave, the employees at the end of the production line did not want to evenly distribute their tips. Management made it the policy to make it more equitable. That carwash likely had a payroll of over 30 employees, which may be considered a mid-sized business rather than a small business. Either way, it seems like the tip decision should be given to each private business individually.

Assemblyman Beers:
Again, that was the owner making the decisions on behalf of the employees. In your example, the fiscal impact on employees was probably not as substantial when they were required to share their tips amongst the other employees. In situations where employees are earning minimum wage and need to support a family, the business should not arbitrarily decide to adjust their bottom-line by deducting a significant portion of employee's tip earnings. A reasonable person can see that is not a good idea.

Albert Maurice, Dealer, Mirage Casino:
I have been a resident of Las Vegas for 36 years. I have also been a dealer for the same number of years. I am here to support A.B. 357. This bill concerns all tip earners throughout the nation. Current tip policy has a sweeping and devastating effect on tip earners. *Nevada Revised Statutes* 608.160 was passed by this body in 1971. When read objectively, this bill clearly states that employers are prohibited from taking their employees' tips for the profit of the employers. The Wynn tip-policy is clearly in violation of NRS 608.160. Unfortunately, the judicial system has distorted the meaning of this law since its passage. This is not the first time that the legal system has distorted the law that they were sworn to protect. Please honor and respect the intent of your predecessors by passing A.B. 357. By doing so you will stop a very damaging policy that is harmful to citizens, the reputation of the main industry of Nevada, and the entire State of Nevada. This will send a message to the legal system in their practice of rewriting legislation and bring you the respect of your successors so that they may honor the legislation that you pass in your tenure. We have seen enough corporate greed and the abuse of power in this country's recent history. This is another example. Please do not let this happen in the great State of Nevada. Please pass A.B. 357.

Chairman Anderson:
Next we will hear from Mr. Guest.

Jesse Guest, Representative, Tip-Earners of Nevada:
I am going to address Ms. Allen's concerns. The young man who was vacuuming cars was entitled to tips. As a consumer, it is my prerogative to tip

any particular person I choose. I do not need anyone, including a casino manager, to take it upon himself to decide who I intend to tip. I understand that sometimes restaurant busboys, casino supervisors, or people who vacuum my car may seem inaccessible when I would like to tip them, but I have the opportunity to tip them if I desire to do so. For example, if I was gambling in a casino and wanted a specific person to receive my tip, I could ensure that I presented them with my tip by specifying who the tip was intended for. I would not want my tip to be confiscated by the supervisor for him to determine who I intended to tip. Consumers have the right to decide who their recipients of their tips are. It is unfair for management to decide who I, as a consumer, am required to tip. I ask that you support A.B. 357 to prevent management from arbitrarily assigning tips that were intended for other individuals. Perhaps employees can be allowed to receive tips directly.

Chairman Anderson:
In reference to Ms. Allen's carwash example, oftentimes I tip the person who presents me with my car after it has been cleaned because that is the person who I see. I do not necessarily tip that person because they have done a great job cleaning my car. The person at the end of the carwash happens to be the person who I have contact with after my car has been washed. The person who vacuums cars probably has the most difficult job in the car washing process. They are most deserving of a tip, but they do not typically come into contact with customers as they are busy vacuuming.

At a carwash or at other similar businesses, are employees unable to determine how their tips are distributed? If service employees desired, would they have the option of amalgamating their tips?

Jesse Guest:
Yes, employees have the option of combining their tips. Generally speaking, people who receive a tip do not want to share it with their coworkers. I can understand that. I also understand your point, and I understand Mr. Pascal's desire to implement this policy. But I do not believe it is necessary. The person who vacuums is paid to do his job. He is compensated for his work from the money that I paid for the carwash package. If I tip the person at the end, it is to ensure that the person vacuuming does his job well as a form of quality control. If I desire to tip the person vacuuming, I have the option to walk to him and do that.

Assemblywoman Gerhardt:
As consumers, we should decide where our tip goes. If I want to tip a valet, he is my intended recipient. If there is a tip box available, I assume that if I contribute to it, it will be distributed among the employees. If I contribute to a

tip box, I am assured of who will receive my tip. If we are going to have tips distributed, perhaps tip boxes are an alternative solution to individual tips. That way if a consumer wants to directly tip a dealer, he can ignore the tip box and directly tip the dealer.

Chairman Anderson:
Since table games are regulated differently, the size of the tip might have to do with the size of the wager that is allowed at a particular table. Getting a $100 chip compared to a table that only allows $2 bets makes a significant difference when considering a tip box. The manager controls which tip box employees could garner since tips also vary by shift. I remember how casino tips are distributed from my own experience as a casino employee.

Assemblywoman Gerhardt:
It should be driven by the consumer because they are the ones giving the tip.

Chairman Anderson:
It seems that employees have a different opinion.

Assemblyman Conklin:
I am concerned about this bill because it seems to have several unintended consequences that need to be addressed. I have not received tips since my work experience has primarily been in human resources. Let us consider that hypothetically there were a group of employees earning the largest amount of tips. Let us also consider that this group decided to combine and divide their tips amongst themselves. What would prevent management from dividing such a group by sending its members to job assignments which result in lower tipping? The unintended consequences of passing this bill seem to outweigh its benefits.

Jesse Guest:
I understand and I agree with you to a certain extent. The practice that has been in place in Las Vegas has been that everyone working on the gaming floor contributes their tip to be distributed evenly. If employees would like a tip pool to be consistently established, maybe we can add an amendment to provide for that. In this proposed amendment, employees who do not wish to participate will be required to regardless.

I do not know if this is necessarily an issue of individual employees in the casino wanting to go for their own tips. As we stated earlier, there is nothing to prevent management from placing favored employees in high-tipping positions. If an employee does not wish to cooperate in a tip-pool, what would stop management from placing that employee in a poor-tipping assignment? If

management wants a 24-hour tip pool in place, there are ways in place for them to go about making that possible. In practice it would not be practical for an established group of high tip-earners to separate themselves from the rest of the employees and leave everyone else out to dry. That is not what management wants. They would not be able to stock their casinos with talented, professional individuals if that were to take place. Perhaps the bill needs to specify this issue somehow. The issue could be addressed easily.

Assemblyman Horne:
We might be getting a little away from the purpose of this legislation. Is this supposed to be a discussion on policies pertaining to whether or not we should allow certain gaming facilities to mandate that they share employees' tips with their management as opposed to the other employees? I know there are some unintended consequences that may arise from this bill. I do not know if one of those consequences is a separation of those working at high tipping tables to those of low-tipping tables having their own separate groups. There is no danger of those employees working at a coffee shop being required to share their tips with everyone on the gaming floor. I do not think that is the danger here. The issue that needs to be addressed in regards to this bill is whether or not we are going to allow tips to be shared with supervisors or other management.

Chairman Anderson:
We are concerned with the precedent that was set recently by the court in revising the original intent of this legislation. We clearly want it to be understood that they have changed it from what the original legislative intent was.

Marcus Hansel, Dealer, Wynn Las Vegas:
I come today as a husband, father of three, and a dealer. I am asking you to protect my fellow dealers and my money. *Nevada Revised Statutes* 608.160 protects dealers' money from casino operators. They are not to benefit from any form of tip pooling of dealer's money. I was hired by Mr. Wynn and his property for $5.15 per hour. That is my pay. About one and one half years later, I now earn $6.15 per hour. My coworkers and I earn our tips. Mr. Wynn did not guarantee me any tips when I was offered the job.

Chairman Anderson:
Please keep your discussion pertinent to the policy only.

Marcus Hansel:
As many of the Assemblymen have stated, we want our earnings to remain ours alone. When we do 100 percent of our job, we do not want to be compensated with 80 percent of our earnings.

Chairman Anderson:
Have you read the bill?

Marcus Hansel:
Yes.

Chairman Anderson:
How will this clarify the problem you experienced at your place of employment? How does the bill resolve the problem you experienced at work?

Marcus Hansel:
The bill gives dealers back the money that they earned in tips and to pool together. It protects our money from being redistributed by casino owners; to collect our money and give it to management.

Assemblyman Horne:
We have heard today about employees of carwashes not being able to share in the earning of tips, only those at the end getting it. The restaurant busboys get to share in tips from the servers; on the gaming floor, the floor supervisors get to share in tips as well. Under that theory, if I give you a tip when I give you a $100 bill for you to make change, arguably you could say that the person you notify for change is helping you to do your job as well. It begs the question: why should you not share your tips with that person? How is that different from other places where tips are shared?

Marcus Hansel:
They have a much higher salary than I do. They do not make $6.15 per hour. They know what they get paid when they work eight hours. I know that if I stay eight hours I make $6.15 multiplied by eight. When I deal to six people, the floor supervisor has four, five, and six games—multiply that exponentially. Can that floor supervisor spend quality time with each individual player as a dealer does? As a dealer we have personal contact with those players. A dice crew has four individuals that do that. Three dealing, one on break, they come back. The specific group of employees takes care of that group of players. You will have 16 players on a dice game. One floor supervisor is potentially watching two games. That is thirty-two people that one person is serving. They have to worry about rating the player. That is their job. They rate the player. They determine how much the player won, how much they left with,

et cetera. They want to know the information that the corporation wants to know. Their job is to monitor the earnings of the casino.

Assemblywoman Allen:
I am trying to grasp how much loss to you there is. As an aggregate amount to you monthly, how much is this loss to you?

Marcus Hansel:
I could send my daughter to college on what I have lost in one year. I lose 25 to 30 percent of my earnings.

