MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fourth Session
March 29, 2007

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:11 a.m., on Thursday, March 29, 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 Harry Mortenson
Assemblyman John Oceguera
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom

GUEST LEGISLATORS PRESENT:

Assemblywoman Peggy Pierce, Clark County Assembly District No. 3

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Risa Lang, Committee Counsel
Janie Novi, Committee Secretary
Matt Mowbray, Committee Assistant

OTHERS PRESENT:

James D. Earl, Executive Director, Advisory Board for the Nevada Task Force for Technological Crime, Reno, Nevada
Kristin Erickson, Chief Deputy District Attorney, Criminal Division, Washoe County District Attorney, representing Nevada District Attorneys Association
Robert D. Fisher, President and CEO, Nevada Broadcasters Association, Las Vegas, Nevada
Robert Roshak, Sergeant, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada
Terry Lesney, Captain, Las Vegas Metropolitan Police Department, Las Vegas, Nevada
James Sala, Senior Representative, Political Director, Southwest Regional Council of Carpenters, Las Vegas, Nevada
Kevin B. Christensen, Attorney at Law, Christensen and Boggess, Las Vegas, Nevada
Steve Holloway, Executive Vice President, Associated General Contractors, Las Vegas Chapter, Nevada
Dylan Shaver, Vice President, AMS Government Relations, representing the Construction Industry Coalition, Reno, Nevada
Trevor Hayes, Attorney at Law, Government Affairs Manager, Lionel, Sawyer, and Collins, representing the Molasky Companies, Las Vegas, Nevada

Chairman Anderson:

[Meeting called to order. Roll called.]

We will begin with Assembly Bill 306.

Assembly Bill 306: Makes various changes to provisions concerning technological crimes. (BDR 14-78)

James D. Earl, Executive Director, Advisory Board for the Nevada Task Force for Technological Crime, Reno, Nevada:
[Read from prepared testimony (Exhibit C).]

Chairman Anderson:
This piece of legislation was initially introduced several years ago by the current Majority Leader of the Senate. At that time, Attorney General Del Papa felt this was a particularly important part of the function of their office. They were trying to find middle ground in creating this so the turf wars surrounding these issues would be resolved, and there would be a common forum for the business community. This would particularly help the banking community, which has been dealing with credit card fraud for some time, as well as the gaming industry. These recommendations are really not out of line. We could say one of the law enforcers has to be from a county of over 400,000 and one has to be from a county under 400,000. Did your discussion revolve around that, or were you hopeful the Governor would make those appointments as he sees fit?

James D. Earl:
There is no specific population qualifier in the bill that is proposed. At present, one of the board members is Commander Don Means who heads the crime lab in the Washoe County Sheriff's Department. We would like to think that the Governor would exercise his discretion to appoint the Las Vegas Metropolitan Police Sheriff. That particular organization was represented on the board at a prior time, and we hoped it would be added.

Chairman Anderson:
This way law enforcement does not take a computer and wipe out the data, it is not like the seizure of an automobile, rifle or another tangible good. There is a need for training among officers. There could be harm done inadvertently to computers.

James D. Earl:
That is correct. Unfortunately, there are some indications—particularly with regards to organized crime—the groups that do use computers a lot have begun to exploit some of the latest U.S. military technology in computer disruption to prevent evidence from falling into the hands of computer forensic examiners. Our first problem here in Nevada is getting our first responders officially trained to be able to recognize digital evidence when they see it, and that it is an important component of almost any crime.

Chairman Anderson:
That is what we have been working on in that committee since day one, trying to raise the awareness of the various agencies. The forensic laboratories have

been very good and are trying to participate in this. I know many states have been concerned about forensic laboratories in general. This may be a bridge to deal with that concern in the future as it is not being addressed in this piece. This is just dealing with the computer technology side of it. Would moving your position to a more permanent position be a result of this also?

James D. Earl:
The executive director position is one which the Board itself determines. When I was selected by the Board, a unanimous decision was required by statute. Although that might be terrific for job security, it is pretty lousy public policy. One of the changes I suggested to the Board, and they included in their recommendations regarding A.B. 306, would be to change the selection process to allow the Board to select an executive director on a two-thirds vote.