Chairman Anderson:
This depends on the size of the hourly wage relative to the type of casino where you are employed. At a minimum, a quarter of your salary comes from gratuities and what you earn based on your performance with players.

Marcus Hansel:
I entertain players the entire time I am working.

Meghan Smith, Representative, Minimum Wage-Tipped Employees of Nevada:
Did you get the four-page letter I wrote (Exhibit J)?

Chairman Anderson:
We will make sure that the four-page letter is in the record. It is not necessary to read it as it is being distributed right now.

Meghan Smith:
I am a dealer at Wynn Las Vegas. I have been in Las Vegas for the last four years. Is everyone aware of the practices taking place at Wynn?

Chairman Anderson:
Please restrict the discussion to this particular policy. If there is an unusual practice taking place at your casino, you may refer to your establishment using the phrase "at my particular establishment."

Meghan Smith:
In my particular establishment there is something very peculiar that happened. We refer to the last Monday in August as "Black Monday." Our casino owner stood in front of us and told us that he was going to take a portion of our tips and give them to management. This bill is trying to stop that. I understand exactly what Ms. Allen is saying about lines of service—from busboys to wait staff. It is important to attend to the needs of different levels of service employees. But management is above service employees. The house pays

them five times more than they pay dealers. Their job is to correct dealers' mistakes and to prevent tip hustling. Something like this happened in 1999. My letter addresses that particular incident. The Resort At Summerlin tried to rename the dealers and floor-men with the title of "hosts." They decided to pay them all a flat rate of $7.75 per hour with their full share of tips. The Labor Commissioner's office is in charge of enforcing the labor laws. The Gaming Control Board cannot monitor what is going on. If everyone is involved in collecting tips, it saves the company money since they do not have to pay management as much money. They said no way. I am trying to figure out why it is okay now, but it was not in 1999. In my letter I address several points. I address case law, the code of federal regulations under the Fair Labor Standards Act (FLSA) where it defines tip pooling. It says tip pooling is okay, but those who withdraw from the tip pool must also contribute to it. They define where if people put $30 or more per month into the tip pool, they should also be allowed to withdraw from it. Managers are traditionally not tipped. I would like to address that fact that we work in a customer service industry so everyone has to be nice to customers. I call the cocktail waitress over to serve the guests at my table, but I do not expect her to give me 15 percent of her tips. What we do is ensure that our guests are served well.

Chairman Anderson:
Have you worked at other properties or is this your only place in this line of work?

Meghan Smith:
Yes, I have worked at other properties.

Chairman Anderson:
Is your current place of employment the only place where these tipping practices have been implemented or have you encountered similar problems elsewhere? This tip issue has all been a fairly recent development. It is the result of a court case challenging the interpretation of the law.

I am just trying to put this issue into perspective. It is easy to dwell on one particular property where the issue is clearly visible, but the policy changes we would like to make need to be consistent throughout the State. That way the law remains very clear.

Assemblyman Segerblom:
This may be more of a statement but in my experience representing dealers, they have a very difficult job. Few jobs require that a person directly cater to his customers by providing them with free drinks, while proceeding to take their money and continuing to try and keep them happy. In the course of that

process a good dealer must have a great deal of personality. Female dealers in particular deal with issues of harassment. Card dealers deserve any money that they are given in tips.

Chairman Anderson:
I do not think anyone disagrees with the idea that people who are working hard deserve the gratuities they receive.

Edward L. Watson, Vice President, National Association for the Advancement of Colored People:
I am a taxpayer in Clark County, and I am in favor of this bill. The decision of this Committee will set precedent throughout the State of Nevada. The National Association for the Advancement of Colored People (NAACP) and I are very concerned about this issue. We think it has long-range potential.

Hypothetically a person could decide to work in construction, and then become a foreman. Would it be ethical for the foreman to allow his employees to work overtime, and then take half of their overtime wages? When you address this bill keep in mind that it goes far beyond the casinos. My example is pertinent because this bill extends into small businesses. This bill is important to me personally because I tend to tip generously. I always ask the recipient of my tip who my tip money is shared with. If there is someone who has worked hard for me, I intend to tip that person generously. If the recipient of my tip is not sharing it with his coworkers who may have worked equally as hard if not more so, then I personally approach those workers and tip them each individually.

If a person vacuuming my car does not do a good job, I will not tip the person at the end of the carwash. When I tip a team they are all responsible for overseeing each other's work. The person who receives a tip needs to take care of the other employees who are on his team if they also earned that tip. I do not want management to walk in and tell the employees how the tips should be distributed. When that happens, we are forced to address a larger issue.

Employees are hired at a set wage. When an employee receives a tip, it is the customer's way of rewarding him for doing his job well. Management should not drop their employees' standard of living by removing any portion of his tip.

I belong to the Local 872. The unions are very concerned about this bill. We strongly support it. I want to emphasize that the labor community in Las Vegas is very concerned as well as the NAACP. We want fairness. If a man can pay $5,000,000 for a picture to hang on his wall, he can surely compensate his supervisors enough to earn a livable income.

Thomas Golly, Representative, Nevada Tip-Earners:
According to the FLSA, employers may not take the tips of dealers. Tips are the sole property of the dealers. The FLSA does not apply in Nevada because it applies to a tip-credit. I have read the FLSA ten times. There is no contradictory language in it at all. In the absence of any contrary language the language that is there prevails. I started at first receiving 100 percent of my tip income. Now I only receive 85 percent.

Chairman Anderson:
Thank you. If anyone else has written statements, you may submit them to the secretary. Next we will hear from those in opposition.

Susan Fisher, Representative, Nevada Hotel and Lodging Association:
We want to express our opposition to this bill. I would like to defer my time to Mr. McMullen.

Samuel McMullen, representing, Las Vegas Chamber of Commerce and Nevada Restaurant Association:
This is a very intense issue as indicated by earlier testimony. For the Chamber of Commerce and the restaurant association this has been a very consistent issue for us.

I will speak generally and then address specific parts of the bill. In general, this bill severely restricts employers and business managers from conducting themselves efficiently. We have always tried to consistently promote and maximize business flexibility. In this particular case, we are addressing a very sensitive subject. Employees are confronting their employers about how they run their businesses. Furthermore, it is important to note that any business having issues with tipping policies is a customer-service oriented business. These businesses are the primary sources of revenue for the State of Nevada. They include the hospitality industries, tourism industries, and gaming industries. Gaming is specifically addressed in this matter.

This bill speaks volumes to several different business arrangements, not only the ones that may have initially generated the issue. This bill and the additional requirements proposed by Assemblyman Beers' amendment severely restrict the ability of an employer to conduct his businesses successfully. In a customer service environment the primary concern of employers is to ensure that people are treated fairly.

Fairness is one of the fundamental issues being heard today. There are serious ethical issues involved in the scheduling and organizing of employees. Managers need to ensure that positions are filled with appropriate employees.

The carwash was an excellent example. The employees at the beginning of the line share in the finished product of a customer's satisfaction and tip. As a business owner, you want everyone to equally benefit from their hard work. Tipping has been a highly litigated issue in past years. It is important to the morale of many businesses that all employees work as a team and understand that they all have a part, and then all share in the rewards. It has been my understanding that the people who are involved in the customer service chain in a casino environment and have supervisor responsibilities have shared in tip pooling arrangements. This happens in many other industries besides casino floors. This bill would disrupt many existing arrangements. There should be no unrealistic restrictions on this issue and an employer's ability to manage his business.

Assemblyman Horne:
You have made it part of your testimony that employers need to have the ability to manage their business. Is it your position that all employees should share in the distribution of tips? It seems more fitting that the appropriate employees should share in the distribution of tips.

If you say all employees should share, then in a restaurant setting the executive chef would share in the tips. In a casino setting tipping distribution could reach as high as the vice president of hospitality. Is that the policy that we want to set or will we establish that it only be employees in the direct line of customer service?

Samuel McMullen:
I meant all employees in the direct line of customer service. We have to be reasonable about this. I want to emphasize that employers need the ability to decide which employees are making a difference in that customer service experience. If there are tips involved, then we need the ability to make sure those are fairly distributed. We do not want employees to have lower morale because it affects whether or not businesses are successful.

In the case of arrangements like those in the gaming industry, we have gone from very hierarchical arrangements with multiple levels to a collapse of those hierarchies. Supervisors are as much a part of the customer's experience as their employees. There are thousands of different examples of tip-pooling arrangements. Employers need the flexibility to decide what makes the most sense.

Assemblyman Horne:
Today you are testifying that the employer is the best person to determine the boundaries of who shares in tips and how that structure should be determined

in their particular business. We are trying to determine if perhaps that boundary has been crossed by employers.

Samuel McMullen:
Again, I emphasize that our general position is always going to be that the employer has to have at least great involvement or control over which employees are eligible to receive tips, which are required to share, and which are eligible to share and in what way. Because you will find that regardless of whether we are discussing a carwash, a restaurant, or a casino, there are places where it is challenging to motivate employees to work.

Employers handle morale issues in which people believe they have been unfairly treated. There are a plethora of issues which can arise on any given day. Morale issues challenge employees' motivation to work well in their environment. Employers need the ability to ensure that their business works properly. They need to figure out how to staff specific areas. They need to ensure that they do not have inordinate turn-over. Employers need to have the ability to find the people that they need in order to fill specific positions. Then they need to make sure they do not have unfair treatment issues amongst the individuals hired.

Assemblyman Carpenter:
I have a very small business. I am not certain how many servers we have, although I know the number does not exceed ten. Some of our servers have been with us since we opened 20 years ago. To a certain extent, the reason they have remained our employees for so long is that they control their own tips. My wife is also adamant that our employees keep their tips because that is how they feed their families and keep their homes. That is my perspective as a small-business owner. I prefer not to get involved in their tips. Getting involved would be an unnecessary hassle. I do not understand the benefits of what you are promoting.

Samuel McMullen:
I have eaten at Assemblyman Carpenter's establishment. I know exactly why his employees are tipped in the manner they are. Employers are not required to practice tip-redistribution among employees if they do not think it is in the best interest of their business. If employers decide tip-redistribution is in the best interest of their business, they should have the flexibility of having that option available to them. That enables employers to determine the best possible way for their business to function.

Hypothetically, if you were to open a second dining room in your establishment and that second room was not always full, you would most likely need to have

servers for that room. Those servers would probably not earn as many tips as the servers in your primary dining area. You would probably want the servers for the second dining area regardless. You would also desire for those servers to remain motivated in their duties. In such a situation, you might decide that it would be fair to divide tips among both groups of servers. Because of your opinion, you probably would not choose to divide the tips. But at least you would have the flexibility whether or not it was necessary to divide tips. Your goal is to consistently ensure that you have people serving your patrons.

Employers have to ensure that their employees maintain high morale when they deal directly with customers. Employers also have to consider the incentives that keep their employees dedicated to maintaining customer satisfaction. In most situations the entire process must be expedited very carefully.

Chairman Anderson:
How large can the tip-pool potentially be for employees who earn a low wage? Do you recognize that they have potentially become more dependent on their tips earnings than upon their hourly compensation? I am certain that the Labor Commissioner will ask the same questions.

Samuel McMullen:
The answer is yes. I reiterate that employers analyze their business situation and try to determine the best action to take to get their employees to provide excellent customer service. Customer service environments in particular need employees that have a very special knack for ensuring that customers have a great experience. These industries are geared towards attaining great employees and then maintaining a reduced turnover rate. If the establishment happens to pay minimum wage, it should still be up to the employer's discretion how to handle tips. Nowadays it is less common to find minimum wage work environments in these establishments. Even McDonald's employees tend to earn $10 per hour.

Chairman Anderson:
Does that set a precedent that needs to be addressed in light of the recent court decision?

Samuel McMullen:
The court held that the law clearly states that employers and managers cannot take their employees' tips. The court put conditions on the redistribution of tips among employees. My understanding of the argument before you today is that you are being confronted with a form of confiscation of tips by employers. In the specific court case that we have referred to, it was determined that the

employer was not taking employees' tips. The court finding confirmed what is already contained in the statute.

Kim Sinatra, Senior Vice President and General Counsel, Wynn Las Vegas:
I brought my team with me. I have Andrew Pascal, President of Wynn Las Vegas and Kevin Tourek, General Counsel of Wynn Las Vegas. We are not going to retrace ground that has already been covered today. As you consider this bill, I want to reinforce the underlying and substantive issues that arise. Andrew is going to describe for you what happened in a particular place on a particular day. Hopefully we will add understanding to some facts that have not been explored or properly characterized. I will reinforce for the Committee that what occurred on our property was not confiscatory.

The law, as it exists and as it has been interpreted both by a U.S. District court and the Supreme Court of the State of Nevada, provides that employers cannot take their employees' tips. Nor can employers use employees' tips to credit employees who would otherwise earn lower than minimum wage. Neither of these situations have been an issue for us.

Based on the testimony of the very first gentleman who came before you today, the spirit of the law continues to protect the employees of the State of Nevada. The other issue we would like to address is that the far-reaching impact that any change to the existing law would have cannot be overstated. We work with large numbers of employees in southern Nevada in large places of employment throughout this State.

Where it may be easy to find a service provider in some places, it is often very challenging to find them for a place as complex as some of the employment locations along the strip. It is a challenge to find every single employee who contributed to your customer service experience. In our particular situation, all 9,000 of us contribute to the customer experience. As employers we want to have the ability to run our business and include those who probably have the least leverage within the tip pool.

If A.B. 357 were enacted into law, all bets would be off. Employers would have no ability to help set policy in tip-pooling arrangements. Those who have the least to argue about and who have the least leverage, like Ms. Allen's brother, could be the ones who suffer the most. They are the people who need tip income the most. Those are the people who are probably paid the least on a base level.

Of our 9,000 employees in southern Nevada, 3,200 earn tips. They are comprised of 95 different job-classifications. Seventy percent of those job

classifications share in some form of tip-pooling arrangement. As you replicate the different arrangements throughout customer service businesses in Nevada, you can see that there are practically an incalculable number of iterations that would be affected by a change to this.

Assemblyman Horne:
You made a statement that raised a question. You said that you wanted to include employees with the least amount of leverage in the tip pool. Based on my understanding of earlier testimony, the employees who have been included in a policy change are those who are currently salaried, were previously salaried, or earn more money than front line employees.

Kim Sinatra:
That is one of the first issues we came here to discuss. Indeed, the job descriptions within our casino have changed. The people who have been included in the tip pool are hourly workers as well. They were making substantially less than the dealers who were previously included in the tip pool. As Andrew will describe in much more detail, we have revised job descriptions, made people responsible for customer service, and included them in the tip pool. But they were and they remain hourly employees who were making less than the dealers were at the time.

Assemblyman Horne:
So you made revisions. So you have employees who are in hypothetical groups A and B that are typically in the tip-pool and employees who are not in categories A and B. Then you reclassified some of those employees to be in A or B so they could participate in the tip-pool. From your testimony I infer that you reclassified them for equity of sorts.

Kim Sinatra:
If you do not mind, I would like you to save your question for after Andrew goes through his description of exactly what happened. It will become clearer at that point.

Assemblyman Manendo:
With regards to the tipping situation among dealers, who specifically shares tips with the dealers? Which employees and what are their hourly wages?

Chairman Anderson:
That is a good question. Let us allow Ms. Sinatra to try to run her testimony the way she wanted to run it. She brought her attorney and everybody with her so that they could explain. We will come back to the questions.

Andrew Pascal, President, Wynn Las Vegas:
I am here to clarify exactly what we did at Wynn, Las Vegas. For as long as Mr. and Mrs. Wynn have been a part of this industry and this community they have been recognized as being incredibly employee oriented. Mr. and Mrs. Wynn recognize that above all else, our employees distinguish us. They help shape the experience that our guests have when they are on our properties.

Chairman Anderson:
With all due respect, please do not specify the name of any establishment.

Andrew Pascal:
We recognized that we had some issues in our casino that we needed to address. The most important of those issues was getting the employees who work closest to customers to take responsibility for the customer's experience. Our dealers have always done a great job at that. We needed the people in the pits to show more motivation in working side by side with dealers. We wanted the pit managers take a more active role in influencing our guests' overall experience. Our desire to see this materialize forced us to closely evaluate everything about how we structured and managed our casino operation.

We came up with an entirely new design which eliminated numerous employee and management positions. We replaced them with key administrative support. The employees who were formerly referred to as Pit Supervisors are called Casino Service Team Leads. They work side by side with our dealers. They welcome a guest to their game. They ensure that our guest is effectively rated during the course of their play. They converse with our guest. They ensure that our guests' cocktail service is appropriate and frequent. They ensure that our environment is clean, that the conditions of the tables are appropriate, and that the temperature remains comfortable. They are responsible for everything involving our guests' experience during their play.

Since they play such a significant role in our guests' experience and since they directly provide customer service, it is appropriate to include them in the distribution of the tip pool. We assigned Casino Service Team Leads a partial share as acknowledgement of the different role they play relative to dealers. They get a 0.4 percent share rather than a full share. The impact for dealers and team leads is that dealers went from making an average of just over $100,000 per year to making just around $90,000 to $93,000 per year. They took about a 10 percent reduction in their overall compensation. They did not take the 25 to 30 percent reduction mentioned earlier.

Service Team Leads had their compensation increased so that they have gone from initially making $60,000 per year to $95,000 per year on average. Now we have more equitable sums in which all employees that participate, serve, and influence our guests' experience can partake as appreciation for their service. Those are the fundamental changes that we made. Service Team Leads are not pit managers, or supervisors. They direct and influence what happens during the game, such as how servers direct and manage a food runner or bus person when servicing the tables that they are responsible for.

We are placing a much greater emphasis than our previous model on the service that our guests receive. That is to clarify the nature of the change. You cannot dispute that they absolutely play a part in creating an experience for our guests. What is being disputed is whether or not they are entitled to share in those tips. Today the law clearly states that if employees are in the line of service they are entitled to tips. To specifically address the legal implications of what we have done I am going to turn this discussion over to our general counsel Kevin Tourek.

Kevin Tourek, Senior Vice President and General Counsel, Wynn Las Vegas:
As Andrew noted we did change our policy at the casino. Prior to changing the policy we did our homework. During the development of the program, we researched the law. We made sure that we gave the notice required under Nevada law prior to implementing the program. We have been complying with the statutory and case law and the directions given to us by the courts and the statutes throughout the administration of the program.

Obviously there were people who were unhappy with the changes we made. Those individuals consulted the Labor Commissioner. In September the Labor Commissioner came out to our casino and reviewed specifically what we were doing with the Team Leads. He issued a press release in September stating that that what we were doing was legal.

Afterwards there were a couple of leaders who filed a class-action lawsuit challenging the policy. In December of 2006 Judge Herndon ruled from the bench that our actions were legal. He specifically noted that the Team Leads were indeed in the line of service in providing customer service. Testimony was given explaining the job description of the Team Leads with an emphasis on how they were providing customer service. The testimony was also given to reinforce that what we are doing is in compliance with the statute. The policies that we have implemented respect the written statute, judicial rulings, and the spirit of the law by allowing the employees who provide customer service to share in the gratuities from the customers.