Chairman Anderson:
By the politics of the board, the decision is clearly laid out.

Assemblyman Horne:
In your testimony, you laid out scenarios on methamphetamine trafficking. In today's society, with our reliance on technology, any crime could be labeled as a technology crime. I can foresee a number of crimes where some type of technological device was used in the commission of a crime.

James D. Earl:
I am not worried so much about the statute we are working under at present, or we would be working with as a result of the passage of A.B. 306. I am concerned about law enforcement officers having the training to recognize the importance of digital evidence. They should realize that a thumb drive at the site of a major methamphetamine bust is every bit as important in evidentiary terms as a knife or a gun at a murder scene. They will begin to request the suspect's electronic devices be processed. This will be done in significantly higher volumes than is done today.

We, in Nevada, will not have the forensic capability to deal with that. At present, almost all of the computer forensic exams are being done by federal personnel. When I say "computer", I am referring to the whole variety of suspect electronic devices. The heads of the Federal Bureau of Investigation (FBI), Secret Service, and Immigration and Customs Enforcement (ICE) have indicated that they are happy to help out Nevada law enforcement. However, in the wake of 9/11 they have issued instructions for their personnel to become more selective so that they may focus on homeland security cases. We potentially see a growing number of cases that involve suspect electronic devices, and we see a larger number of devices being seized by investigators.

These numbers will increase at the same time that the number of federal personnel doing examinations will be decreasing. That is the reason that the Board recommended additional forensic personnel be added to the Attorney General's office. This is the first time any State agency in Nevada will actually recruit for computer forensic examiners. The State only has one full time computer forensic examiner. He is only partially certified and trained, but works at the Internet Crimes Against Children (ICAC) unit in Las Vegas.

Chairman Anderson:
I want to make sure that we understand Section 12 of the bill. With the forfeiture and seizure of property, it is important to make sure the property is there at the time of trial. If you catch a suspect in an unlawful act or by following the issue of a search warrant, are there lawful outlines that establish the criteria for seizure, especially considering the fact that you are not the Attorney General, but rather the forensic expert?

James D. Earl:
That is correct. In making particular proposals to the Legislative Council Bureau (LCB), we wanted to use the existing language from the Nevada racketeering statute to the maximum extent we could.

Chairman Anderson:
Ms. Erickson?

Kristin Erickson, Chief Deputy District Attorney, Criminal Division, Washoe County District Attorney, representing Nevada District Attorneys Association:
I simply wanted to provide a "me too" in regards to this legislation.

Chairman Anderson:
Is there anything out of the ordinary statutorily that the district attorney does not currently do in terms of the process? Does this bill provide a normal course of events as far as process is concerned?

Kristin Erickson:
Nothing unusual has been brought to my attention.

Chairman Anderson:
Let us close the hearing on A.B. 306.

ASSEMBLYMAN COBB MOVED TO DO PASS ASSEMBLY BILL 306.

ASSEMBLYMAN OCEGUERA SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY. (ASSEMBLYMEN CONKLIN AND MORTENSON WERE ABSENT FOR THE VOTE)

The Chair will take the bill to the Floor. Let us now turn our attention to Assembly Bill 344.

Assembly Bill 344: Prohibits intentionally making certain false or misleading statements to activate the Statewide Alert System for the Safe Return of Abducted Children. (BDR 15-1276)

Assemblyman John Oceguera, Clark County Assembly District No. 16:
Each day, 2000 children are reported missing or abducted. Each year, 203,000 children are kidnapped by a family member, and 58,200 are abducted by non-family members. Since the first Amber Alert in Nevada in 2001, the program has received 23 activations involving 30 children, with 29 safely recovered. The Amber Alert program has proven to be successful in bringing abducted children home. You may have noticed in the paper last week that a four-year-old boy was safely recovered just two days after being kidnapped in California after an Amber Alert was issued. However, there are instances where the benefits of Amber Alert are misused. They waste time and they waste money, as well as making the system less credible and effective. Issuing a false Amber Alert can be a danger to everyone involved. This legislation will help deter false claims made intentionally.