Assemblyman Horne:
My original question seems to have been answered. I agree with the attempt to provide equity among the employees who you believe are in the line of service to your customers. What you refer to as "team leads," previously referred to as floor supervisors or pit bosses, are they no longer supervising? Do they just have additional duties which include a supervisory role?

Andrew Pascal:
They still provide a level of oversight on games, but a much greater part of their role is now in serving guests. In restructuring and redefining their role, it was not just a matter of giving them a new title and then placing them in the tip pool. We have redefined the job. We retrained everybody on how to perform that job. All forms of supervisors were put through interviews for the new positions. The interviewees had to qualify by satisfying the new standards in what we were emphasizing as part of their job. A number of them did not receive the promotional opportunities into the Team Lead position.

We had a number of dealers who expressed interest in becoming Team Leads as well. They also had to qualify to be extended the opportunity of being promoted into the new position. The composition of the people that are in this position is very different. They provide some level of oversight, but I emphasize that there is now a much greater focus on managing the experience of our guests.

Assemblyman Horne
I just heard you say that some of the dealers sought a promotion to become a Team Lead. But you mentioned in earlier testimony that Team Leads make less money than the dealers.

Andrew Pascal:
As former supervisors, Team Leads would have made less money. Currently team leads make slightly more than dealers.

Assemblyman Horne:
It seems as if you have decreased the pay of one group so that you could give the other group an increase in an attempt to maintain a set wage. If you were going to include Team Leads in the same group as dealers, it may have been more equitable to at least keep them at the same level of their previous pay. That way they would not take a blow to their income for including the Leads in the tip pool.

Andrew Pascal:
To some extent we have. We did not really understand what the full impact of the dilution would be. Overall, we felt that service would improve in our casino, and it did. We thought that having more customers would provide more tips. The dealers will get back to what they were previously earning.

Recognizing that the tips were to be diluted, we enacted a bonus program for dealers. They have the opportunity to make an additional $6,000 per year based upon satisfying certain criteria. The criteria are focused on customer service, how they procedurally deal with their games, and attendance. That greatest emphasis is placed on customer service.

There has been a lot of talk about how we implemented these changes to save money, but the bonus program alone could equate to $3,500,000 in incremental compensation per year. We also increased the hourly wage rate for our Team Leads. That increase is also well over $1,000,000 per year in compensation. Since we have instituted these changes we are millions of dollars over previous compensation. That is the investment we are making along with these changes in achieving a higher level of service.

Assemblyman Manendo
I am trying to understand how many different categories of employees share the tips with the dealers? There are the dealers, the Team Lead, who else?

Andrew Pascal:
There is also a box person.

Assemblyman Manendo:
Is he in that tip pool?

Andrew Pascal:
Yes, he is in that tip pool.

Assemblyman Manendo:
How much are the Team Leads paid hourly and what is the hourly wage of the box people?

Andrew Pascal:
Currently the Team Leads make an hourly wage of $31.25. I do not know the specific wage of the box person. I will have to provide you with that information at a later time.

Assemblyman Manendo:
How much is a dealer's hourly wage?

Andrew Pascal:
A dealer's hourly wage is dependent upon their tenure with us. It is between $6.15 per hour and $7.15 per hour.

Assemblyman Manendo:
They make $6.15 per hour and you are saying that the average dealer makes $93,000 per year?

Andrew Pascal:
We are saying that on average their potential is to make $93,000 per year. This year they are making about $300 per shift. That amount equals about $75,000 per year in gratuities. That would be an additional $13,000 when including their base hourly wage. They also have the opportunity to make an additional $6,000 through the bonus program.

Chairman Anderson:
Do Team Leads contribute money to the tip pool?

Andrew Pascal:
Yes, always. If Team Leads received tips they were required to deposit them into the tip pool. If they were to receive tips today, they would absolutely go into the tip box.

Chairman Anderson:
Was that the case in the past prior to the change in policy? Has the tradition always been that they put it into the common pool?

Andrew Pascal:
Yes, that is correct.

Chairman Anderson
Are you certain of that?

Andrew Pascal:
They put it into the pool and they did not share in it.

Chairman Anderson:
Are you certain that they contributed to the pool and they did not share in it?

Andrew Pascal:
That is correct. Gratuities were directed to the tip pool.

Chairman Anderson:
In response to Vice Chairman Horne's question, you mentioned an improvement in service at your establishment. How did you measure any improvement resulting from this policy change? Has housekeep gone up? Has the tip pool changed?

Andrew Pascal:
We have a number of different measurements of service. We evaluate the quality of our service throughout our resorts. We consistently engage customer service feedback. We hire people to come in posing as customers. They basically play, profile, and evaluate Team Leads and dealers. This is practiced throughout our resorts. Every point of service is evaluated. We are consistently provided with written reports pertaining to the quality of their experience.

The reports have improved. There are now new measures that take into consideration the length of play in games. We can evaluate and track the average length of playing sessions. They have improved. We can also look at the overall volume of business with head counts of the number of people that are actively playing at any given time. We can then compare our feedback to the same season for the prior year. By all measures things have improved. Service has improved.

Chairman Anderson:
Have you changed the way in which your survey instrument is presented? Have you made the survey more readily available than it was in the past?

Andrew Pascal:
We have always had programs where we have people come in. The individuals we hire are like anonymous shoppers. They are hired to come in and pose as customers. They evaluate their experience. The criteria they use to evaluate the experience have been consistent in the way it was provided.

Chairman Anderson:
Do you always track the length of time people play?

Andrew Pascal:
We do head counts, length of playing sessions, and ultimately revenue.

Assemblyman Ohrenschall:
My understanding is that the traditional, historical role of the floor person is to be impartial to protect the integrity of the game. If the floor person shares in the tokes would it compromise that impartiality in any way?

Andrew Pascal:
No. That is no longer the only means of really evaluating what is happening at the point of the game. Today's surveillance is far more robust than in the past. We also have a dedicated team of people that procedurally evaluate what happens on the floor. They do skill checks on specific players that we might have some concerns about. Team leads are not the primary means of protecting the integrity of the games. We have several other people and systems in place to ensure integrity.

Assemblyman Ohrenschall:
Are dealers allowed to solicit a toke? If so what does the floor man do if he observes a dealer soliciting a toke?

Andrew Pascal:
They are not to solicit a toke. The tokes exist as a guest's expression of their appreciation of service. If tips were solicited, the dealer would be addressed and counseled.

Assemblywoman Gerhardt:
I am uncertain about the serious use of the term "equity." During times when our economy is very robust your policy is great. What if we were to experience a period of time when perhaps our economy was not so robust? If supervisors were making around $30 per hour and dealers were making $6.15 per hour, would supervisors have to share their salaries with dealers? The question is valid considering that we are trying to be equitable.

Andrew Pascal:
You have presented me with a hypothetical situation. I do not think that I would ask supervisors to share their salaries with dealers. If there was an intolerable hardship for our employees, we might look to address that through other means.

Assemblywoman Gerhardt:
So was your answer yes?

Andrew Pascal:
No. We would not necessarily have supervisors share their base wages with dealers. But if we found that the volume of business suffered so dramatically

that it impacted our ability to retain and compensate our dealers, then we would have to address that. I cannot speculate today what that mechanism would be.

Assemblywoman Gerhardt:
I think you understand my point regarding the use of the term "equity."

Assemblyman Carpenter:
What about the total number of employees in the pit area? Is it the same number as before or has that number been reduced or increased?

Andrew Pascal:
It has increased slightly due to our changing seasons. We institute change as we enter our peak season. For the most part, our total number of working employees remains fairly consistent with some occasional moderate increases.

Assemblyman Goedhart:
I assume that most of your floor associates are under some type of collective bargaining agreement. Is that correct?

Andrew Pascal:
No, they are not.

Chairman Anderson:
Some dealer groups practice collective bargaining agreements. It depends on which property they are employed.

Assemblyman Goedhart:
Historically how did they decide who shared in which tip pool? I would like to know if it was always a customary tradition and how it may have evolved to become so.

Andrew Pascal:
It evolved to address a lot of the issues that were raised in earlier testimony. We ensure that we are making it equitable; as far as balancing schedules, making sure that there was no disincentive for someone to work in an odd location or a lesser location within the casino, or on a shift where there typically is not as much business. Again, in the interest of being equitable, we arrived at these pooling arrangements. They have worked.

Chairman Anderson:
What time does your graveyard shift begin?

Andrew Pascal:
The graveyard shift starts at 4:00 in the morning.

Chairman Anderson:
What time does your swing shift begin?

Andrew Pascal:
Swing shifts start at 8:00 in the evening.

Chairman Anderson:
So the swing shift earns the greatest amount of tips?

Andrew Pascal:
Yes, for the most part. Gratuities are stronger during the swing shift. They are also stronger during the weekends verses during the middle of the week.

Chairman Anderson:
It is also dependent upon certain days, where you are located, and which games you are dealing with in the house. Tips are stronger on certain days than on the swing shift.

Andrew Pascal:
That is correct. We have outer pits where the table minimums may be $10. We have other pits where the table minimums may be $1,000 or $5,000.

Chairman Anderson:
The high rollers do not appear until late in the day.

Andrew Pascal:
They tend to show up and then play for longer periods of time.

Michael Tancheck, Labor Commissioner, State of Nevada:
I reiterate that am neutral on this bill. Unfortunately, I have been handling this matter quite frequently for the past several months. I cannot choose a side. I am neutral in this situation because my function in it is like the function of a referee in a boxing match. My duty is to ensure that the rules are enforced.

There is kind of a disassociation between that and the language in the statute that discusses the employees agreeing among themselves to share tips. That has included some legal issues that have arisen. The Chairman asked the question earlier of whether or not this bill solves the problem that we are looking at. I was looking at one of things that this does. It firmly establishes

that employees can set up their tip pools in writing. So that kind of answers that question.

As we pointed out earlier there are probably some unanticipated consequences that could result from this bill.. If there is an unanticipated consequence, you can guarantee that I am going to find it at some point in time. It will end up on my desk. There are a couple of things that I have looked at, and one was touched on earlier: that is to reflect the family-owned business, where that line is a little blurry between who is employer and who is employee. Another question is what you will do with a new employee who does not want to participate in the pool if the employer is out of the loop there. What about employee agreements that are not in writing? How do you work around those? This is an issue that people are probably going to be working on a little bit going forward, trying to answer some of these questions. I am more than happy to work with anyone that would have my assistance in trying to work out the mechanics of how you want to go forward with this. That said, I would be happy to answer any questions.

Chairman Anderson:
Unintended consequences are what we all fear, especially with new legislation. Do you see any issue that has been unaddressed here that needs to be addressed in this piece of legislation without recognizing the general sweep of the NRS versus the specific application of regulation?

Michael Tancheck:
You have a pool, how big is that pool going to be? How far is it going to extend? When you get down to it, that is the heart of the issue here. Does this extend to everyone in the organization or just to those in the line of service? How far do you want these boundaries to go?

Chairman Anderson:
Are you suggesting that if we are dealing with an organized group over a certain number that they should have a mandated tip pool?

Michael Tancheck:
I would not go that far. The reason we need some flexibility here is that there are a lot of different arrangements even within a single property—from the valets to the food service to the casino floor to the housekeeping staff. Circumstances may change from group to group. That is one of the things that makes it so particularly difficult to deal with. Look at Harrah's for example. A few years back they had four different properties—Lake Tahoe, Reno, Las Vegas, and Laughlin. There were no violations that took place. We found

that each property was tip-pooling and they were all doing it slightly differently. The idea of a one-size-fits-all solution makes it a little difficult to get that result.

Chairman Anderson
Do you think that further modification of the bill needs to be taken up?

Michael Tancheck:
I could enforce the bill as it is written, and I would not require anything additional to enforce it. If the group would like to move forward with modifications, I would fully support that and lend my expertise.

Assemblyman Ohrenschall:
Do the employees or employers pay the social security on the tips?

Michael Tancheck:
Without knowing exactly how they do it, having a one-time thing in a small company, I think it is a shared type of deal. The employer pays part. The employee pays part. I do not know, though.

Chairman Anderson:
There is that question, and that is why Mr. Beers suggested a removal from the current language of the bill. The potential conflict with the IRS relative to the reporting requirements of larger properties to the IRS is concerned about making sure that they get their cut first. That is the reason why this whole scenario became present. That is why Mr. Mello put forth the legislation initially in 1971. Just prior to that time the IRS was beginning to make service employees keep their own log. The inconsistency in that log led to a uniform policy so it could satisfy both employees, and so they would not lose 100 percent of their weekly checks in trying to satisfy the IRS part of it. That is the reason why places like Harold's Club ended up getting involved in this. Initially it was to try to solve a dealer problem at their institution. Now we see a new nuance to it that adds a very unusual wrinkle that does not make me very comfortable. We will close the hearing on A.B. 357.

We will now turn our attention to the third bill of the day, Assembly Bill 364.

Assembly Bill 364: Revises certain provisions relating to the use of a grand jury. (BDR 14-1303)

Assemblyman William Horne, Assembly District No. 34:
Assembly Bill 364 is a bill that places parameters on the use of grand juries in our courts. I will hand out an image for you. This legislation may seem self-serving; however, I am a criminal defense attorney. If this bill is passed, it

will not affect me any more than other criminal defense attorneys in the State of Nevada.

If a defendant is arrested for a crime, gross misdemeanor, or a felony, the district attorney has a choice to go to justice court and have a preliminary hearing. At that preliminary hearing the district attorney must present slight or marginal evidence before a judge and their standard of proof before getting that case bound up to district court. At this preliminary hearing the district attorneys present some evidence that would be necessary to meet that burden in order to have that defendant bound up to district court where gross misdemeanors and felonies have to be heard at trial. During a preliminary hearing, the defendant can be present along with their defense attorney. There is evidence that is presented by the district attorney or witnesses; that defense attorney then has an opportunity to cross examine. Because the burden is so low, needing only slight or marginal evidence, it is very rare that a defense attorney puts on evidence or witnesses themselves because it is an easy bar to reach. Approximately 98 percent of cases that go through preliminary hearings are bound up. Of that remaining two percent that are not bound up, the district attorney then issues what is called a Marcum notice, which gives notice to the defendant that we are going to go to the grand jury to seek an indictment. At that time the district attorney goes with their evidence and presents it to the grand jury to hopefully have it bound up to district court.

Another option the district attorney has is to go straight to the grand jury and skip the preliminary hearing altogether. Where I believe the problem lies is in taking two bites of the apple. This does not do away with grand juries. They are very important. Currently if you have a hearing before a judge where your burden is very low and you cannot meet that burden, the judge says, "Sorry, but you did not meet it and the case is dismissed." Why is it fair for the district attorney to go down to the grand jury empanelled by lay persons with that same evidence and say, "This is the evidence we have. We want to send it up to district court"?

This bill provides that if they are going to go to a preliminary hearing first, before they can go to the grand jury, they have to bring substantial evidence that they did not have at the time of the preliminary hearing. That happens sometimes. A lot of times we are at the preliminary hearing stage and investigation is still going on, interviews are still being conducted, et cetera. New evidence comes forward. If that happens and you have substantial evidence that you did not have before, it is appropriate to go the grand jury at that juncture. To go to the grand jury because you lost the preliminary hearing is inappropriate and backwards, along with going from a learned judge who says no, then bringing the same evidence in to the grand jury to get them to say yes.

At a grand jury there is no defense attorney. The defendant can participate at their peril because it is not the same setting as the preliminary hearing; there is no cross-examination, et cetera. Anything the defendant would say could be used against them in a court of law. I have never advised any of my clients to go participate in a grand jury setting. To give you an example, I will present to you a case in which my clients were co-defendants charged with the possession of a stolen vehicle. Allegedly my client was in the passenger seat of this minivan with tinted windows. The complaining witness said that he came out of a store and saw his wife's car being driven down the road while his wife was at work. He chased the car. Further testimony showed that the alleged driver had purchased an automobile from this family and was making payments and then had stopped making payments. There had been some dispute between the two parties. The judge called us up to the bench and said, "Are we really going through this exercise here? This is clearly some kind of a civil dispute between these two parties." The other party said, "Yes we are going to go forward." We went through it all and the judge found slight or marginal evidence that the prosecutors had met their burden for the driver, the defendant accused of driving the car. That person was bound up. As for my client who was assigned to me by the court, the judge found that there was not sufficient evidence to meet the crime of possession of a stolen vehicle. At that point the district attorney approached me to give me notice that they were going to a grand jury based on the fact that my client may have been in the passenger seat of a stolen car.

This bill is an attempt to provide a little more fairness in that procedure. If the district attorneys want to utilize a grand jury, they can. They can go there first. They can get a case bound up that way. Or if they had a preliminary hearing, and they are unsuccessful, which is rare, and if they obtain substantial evidence for their case, then they can go to the grand jury at that time. Nothing in this bill prohibits them from using a grand jury as it was intended to be used. In the current practice and in my experience, usually it seems unfair, and I ask this Committee to pass this bill.

There is going to be testimony today from Mr. Frierson and also down south, Mr. Silverstein. There will certainly be opposition from the district attorney's office.

Dan Silverstein, Vice President, Nevada Attorneys for Criminal Justice; Attorney, Homicide Unit, Clark County Public Defender's Office:

The grand jury process was originally designed to protect citizens from governmental abuses of power. That is why it is so disturbing that here in Nevada the grand jury process is being used to perpetrate governmental abuses of power. What the prosecutors have been doing is using this process as an

escape hatch to avoid unfavorable rulings from our elected and appointed justice court judges. I will give you two examples, both of which happened to me over the course of the past year.

In one case I had a hearing before the Honorable Justice Deborah Lippis. This was a homicide case in which there was clearly probable cause to support a first-degree murder charge. But the prosecutors were not satisfied with that. They wanted to amend the complaint out of felony murder theory that the homicide was committed in the course of a sexual assault. Their only evidence to support this was that the victim's body had semen in it.

There was a DNA test done. The DNA did not match my client and could not be matched to any one. The victim was married, and there was evidence that the victim had sex several days before this had happened. After hearing all of the evidence, Justice Lippis found probable cause for the murder but dismissed the unsupported sexual assault theory.

The prosecutors went to the grand jury, which as Mr. Horne pointed out, is completely biased. There is no defense lawyer to protect the client's rights. They got their felony murder theory back. Now my client is facing this theory even though the initial magistrate found absolutely no evidence to support that theory.

I had another case before Justice Pro Tem Melanie Tobiason. Again it was a homicide case. There was clear probable cause to support the first-degree murder charge. But the prosecutors were not satisfied in that case either. They wanted to add a deadly weapon enhancement.

After hearing all the evidence the Justice of the Peace disagreed with the enhancement and found no probable cause to support a deadly weapon enhancement. So the prosecutors went to the grand jury, and they got their deadly weapon enhancement back. Now my client is facing an additional 20 years to life in prison for an allegation that a neutral magistrate found no evidence to support.