Assemblywoman Allen:
Has a scenario like this occurred in the last six years that the Amber Alert System has been in existence in Nevada?

Assemblyman Oceguera:
Apparently, Mr. Fisher can better answer that.

Robert D. Fisher, President and CEO, Nevada Broadcasters Association, Las Vegas, Nevada:
[Read from prepared testimony (Exhibit D).]

Chairman Anderson:
I do not think any of us here would doubt the need for the program. Clearly, the cooperation that has taken place between the Broadcasters Association of the State, law enforcement, and other agencies makes this a viable system. The geographical distances of this State are enormous. While the two large metropolitan communities do a good job, without the cooperation of the other major stake holders, the system would not work. Clearly, the stake holders have to be encouraged. How large should a committee be to oversee such a

group? It is important for every stake holder to have a voice and the feeling of a buy-in. That only increases the participation.

Assemblyman Horne:
The penalty of a category D felony for this crime concerns me. I am curious if a category E felony would harm this bill or make it ineffective. Both category D and E felonies carry a one-to-four year sentence. The category E starts off with probation, and if you do not satisfy your probation you would be sent to prison. My concerns are twofold. Number one, we have taken great care in trying to curb wasteful dollars in our prison system used by people occupying beds, especially those who can be supervised in a better manner. Two, I envision a scenario of a mother upset with an ex-husband because he said he would bring the kid home when he is ready to and she sends out an Amber Alert saying her ex-husband has kidnapped their kid. I agree we do not want an Amber Alert activated for the wrong reasons, but I do not know if it warrants sending her to prison.

Robert D. Fisher:
We have a number of law enforcement officials who are here today. I would feel more comfortable if one of them responded to this question.

Assemblyman Oceguera:
An Amber Alert is not issued based on a phone call. There is a series of questions, reports, and forms that have to be filled out. The last question asked of the person reporting the crime is: "Are you sure this is what you want to do?" They are then informed of the fact that it is a felony to provide false information. There are many things that go into the process before an Amber Alert is issued.

Assemblyman Horne:
I understand that. My question was about changing the penalty. Does using a category E felony make it any less serious of a crime?

Robert Roshak, Sergeant, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
I would like to introduce Captain Terry Lesney. She is in charge of our Crimes Against Youth and Family section. I believe she will best answer your questions.

Terry Lesney, Captain, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
The scenario you proposed would not even fit the criteria for an Amber Alert activation. An Amber Alert does not replace traditional investigative techniques

in missing and runaway children. It does not replace investigative techniques for custodial interference cases. The Amber Alert system is specifically geared to a supported and corroborated story that suggests a child is in immediate danger. An Amber Alert is not issued simply because a child is reported missing or possibly abducted by a parent. For example, the first Amber Alert activation the Las Vegas Metropolitan Police Department had was an incident involving a parental abduction. In most cases, a parental abduction does not endanger the child. The parent is taking that child because they want the child with them. It is simply a violation of court orders and civil actions made by the State or the county. The abduction we had, involved a gentleman who had just killed the mother of that child. Because of the felony murder, we felt the child may be in danger. There has to be direct knowledge and information gathered that suggests the child is in immediate harm or danger.

Chairman Anderson:
Do you accomplish the same goals by using a category E felony as you would by using a category D felony penalty? Using a category E is a way to still charge a felony without taking up prison bed space.

Terry Lesney:
I believe that using a class E felony would accomplish the same goal. In the extreme cases of a complete Amber Alert falsification, there will usually be other crimes involved. The category E felony would still fit the intent of the bill.

Assemblyman Segerblom:
Is there a procedure in place that, if an incident is reported that may trigger an Amber Alert, that places somebody on the other side of the phone who will inform a caller that it is a felony to go forward with a false accusation? How are those procedures handled? Is that something that has to be done in writing? Do different police departments handle it differently?

Robert D. Fisher:
No, Amber Alert activation would never involve a telephone call. You may ask why it takes so long to have an Amber Alert issued. It is because of the scope of work and investigation taking place. When the local law enforcement has reached the conclusion that all criteria have been met and an Amber Alert is issued, there is a specific Amber Alert plan and protocol that is followed. In Nevada, we start with a local Amber Alert rather than a regional or statewide Amber Alert.