These two examples show a perversion of the grand jury system. The system was never intended to serve as an appellate process for prosecutors to try to overturn judicial rulings. This is akin to a child approaching his mother for permission to go to a party. And when the child's mother says no, the child asks his father for permission without telling him what Mother said.

The prosecutors are basically asking grand juries to resurrect charges that have already been dismissed. By doing this the prosecutors are in a sense snubbing

their noses at our justice court judges. They are showing a tremendous disregard for the rule of law. What makes this practice even more despicable is that the grand jurors are completely in the dark about the prior rulings. Under Nevada law the grand jurors cannot be told that the charges that they are considering have already been considered and dismissed by a neutral judge.

As Mr. Horne pointed out, it is important to note that this in no way prevents the State from going to a grand jury first and there is an exception for cases in which there is substantial new evidence that prosecutors discover after the preliminary hearing. Meritorious cases can still be pursued. Passing this bill is also a step forward in providing relief to our severely overburdened court system.

Since the year 2000, criminal case filings have increased by over 31 percent. The annual case load for a district court judge here in Las Vegas is over 2,700. That amounts to over 800 more per judge than Albuquerque, 1,100 more per judge than Phoenix, 1,600 more per judge than Denver, and 1,700 more per judge than Tucson.

Yesterday in *The Las Vegas Review Journal*, Clark County District Attorney David Roger was quoted as saying, "We do not want to flood the system with cases we cannot take to trial." I ask that you take David Roger at his word. A case that is dismissed for a lack of probable cause in justice court has no business being taken to trial, and it should not be the subject of a grand jury indictment. I urge you to pass this bill to help reduce our overburdened courts system, to show respect to the rulings of our esteemed judges on the justice court bench, to affirm their power to make those rulings, and to restore the integrity of the grand jury process as a protection against governmental abuses and not a tool to assist in their commission.

Assemblyman Segerblom:
How would this process work to prove to the grand jury that you had to have substantial new evidence? Would you have to approach the defense attorney and say, "Here is what I have?" How would that work procedurally?

Dan Silverstein:
The prosecutor would be the person who initially makes that determination as to whether they think there is substantial new evidence. They would go to the grand jury. When the indictment was returned the defense attorney would file a writ with the district court—a writ of habeas corpus—and make the allegation that there was not substantial new evidence. That is most likely how it would work in practice.

Assemblyman Ohrenschall:
Under current practice when the grand jury is presented with a case by the prosecution, are they informed if this is a potential lemon—a case that was turned down by a magistrate at a preliminary hearing? Does the grand jury have any knowledge as to whether this is a fresh case that has never been presented before?

Dan Silverstein:
The grand jury is not allowed to hear evidence that the case was previously presented to a justice court. The grand jury is not allowed to hear evidence of prior rulings by any court. When the grand jury hears a case, they hear it as though it were a fresh case that is being heard for the first time. They have no idea that the case has been heard and rejected by a neutral magistrate.

Assemblyman Ohrenschall:
Do you have any idea how many cases are two-time losers that failed at the magistrate then go to the grand jury and fail again?

Dan Silverstein:
I do not have any numbers. Personally, I have handled about 20 homicide cases over the past 12 months. Of those, two of them have been two-time losers. At the preliminary hearing the prosecutors did not like the result, and they went to the grand jury to change it. Ten percent of my caseload has resulted in this type of practice.

Assemblyman Carpenter:
If there was substantial evidence discovered after the preliminary hearing, could it go back through the process where the judge could rehear it?

Assemblyman Horne:
In my experience over the past couple of years, once a preliminary hearing has been conducted and a ruling has been made, there is not a second preliminary hearing on the same charges. Typically, the prosecutors appeal to the grand jury. If substantial evidence appears after the preliminary hearing, it would be appropriate for the district attorney to appeal to the grand jury with that new evidence. They would seek an indictment from the grand jury. The grand jury would not know that there had already been a preliminary hearing on the case.

Chairman Anderson:
That would be an appropriate question for the District Attorney's Association to answer in their testimony. We will ask them to make sure that they address this in their testimony. Vice Chairman Horne will now rejoin the Committee. Next we will hear from Mr. Frierson.

Jason Frierson, Public Defender, Clark County:
I concur with the comments of Dan Silverstein regarding the value of this bill. I will add a few points to what has already been stated. I will do my best not to be redundant. Mr. Horne mentioned that the grand jury does serve a good purpose. Typically their purpose in practice is to serve on cases that involve complex issues or extensive numbers of witnesses. A grand jury is different in that they are grand jurors for a set amount of time. I believe their term is about nine months. They meet about once per week during that entire period. For cases that will take an extended amount of time, it is extremely inconvenient for the justices of those courts to hear those cases. When there is heavy documentation and lengthy evidence or many witnesses is typically when we would use grand juries. I am aware of this not because of practice as a public defender, since we do not go to grand juries, but in previous experience I have had exposure to the grand jury system, which has shown me that is the typical use of grand juries.

There is a statement among lawyers regarding the use of grand juries, and it is "at grand jury you are can indict a ham sandwich." That is a common statement among attorneys because it is one-sided. There is no opposition. The prosecution presents a case and has a much less formal interaction with the grand jurors, where grand jurors can ask questions. As rare as it is that a preliminary hearing is not bound up to district court, I would say that it is twice as rare if not even rarer than that for a case to go to grand jury and not result in an indictment. There is an opportunity for the State to present slight or marginal evidenc, and if that evidence is not sufficient enough to bind it up at that lower standard, then typically in my experience prosecutors often have a Marcum notice ready just in case. It is in practice an automatic do-over.

In response to Assemblyman Carpenter's question regarding whether additional evidence is discovered after a preliminary hearing, my understanding of the question was if there was additional evidence discovered after a preliminary hearing. Mr. Horne responded to additional evidence of new charges. Often there is additional evidence of the charge that was actually bound up. In those cases that evidence can be presented at trial because the standard is so much lower for preliminary hearings. Oftentimes not all of the evidence is heard. If the evidence is not presented at a preliminary hearing, but the charges are bound up at trial when there is a more expansive review of the evidence, and that evidence is not precluded from being presented to a jury if it is regarding those charges.

Chairman Anderson:
I believe Assemblyman Carpenter's question was regarding what happens if at the preliminary hearing there were not sufficient grounds. How then would

there be an opportunity for a judge to make a determination since there would not be another hearing?

Jason Frierson:
If that was the nature of Assemblyman Carpenter's question, then my answer does not address that. I wanted to ensure that I understood his question. If it addresses cases that were not bound up, then that would be different.

Chairman Anderson:
Vice Chairman Horne what was your understanding of the question?

Assemblyman Horne:
My understanding of the question was that in instances where substantial evidence was later found after a preliminary hearing had been conducted, could they go back and have another preliminary hearing?

Chairman Anderson
Was that your question Assemblyman Carpenter?

Assemblyman Carpenter:
Yes, that was my question.

Jason Frierson:
Overall I want to reiterate that there is already a low standard. I urge the Committee to consider passing this legislation to encourage the State to limit the use of resources so that we have a one-try per case, and that we do it right the first time at the preliminary hearing.

Assemblyman Segerblom:
Please define probable cause.

Jason Frierson:
For trial the standard would be beyond a reasonable doubt. It is lesser to bind up at a preliminary hearing with slight and marginal evidence. The probable cause damage is typically something that law enforcement uses for an arrest, and that is the standard that a grand jury would use to determine whether or not an indictment would be issued.

Assemblyman Mabey:
How does Nevada differ from other states with regard to this grand jury issue?

Jason Frierson:
Half of the country has a grand jury process that is independent of federal rules. Slightly less than half of the country has a grand jury process that models the federal rules which are slightly different, but overall very similar. There are two states that have no grand jury process at all. The intricacies of each state and how they proceed, I am unaware of. I can provide additional information about that and compare with other states at a later time.

Chairman Anderson:
The use of the grand jury and its power has been discussed extensively in the 1960s and 1970s regarding the nature of how they can be misused. They have been misused by different jurisdictions at different times.

Cotter Conway, Deputy Public Defender, Washoe County:
We stand in support of A.B. 364. I do not want to reiterate. I want to add to the theory of the two bites of the apple. It appears that when the prosecuting attorneys lose at the preliminary hearing and then request a grand jury indictment, one concern that may be raised by the prosecution is that perhaps sometimes they are not fully ready for that preliminary hearing. That is why they need that second attempt. It should also be noted that there are a number of protections already in the statutes. The district attorney can also dismiss the case and refile if they were not prepared on a particular day. They can do that once. The other aspect to consider is that they can also request continuances under the Hill/Bustos standards based on *Hill v. Sheriff, 85 Nev. 234, 452 P.2d 918 (1969) and Bustos V. Sheriff, 87 Nev. 622, 491 P.2d 1279 (1971)*. They have protections to be adequately prepared at the preliminary hearing level, and they should not be allowed to react in a way that reflects an attitude of "Whoops, let me try that again with the grand jury." This is good legislation and I ask that you pass it.

Joseph Turco, Representative, American Civil Liberties Union of Nevada:
I want to reiterate that a grand jury will indict a ham sandwich and that two bites of the apple are unfair. Our position is two-fold. We are based on fairness and judicial economy. There were numerous judges here last week who testified about the overflooded dockets. It is time to consider dispensing with an extra layer. Preliminary hearings can take up a morning of a judge's time. That starts to add up. Every point that I intended to make has been made by my colleagues. I speak on behalf of the American Civil Liberties Union (ACLU) of Nevada and myself in support of the passage of this bill.

Ben Graham, Representative, Nevada District Attorneys Association:
Please be mindful that in Clark County we are dealing with over 35,000 felony criminal defendants. A defendant has had an opportunity to have his case

reviewed prior to preliminary hearings by police officers, justice court judges, and occasionally things happen and the preliminary hearing heads downhill. We have heard over and over again that if it is not broken what are we trying to fix? I would like to turn it over to Ms. Erickson at this time.

Kristin Erickson, Representative, Nevada District Attorneys Association:
All or most legislation is certainly brought forth with good intentions and this legislation is no exception. However, we have heard a lot this morning about unintended consequences. Unfortunately, this bill is loaded with unintended consequences. Most importantly if the unintended consequence strikes that part of our population that needs our protection most—children. A victim of child abuse, sexual assault, or lewdness must be brought to court to testify. Hypothetically, she sits at the table and looks at her stepfather, and he is scratching his chin. To that child that is the signal that trouble is coming. That child would clam up and not speak, terrified. They take a recess and the child comes back. The child is not speaking. The case would be dismissed and a child molester walks free. If this bill passes, we are done. That is it. Under the current system, we can move forward with the grand jury system and the child can testify.

Another unintended consequence is in drunk driving cases. A victim of a drunk driving crash may be severely injured. The preliminary hearing is set within 15 days of the arrest of the person. That gives the state 16 to17 days to prepare for a preliminary hearing. The victim of a drunk driver may not even be out of the hospital in that time period. Can we request a continuance? Absolutely we can. Will it be granted? Most likely it will. What happens on the next date? Is the victim out of the hospital? Will the police officer who conducted the investigation be on vacation with his family in Hawaii? Can we ask for a continuance? We can ask. Will it be granted? Not likely; it will probably be denied. When we are asked to present our first witness, we will not have a witness to present and the case is dismissed. The drunk driver is free.

With regards to the issue of bypassing the justices of the peace and going to the grand jury to avoid an adverse ruling of insufficient evidence, there is a remedy for that. Go to the grand jury and the indictment is received, there is a writ of habeas corpus. It is very commonly used in grand juries. It is almost routinely used. The very issue is addressing the sufficiency of the evidence. The writ of habeas corpus says insufficient evidence has been presented to the grand jury and as a result the case should be dismissed. The district court judge then reviews the entire transcript to make sure that no illegal evidence was admitted, reviews the procedures and the sufficiency of the evidence, and

decides. If there is insufficient evidence, the case is dismissed. If there is sufficient evidence, the writ is denied and the case goes forward.

There are protections built into the system. With regards to indicting a ham sandwich, in Washoe County we have had a child's death that was denied a writ where an indictment was not issued. With regard to adding deadly weapons enhancements and different theories, many times once the defendant is arrested the clock is ticking. By the time we get to preliminary hearings we do not always have all the evidence. Sometimes we get to the preliminary hearing and we say, "Ms. Witness did you see the person who shot him?" "Yeah, it was Johnny Defendant who shot this person." And we say, "How do you know that?" "Well I heard the sound and it came from over there." All of a sudden we are just as surprised as the defense team that they do not know for certain who fired the gun. However, another witness does, but they were not there. That witness was not subpoenaed for various reasons. We do not bring in everybody for a preliminary hearing. So the deadly weapon enhancement is dismissed. We can go to grand jury and bring in that other person. It is not necessarily insufficient evidence, but we have the right witness. Now we have all of the information. There are many reasons we choose to go to grand jury. We cannot typically go to grand jury immediately after an arrest because preliminary hearings are set within 15 days. In Washoe County our grand juries are booked out for months. At the very minimum they are booked out for weeks at a time. The Marcum notice has to be sent out 10 days prior to the grand jury. That gives us four or five days to deal with this. That is extremely difficult.

Today I brought Tammy Riggs with me. She is a deputy district attorney in our domestic violence unit. They also handle crimes against children that are of a sexual nature.

Chairman Anderson:
I have a couple of questions before Ms. Riggs begins her testimony. Vice Chairman Horne and Assemblyman Cobb also have questions. I realize that your experiences are limited to the second judicial district and the courts in Washoe County. Of the percentage of cases that come, how many do you think you would have to send to preliminary hearings and then from there to the grand jury?

Kristin Erickson:
I do not have an exact number in my own personal experience, and I have more limited caseload due to other responsibilities. I had a repeat offender target that had upwards of eight felony convictions. They were mostly theft crimes. His

trial had to be continued once because our witness whose checks were stolen was out of town on vacation or on a business trip.

We came back a second time and there was another witness problem. We made a motion for continuance and the case was denied. They asked us to call our first witness, but we had no witnesses available. This repeat offender was released. I went to the grand jury on that particular case as quickly as I could. It happened to be several weeks later, but we got him indicted.

Chairman Anderson:
If a person were the victim of a crime, in most cases they would want to appear, with the exception of sexual abuse cases. I would assume that it would be possible. Have you seen the DUI scenario that you described take place? There is usually sufficient evidence for a conviction based on a breath analysis or blood sampling evidence.

Kristin Erickson:
Alcohol level is not usually an issue with a DUI. Usually the issue is the victim's injury. They are usually the only person who can put the defendant behind the wheel. Or, often the defendant approaches the victim and that victim needs to identify the defendant. The victim also testifies regarding their injuries. Medical records can be subpoenaed to substantiate their injuries. However, it is very difficult to obtain medical records within two weeks.

Chairman Anderson:
Why are you unable to refile?

Kristin Erickson:
We cannot refile. The only time we are able to refile is pursuant to NRS 174.085. In that situation, the case has to be dismissed prior to preliminary hearing. Often we do not realize the problems with the case or with witnesses until we are in the preliminary hearing. At that point it is too late because the statute specifically states "prior to preliminary hearing." Ms. Riggs' testimony could answer some of these questions.

Assemblyman Horne:
You mentioned a refile based on dismissal. Does the district attorney have the authority to voluntarily dismiss a case while in the midst of a preliminary hearing, voluntarily dismissing a case?

Kristin Erickson:
The State can dismiss at any time. If we feel that evidence is insufficient or clearly injustice is being served, we can absolutely dismiss it at any time. Once

the witness has been sworn in and a preliminary hearing has begun, we cannot dismiss a case and then refile, not in Washoe County at least.

Assemblyman Horne:
Does that policy apply to Washoe County exclusively? I understand you are testifying based on your experience in Washoe County, but my experience in Clark County is that you can voluntarily dismiss and then refile those charges.

Also, your scenario involving the little girl is an example in which the state can voluntarily dismiss because they have a problem with their witness. Then they can go to the grand jury before the ruling by the judge in a preliminary hearing.

Kristin Erickson:
Perhaps the best answer is in the wording of NRS 174.085. My understanding of it is that it says "prior to preliminary hearing." My explanation is derived from the way we interpret that statute in Washoe County. Maybe what you are explaining from your experience in Clark County has occurred, but it has not in my experience.

Assemblyman Horne:
It is your position today that if that were a scenario, and you voluntarily dismissed once the preliminary hearing began, you would not be able to go to the grand jury unless you had substantial new evidence.

Kristin Erickson:
If this bill passed, yes.

Assemblyman Horne:
In your scenario you could not find substantial evidence. You had problems with the evidence before and now you want to do it with the grand jury with the same problem as it is.

Kristin Erickson:
If the problem is that this person did not see anything and in their statement they said, "Johnny shot him," but in their actual testimony they only heard it but another person did see it, it would be very difficult to argue that new and sufficient evidence had been found because that evidence did in fact exist at the preliminary hearing, but the correct person was not subpoenaed to testify. Would it be new, undiscovered evidence? It would not. I am uncertain that I answered your question, but it would not be new, undiscovered evidence.

Tammy Riggs, Deputy District Attorney, Criminal Division, Washoe County:
I would like to address some of the questions that Committee members raised earlier. To Assemblyman Carpenter's question, the State is specifically barred by NRS 174.085 from proceeding in another preliminary hearing after that preliminary hearing has been dismissed once. No, the State may not refile no matter how much evidence they have obtained.

In response to your question, Chairman Anderson, regarding percentages of cases, my research indicates that less than two percent of the cases in Washoe County between January 1, 2005 and March 23, 2007 proceeded by indictment in Washoe County, or 113. Only a handful, from what I have been able to determine between five and ten, were after the State had failed to prove probable cause at the preliminary hearing. Approximately one tenth of one percent of all cases in Washoe County find themselves in that scenario. Also, in none of those cases was the prosecutor found to be consciously indifferent to a defendant's procedural rights.

The State may not proceed after the preliminary hearing has begun. According to the statute, that dismissal must be made before the preliminary hearing. In addition, the state may only refile and summons the defendant. Now imagine this scenario, Chairman Anderson: a defendant has just had his case of lewdness with a child dismissed, which carries a mandatory sentence of 10 years to life in prison in Nevada. He is free to leave. Now the State needs to find him and summons him to court. We may not get him into court unless we serve his summons and then if he fails to appear, we may ask the judge to issue a warrant. What are the odds that we will ever be able to get that defendant into court? The chances are slim to none.

I do not want to cover what Ms. Erickson has already addressed, but I would like to state that this change is not needed. The system works well as it is. Yes, we need to provide slight or marginal evidence, and if we do not in a preliminary hearing then the case is dismissed. The defendant is released, his bail is exonerated, and his liberty interest is preserved. Now if the State does provide that probable cause to the grand jury within the statute of limitations, an indictment is issued, but that indictment can be challenged by habeas corpus. The defendant has a chance in front of the district court and in front of the Supreme Court to find that the State has been consciously indifferent to his procedural protections. He is protected there.