Assemblyman Segerblom:
Is there some point where the responsible law enforcement person would indicate to the person reporting the crime that to be misleading is a felony?

Terry Lesney:
In the Las Vegas Metropolitan Police Department, there are only three individuals who have the authority to issue an Amber Alert: the sergeant of the missing persons unit, the lieutenant over that section, and myself. When we issue that Alert, there is a form we fill out. As we are interviewing the parent or guardian of the victim, we have them sign the document, and advise them on tape and video of the potential ramifications of a false report.

Chairman Anderson:
Let us say I am a distraught parent, I cannot find my child, and I am not sure where he is. I believe somebody has abducted my child and have an idea of who that might be. I call the local radio or television station and they tell me to call the police. I call your department, but there is some distance from where you are to where I am. Do you send somebody to my house to take the information in a timely fashion? I presume the quicker you move, the faster you recover the child. The statement is taken not necessarily by you, but by an officer who comes to my house. They will gather the pertinent information as to the way the child is dressed, the age, a photo, etcetera. They will get all of the information that would be necessary for a rapid return of the child. The television or radio station may recognize this as a potential news story and may also be sending a crew out. The investigator relays the information back to you, and you decide there is enough information to issue an Alert. However, at this point we have lost a good amount of time.

Terry Lesney:
Usually, a missing persons detective immediately reports to the scene. We then communicate with each other by phone or radio. We are getting flyers out while we are deciding if this is an Amber Alert situation. We are still using the traditional investigative techniques to recover that child. We need all of the pertinent information to ensure that if we issue an Alert people know what they are looking for.

Chairman Anderson:
It seems to be a long time before this huge step of an Amber Alert is taken.

Terry Lesney:
It is not necessarily at the end of the investigation. The process is parallel. Both situations are going on simultaneously. When we realize that we need to mobilize the entire community to recover the child within 24 to 48 hours, we then use the Amber Alert.

Chairman Anderson:
That is the reason the community and the broadcasters all bought into the system initially.

Terry Lesney:
Correct.

Assemblywoman Gerhardt:
What happens when you do not have the cooperation of the parents? I am particularly concerned about the Everlyse Cabrera case. Did we activate an Amber Alert?

Terry Lesney:
With the Everlyse Cabrera case, we did not activate an Amber Alert. We could not gain enough significant information. We had no description of a vehicle and no reason why the child was missing. We had nothing to put on our reader board or on a broadcast to tell people what to look for. Many times, in the case of an abducted child, we have none of the pertinent information, other than the child is gone. We have no other choice but to use traditional investigative techniques. There is no information to share with the public except for a picture of the missing child.

Chairman Anderson:
If you are lacking the information about the suspect vehicle or clothing, you will not utilize the photo and tell the public to watch for the missing child?

Terry Lesney:
We would not activate an Amber Alert unless there was specific descriptive information to give the public. We would utilize traditional investigative techniques. We would send out fliers, mobilize volunteers, etcetera.

Chairman Anderson:
A news station might be broadcasting a news story, but that is not the Amber Alert.

Assemblyman Manendo:
Are there certain cell phone carriers that are involved with the Amber Alert system? How does that work?

Robert D. Fisher:
The Department of Justice (DOJ) has worked closely with cell phone carriers to get them to buy into Amber Alert activations. Most cell phone carriers are now doing so, but several are not. One of the rules the DOJ has with Amber Alert is

that no one is supposed to make a profit from an Amber Alert. There are several phone companies that do not want to participate in Amber Alerts at this point. In order for a cell phone user to receive an Amber Alert on their phone, they have to sign up for it. It is not automatic.

Chairman Anderson:
I question the move from a 12 person committee to a 15 person committee. Why the number of 15? Will this number continue to grow?

Robert D. Fisher:
The Committee struggled with the number as well. The number was reached because of need. The Amber Alert Review Committee is composed of ten members of law enforcement. It includes about five different law enforcement agencies. By statute, the Nevada Broadcasters Association appoints two people. We thought the Nevada Department of Transportation should have a representative; they have taken an important role and are one of the major stakeholders in our purpose. A child advocate was requested by the Attorney General's office. There was not an easy solution because we did not want to cut any of the law enforcement agents. The final seat is for another stakeholder who may not necessarily be law enforcement.