In response to Dr. Mabey's concerns about how Nevada differs from other states, Nevada provides more procedural protections to defendants at this preliminary hearing stage than most states and the federal government. Many states allow the state to proceed by affidavit or by placing a police officer

witness to testify to hearsay. All the state's case consists of is having the officer get up, discuss his investigation, the justice of the peace decides that there is probable cause, and the case is over. That is not allowed in Nevada. Nevada prosecutors must follow the rules of evidence. We cannot admit hearsay. We have to follow that rule. We do not allow any exceptions to that rule. We follow the regular evidentiary exceptions. In Nevada, the defendant also has the right to counsel and cross-examination. Cross-examination in other states is limited. Nevada is only one of 11 states that provide this level of protection to defendants. Defendants already enjoy a high level of protection in Nevada.

In addition, you have heard me discuss the conscience indifference rule. It is not true that the State can go up, as what was previously talked about as a lemon case, to the grand jury and submit it without probable cause. A prosecutor may not present a case to the grand jury and be able to maintain that indictment if they exhibit conscious indifference. That is the standard that has been used in Nevada to a defendant's procedural rights. Only four cases in the past 27 years have occurred where the Supreme Court has found that a prosecutor has acted consciously indifferent to a defendant's rights. The last one occurred in 1990.

As we have described with the minimal additional benefit given defendants, this legislation will in fact be sweeping. It will cause sweeping changes with exorbitant costs, unlike what previous witnesses indicated to you. I would like to discuss the language itself and some of the problems associated with the language and why this is going to be incredibly costly to us.

Chairman Anderson:
I am a little concerned. In NRS 174.085, subsections 5 and 7, it says "the prosecuting attorney, in a case that he has initiated, may voluntarily dismiss a complaint before a preliminary hearing ...or before a trial." It goes on to say in Section 6:

> if a prosecuting attorney files a subsequent complaint after a complaint concerning the same matter has been filed and dismissed against the defendant: the case must be assigned to the same judge to whom the initial complaint was assigned; and a court shall not issue a warrant for the arrest of a defendant who was released from custody pursuant to subsection 5 or require a defendant whose bail has been exonerated pursuant to subsection 5 to give bail unless the defendant does not appear in court in response to a properly issued summons in connection with the complaint.

Then in Section 7 it clearly says "the prosecuting attorney, in a case that he has initiated, may voluntarily dismiss an indictment or information before the actual arrest or incarceration of the defendant without prejudice to the right to bring another indictment or information." That would indicate since that usually follows the initial arrest, and then release on bail, and that would be the next arrest that follows a properly executed indictment. It goes on to state that "after the arrest or incarceration of the defendant, the prosecuting attorney may voluntarily dismiss an indictment." Essentially you get three or four bites of the apple. That was part of the question.

Let us hear the rest of your presentation. I only bring that for Ms. Erickson's and your concern because I think that was what Vice Chairman Horne was alluding to.

Tammy Riggs:
That provision is in regard to when you are actually in district court.

Chairman Anderson:
Were there other issues that you wanted to address?

Tammy Riggs:
Regarding the introduced legislation, much of the wording in it is flawed and would introduce a plethora of problems. There is a provision that the indictment cannot issue unless substantial new evidence, that was not available at the time of the preliminary hearing, is discovered. Who makes that determination? Are we required to get a district court approval to proceed? What is the State's remedy if we disagree with the justice court? At what point does the defendant challenge the grand jury's issuing of the indictment? All of these questions are raised.

You heard earlier that that could be subject to habeas corpus. Well it cannot because habeas corpus is subject to the record and there would be no record or why the evidence was not there. Underlining the assumption of the amendment is that this process is currently unfair. We are assuming that prosecutors regularly commit misconduct at preliminary hearings. There are many reasons why a preliminary hearing may not go forward even though this prosecutor believes it should.

Preliminary hearings must be held in Nevada within 15 days. As you heard, the defendant has several protections. We have to get all the witnesses there that we need within 15 days. You have heard that "plays in hell are not cast with angels." As you can imagine many of the witnesses in our cases are not eager to cooperate or comply with our subpoenas. We often have witness problems.

I will also reiterate that investigations may not be done. That also includes sexual assault kits. Sexual assault kits are now taking six months to come out of Washoe County crime lab. That may be the only information that we have to corroborate a child victim. That also goes for bank records, fraud cases, and lab analyses of all sorts. The Washoe County crime lab is very good, but also very busy. As Ms. Erickson mentioned, witnesses often do not disclose as accurately as you would expect them to.

Mr. Silverstein said that the system needs to be less burdened. This Legislature would certainly overburden the system more than it already is because this standard is a double jeopardy standard, which, by the way, Nevada would be the first in the nation to implement at the preliminary hearing level. That would force us to bring all of our witnesses, at immense cost to the State, at the preliminary hearings to avoid the consequence of terminal disposal of these cases at the preliminary hearings.

I would like to bring up the example of a child who may be having problems at a preliminary hearing. They may have been taken out of their home by social services. They may also be subject to foster care, and they may also be under the watchful gaze of family and the defendant at preliminary hearings. It is a very intimidating environment and the defendant is present. Children lock up, and we cannot qualify them as reliable witnesses. We are then unable to obtain their testimony. At this point under the new legislation, a case like this would be dead. That is unfair and unjust. It is through no fault of the State, and the State should not be penalized. The legislation is not needed.

Assemblyman Segerblom:
I am actually addressing something Ms. Erickson stated. Basically what you want to have happen is to go to the preliminary hearing if the defense prevails and you go to the grand jury and get an indictment. Then the defendant is required to take that up on a writ to the district court and the district court reviews the records. Are you saying that the district court looks at the justice court transcripts and the justice court decision as well as the transcript before the grand jury and their decision when they make their ruling?

Tammy Riggs:
No, if the State proceeds to the grand jury, the district court will review strictly the grand jury transcript. It will not consider the preliminary hearing testimony.

Assemblyman Segerblom:
Do you have a right to appeal the justice court denial of the preliminary hearing?

Tammy Riggs:
We do not. The only remedy we have at the justice court level is if they grant a motion to suppress, we could request a stay in the proceedings to appeal that. But if they simply dismiss the case, we do not have an appellate right.

Assemblyman Cobb:
Have there been instances in Nevada where an unsuccessful preliminary hearing has been followed up with a grand jury appearance which later ended in a successful prosecution?

Tammy Riggs:
Yes, there have been many successful prosecutions. The reason for that is because not only additional evidence was provided but also additional time to get the case together. So we started out with a meritorious case, but for whatever reason at the preliminary hearing, we were unable to put it on.

Assemblyman Cobb:
Are you saying that under the current system justice has been served in this matter?

Tammy Riggs:
Yes, it absolutely has.

Josh Martinez, Representative, Las Vegas Metro Police Department, Nevada Sheriff's and Chief's Association:
We concur with the comments that Ms. Erickson made with regard to this legislation. Dealing with the kid crimes is difficult because they do feel intimidated, and sometimes it is challenging to obtain their point of view when a case goes to the preliminary hearing. For example, if you have a domestic violence situation where a woman is intimidated by the suspect and it is a third offense, which is a felony, she is intimidated to make a statement during preliminary hearing. She would probably feel very intimidated to provide in court before the suspect the same statement she provided officers within the field. These types of situations arise, and they make such cases very difficult to prosecute. We want to ensure that we get the suspects who committed the crime as officers have documented it in the field.

Chairman Anderson:
Mr. Graham, in light of Mr. Martinez's statement, is there anything that precludes you from taking child abuse cases or those domestic violence cases directly to the grand jury rather than having to go through the preliminary hearing, other than the time factor of 16 days? Do you have a seated grand jury?

Ben Graham:
Yes, though as noted, frequently the grand juries are scheduled way ahead of time. Sometimes these cases are such that preliminary hearings are necessary because they cannot get into the grand jury due to scheduling factors.

Chairman Anderson:
The question of the volume of cases in the Eighth Judicial District of Clark County is not the norm in the country.

Ben Graham:
There are only two counties that have grand juries: Washoe County and Clark County. Occasionally they utilize them in Douglas County, Carson City, and Elko.

Assemblyman Segerblom:
It is my understanding that in a preliminary hearing, if the witness either denies that they made the statement or denies what they want to deny under oath,. the judge throws the case out. Then if they go to a grand jury and the witness testifies again under oath, but then says, "Oh, this thing did happen to me," and the grand jury is not told that the witness previously denied his original statements under oath in the previous proceeding, the defendant is indicted. Is that correct?

Chairman Anderson:
That is part of the discussion. There is a different procedure between grand jury and preliminary hearings and when the witness is cross-examined and other due-process questions are asked. Perhaps this question should be directed to a work session.

I will close the hearing on A.B. 364.

Assemblyman Cobb and Assemblyman Ohrenschall, Assembly Bill 534 will come before this Committee on Tuesday April 10, 2007. This bill needs to be examined closely by you. It is about correction of certain clerical errors and the resolutions of certain statutory conflicts. It is referred to as the reviser's bill. After examining the bill, please be prepared to report to the Committee about this.

Meeting adjourned [at 12:07 p.m.].

RESPECTFULLY SUBMITTED:

Danielle Mayabb
Committee Secretary

APPROVED BY:

Assemblyman Bernie Anderson, Chair

DATE:

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 27, 2007 Time of Meeting: 7:30 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
AB 282	C	Assemblywoman Leslie	Prepared testimony
AB 282	D	Victoria Van Meter	Prepared testimony
AB 282	E	Nancy Hart	Facts and letter
AB 282	F	Heidi Folle	Children's drawings
AB 282	G	Michael Sprinkle	Letter
AB 357	H	Assemblyman Beers	Proposed Amendment
AB 357	I	Assemblyman Beers	Letters, Affidavits
AB 357	J	Meghan Smith	Letter