Chairman Anderson:
I have never seen a committee that wanted to give up a member, especially when they are part of the creation. I have never known of another committee or board that allows the chairman of the committee who is not elected to select the members of the committee. This committee has a Governor-appointed chair and vice chair. You also select the committee members. Why is this situation so unique?

Robert D. Fisher:
In the statute, the only non-law enforcement members to be appointed to the committee would be two broadcasters appointed by the Nevada Broadcasters. I, as the chairman, was appointed by the Governor. We followed the model that the only other non-law enforcement was done by appointment.

Chairman Anderson:
I presume you were appointed by the Broadcaster's Association and then the Governor selected you from among the members of the existing body and designated you as chairman.

Robert D. Fisher:
Yes, sir.

Chairman Anderson:
Why should the Governor not just have another appointment? I am trying to find an example where the chairman has the power of an elected representative. Would there be an opportunity for the Governor to select somebody who is not in law enforcement—a person who would bring a unique perspective to the body?

Robert D. Fisher:
Yes, the Amber Alert Review Committee has always had an ongoing working relationship with the Governor, especially with Amber Alert. I do not think that the Amber Alert Review Committee would find it objectionable, and I am sure they would endorse and recommend a candidate to be appointed by the Governor.

Kristin Erickson:
We just wanted to voice our support for this legislation. We have no preference of a category D or E felony. A category E felony would be fine with us.

Chairman Anderson:
We will close the hearing on A.B. 344. Are there any feelings about the difference of the category D and E felonies? Additionally, are there any comments about the representative to be a representative of the public, which would be recommended by the Committee and appointed by the Governor?

Assemblyman Oceguera:
I am fine with the category E felony. The first two amendments seem reasonable to me and I would defer to your pleasure on the third.

Chairman Anderson:
Ms. Lang, on the conceptual amendment, could we change the bill to reflect a category E felony, and that the additional representative be at the recommendation of the Committee and appointed by the Governor?

Risa Lang, Committee Counsel:
Those amendments look fine.

> ASSEMBLYMAN SEGERBLOM MOVED TO AMEND AND DO PASS ASSEMBLY BILL 344.
>
> ASSEMBLYMAN HORNE SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY. (ASSEMBLYMEN CONKLIN AND MORTENSON WERE ABSENT FOR THE VOTE.)

Chairman Anderson:
We will now examine Assembly Bill 359.

Assembly Bill 359: Revises provisions governing certain statutory liens. (BDR 9-1011)

Assemblywoman Peggy Pierce, Clark County Assembly District No. 3:
A.B. 359 is the result of a judge interpreting a statute of the *Nevada Revised Statutes* (NRS) in a way that it had not been previously interpreted. With that I am going to turn it over to Jim Sala.

Jim Sala, Senior Representative, Political Director, Southwest Regional Council of Carpenters, Las Vegas, Nevada:
This change is intended to fix a very specific problem and hopefully clarify an issue. The wages for a laborer come in the form of a paycheck and sometimes in fringe benefits that go to a trust fund. In NRS 108.2214, changes in lien laws have enunciated the many different people who can file mechanics liens; artisans, builders, contractors, people who lease equipment, miners, subcontractors, architects, engineers, surveyors, geologists, and laborers. We have run into a catch-22 situation. If the laborer has part of this compensation going to a trust fund and if he did not get paid fully for a job, he could lien for the wages that he receives on his paycheck, but he is unable to lien on behalf of the trust fund. A judge has decided the trust fund cannot do it on behalf of a laborer. You get into a situation where up to 25 percent of a laborer's wages could be going to a trust fund. If they do not get paid, he may not be able to collect that portion of his compensation. We are hoping that this simple modification to the law will make it possible for a laborer to collect the trust fund money due to him.

In our market in both southern and northern Nevada, we are having a lot of out-of-state developers come and develop projects. They often have different guidelines and regulations than us. They bring contractors with them who are also from out of town. Sometimes those people do not always finish projects, or they leave town without paying all of their obligations. This is an effective way to recover some of that money. This is not the preferred method and is used less frequently than other ways to collect money, but it is certainly an important way to preserve the right of laborers to collect that money.

Kevin Christensen, Attorney at Law, Christensen and Boggess, Las Vegas, Nevada:
I am appearing in support of A.B. 359 and have had some hand in its preparation and drafting. I have been in the area of trust fund law for about

25 years in the State of Nevada. Traditionally, the federal government put together a remedy to collect these contributions that are delinquent and unpaid. It is in a statute called the Employment Retirement Income Security Act (ERISA). It relates to things like pension benefits and health and welfare benefits. We are attempting to clarify this labor priority that is throughout federal and state law. There are many different statutes in the State of Nevada that impose a labor priority and preference when you are trying to collect from a limited source of monies. There are contractors' bonds, and labor is the first priority under those bonds. That is under NRS 624.273. There are lien statutes under Chapter 108 of NRS, and that statute prefers labor claims over any other claim. It is just the pronounced policy of the State of Nevada and has been for 140 years. I believe the lien statute began in 1875. We are trying to make sure there is no misunderstanding in the application of Chapter 108 of NRS, when a laborer is unpaid on a project. We had a particular case in the Clark County District Court in September 2005. The judge, in determining whether or not two liens should be expunged, took a look at the statute. In 2003, the Legislature decided to define who the lien claimants are, which are the referenced mechanics and material men. The statute that Jim just read outlines the individuals that were identified and placed in that definition under NRS 108.2214. Laborer was in that definition and should have been. It formalized 130 years of case law and practice in which a labor claimant could get both his wages and his fringe benefits. It is an unusual remedy, but you can see a typical scenario that happens everyday in the State of Nevada. A general contractor is not paid by an owner of a project. There are many reasons for this. Maybe the owner ran out of money or does not like what the general contractor did. The result of that is that a subcontractor under the general is affected more drastically. They have many laborers on the project working for several months. They are not getting paid because the owner is not paying the general contractor. Chapter 108 of NRS was drafted strategically a century ago to address the kind of situation where the laborer and other mechanics and material men do not have any other remedy. It is a limited remedy. They only have 90 days after the last labor has been provided to be able to claim the lien. Within six months, the laborer has to file an action to enforce it. It is not used as regularly as other collection devices are. In our case, the judge said that the term "laborer" was stated but trust funds were not. We do not necessarily think you have to say "trust funds." We do think that you have to say that the benefits and the wages are the product of the work of the employer. There are men and women in the State of Nevada who work on construction sites and depend upon these benefits. These benefits make it possible for them to be able to have health insurance and eventually a retirement. This depends in some large measure on this type of remedy. The judge ordered those liens were expunged because the trust funds were not a named lien claimant under the definition. We moved the case to federal court. There were a couple of different cases. Judge Jones, a

U.S. District Court judge now has the case. His first comment was that a laborer has every right to file a mechanic's lien. That is how it has always been. We are asking that the 2003 definition be slightly revised to accentuate the labor priority and to clarify that benefits are part of the recoverable claim a laborer can place.

Assemblyman Horne:
Hypothetically, there could be a dispute between two subcontractors, but the property owner may not have been involved in the dispute which led to the lack of payment that generated the lien in the first place. I am assuming that a property owner's property can get tied up in a lien that had nothing to do with the contract of the subcontractor.

Kevin Christensen:
There is that element and it can come into play. However, a labor lien is handled differently than a subcontractor's lien. A subcontractor has to give a pre-lien notice so the owner knows he is on the project. That is required by Chapter 108 of NRS. A laborer has a preference and priority so he does not have to give a pre-lien notice. If somebody comes onto my property to improve it, I ultimately control the strings for the funds, and I will be responsible to make sure that the laborer gets paid. Labor has a straight priority, subcontractors have to jump through a few hoops just to be eligible to assert a lien. Labor claims traditionally are not tied up in subcontractor claims or general contractor claims. They are asserted directly by the laborer himself, or the trust funds on the laborers behalf.

Assemblyman Horne:
You defined how laborers are different from subcontractors. I am still trying to figure out what ill effects a property owner could endure. You are saying that a property owner would generally have direct contact with that laborer.

Kevin Christensen:
No, just direct responsibility.

Assemblyman Horne:
They have a direct responsibility to the laborer, even though they did not contract with that laborer?

Kevin Christensen:
That is correct. That is because the laborer is the furthest removed element on the project. If a laborer brings equipment on the project, he gives the owner notice that he is delivering materials. If you are a subcontractor or a general contractor, you give a pre-lien notice as well. The laborer works for one of

those entities. They have no direct contact, thus they are not directly protected. One hundred and thirty years ago, the Legislature thought that it was important to protect that element of the construction process that was furthest removed and did not seem to have direct contact with the owner.

Chairman Anderson:
Hypothetically, if I hire a roofing company to put a new roof on my place, my relationship is with the roofing company. The roofing company goes to the warehouse and purchases the roofing materials for the project. That conceivably could create a lien against my house based upon the material delivered to the site by that company. Now the roof guys show up and lay down the material. I pay the roofing company, but it does not pay the warehouse for the material, and then does not pay the roofers. I now have two liens against my property. The first has to be taken care of by the roofing company, but the lien regarding the workmen is my responsibility. Is that what we are getting at?

Kevin Christensen:
It would be taken care of by the owner. Certainly the subcontractor would be on the hook. Sometimes they are in a bankruptcy. The labor claim has always had priority and still does. The only question was whether the fringe benefits portion of that also has that priority and can it be asserted through a set of trust funds.

Chairman Anderson:
The owner of the company hired an individual along with the trust fund element of the situation. These are part of the employee's wage.

Kevin Christensen:
Yes.

Assemblywoman Allen:
Potentially, the owner of a piece of land or a structure could have the title held with a lien against it because of a subcontractor and an employee dispute over benefits. Can you elaborate on that and where the nexus is?

Kevin Christensen:
The nexus is the extent a subcontractor has agreed to compensate an employee through wages and benefits. They have negotiated that in the form of a collective bargaining agreement. In the open shop sector, sometimes it is in a direct contract. That is the nexus. The negotiation already took place between the bargaining parties. Sometimes, for economic reasons the subcontractor decides not to pay those contributions when they are due, which is usually

within a month. The wages are paid, but the laborer does not find out about the fringe benefits until a month or two later. The laborer is working in a short period of time to protect that element of his compensation. Because the owner gets the benefit of the labor, he is ultimately held responsible to make sure that the labor compensation is paid. If the subcontractor goes out of business, the owner is on the hook. If the general goes out of business, the owner is still on the hook.

Assemblywoman Allen:
There is no way to go after the subcontractor?

Kevin Christensen:
There is. There are collection actions, but if the subcontractor is in bankruptcy those funds dry up. There are bond actions under Chapter 624 of NRS, and there is a general contractor liability section under NRS 608.150. These are all independent and separate remedies utilized by trust funds from time to time to collect these kinds of unpaid contributions. This usually happens when a subcontractor goes out of business.

Assemblywoman Allen:
There could be a scenario where the owner, the contractor, the subcontractor, and the laborer have a dispute, put a lien against the property, and the owner wants to sell the property. The owner paid the general contractor, the general contractor paid the subcontractor, but the subcontractor is not paying the laborer. The owner has already paid once, and to get the lien off his home he will have to pay again.

Kevin Christensen:
That is correct. Usually the three entities will receive releases from the laborers working on the project. The laborer must sign off that they have received all of their wages and benefits.

Assemblywoman Allen:
That is a really big loop hole. You said the laborer may not know about non-payment of benefits for another month.

Kevin Christensen:
That is correct.

Assemblywoman Allen:
The person signed the release.

Kevin Christensen:
That is correct. It is a difficult thing. It does not diminish the importance of receiving the value for what you did. The Legislature has tried to figure out who gets the benefit of the work and is it appropriate to compensate somebody for what they thought they were going to be paid. Ultimately, it has been determined the primary burden should be placed upon the owner.

Chairman Anderson:
The difficulty here rests not with faulty materials at the site, nor the labor that was putting it into place thus enhancing the property, but rather the person who contracted for the materials and the workers? The margin of profit becomes a questionable issue if the contractor is going into foreclosure. In this case, they are supposed to have surety bond and other kinds of remedies in place. These other things also have the chance of failure.

Assemblyman Segerblom:
In a typical situation, the owner of the property and the general contractor would both know a union workforce was on the job. They would not release that final bit of money until they had talked to the union and knew the trust funds had been paid by the subcontractors. It is not that they are flying blind here and do not know what the reality is. They go to the people they know might have a claim and say, "Do you have a claim?" They would have them then sign off if they have been paid, otherwise you would retain whatever you felt would cover this. This is not something the owner or the general contractor would not be aware of.

Kevin Christensen:
That is correct. Typical of every construction contract is that a retention provision is in the contract and usually lasts for a significant period of time before that last 10 percent is released. Usually, you can protect yourself in that fashion as a homeowner or a property owner.

Assemblyman Goedhart:
What if you are the owner who has contracted with a contractor who has now gone through a subcontractor? You may not know that the laborers are not getting the matches in their trust account or their benefits account. You said that many times you do not know if those funds are in the account until a month after the job ends. Is there some kind of provision made that ensures for each week that the laborers get paid, there is a match that goes to an account that is being managed in real time? Rather than finding out at the very end of the project, that the subcontractor did not put that money in the account.

Kevin Christensen:
It certainly could be inserted into the requirements of the owner that a weekly payment be made and a weekly report. Typically trust fund contributions are remitted on a monthly basis and usually the tenth or twentieth of the following month. Usually, you are at least six weeks out. If an owner or developer is aware there are fringe benefits involved in the compensation on a project, they will actively check with the potential representatives of the laborers to make sure that the contributions are actively being made. They make a final check before they release the retention. There is not a statutory or a required contractual provision unless somebody negotiates it.

Steve Holloway, Executive Vice President, Associated General Contractors, Las Vegas Chapter, Las Vegas, Nevada:
I am the person responsible for the changes in 2003 to the lien law. I promised that the Associated General Contractors (ACG) would not bring forth any more changes to the lien law, Chapter 108 of NRS this session. I am not responsible for this proposed change. I want to raise a couple of concerns. We intentionally did not include trusts in the language changes in 2003. It has been an issue, and these are not the first court cases that have come up that reference these issues. We did not include trusts because we felt there were other remedies available for the trusts. I have sat on these trusts and currently appoint people to sit on, both the pension trusts and the health and welfare trusts for the various construction unions. We did not include trusts because there is a remedy under NRS 608.150 in the event that a trust is not paid. It provides those involved to first go to the subcontractor to recover that money. If the subcontractor has gone bankrupt, left the state, is not available for some other reason, or does not have the money available, the laborer then is able to go to the general contractor and hold that contractor responsible for payment to those trusts. They often do that. It has been an item of contention for years, but it is one we have not fought because there is a contractual relationship between that subcontractor and the general contractor. There is not contractual relationship between the subcontractor and the owner. Very often the owner has no knowledge of who is working on that project or when they are working on that project. The owner many times does not know when or if certain trusts have been paid. Often the general contractor does not have that knowledge. We go to the trusts and have asked them to provide us with that information before we even hire a subcontractor for a project. They are usually unable to provide that information because they are that far behind in their bookkeeping. They will not provide us with definitive information even when they do know. It is a problem and that is why we did not include trusts in the changes we made in 2003. Again, there is no way that an unsuspecting owner can know a subcontractor did not make payments to a trust. Then they are faced with a lien on their property when they have already paid that money out.

In order to clear that lien, they would have to again pay what was already paid for. In those cases when a large enterprise is involved—for example a gaming casino—and if the owner did not pay the general contractor and the general contractor did not pay the subcontractors and the subcontractors did not pay their subcontractors and suppliers, we could say that it should be possible to place a lien. The laborer himself could lien and the subs could lien, and the general can lien that property. It did not always work that way. We built in some other remedies. They can stop work if they are not paid by the owner.

Chairman Anderson:
Are you of the opinion that this legislation creates greater unsuspecting liability to a homeowner than is currently the case when he hires a laborer? If it is a large project, there may be many subcontractors. The owner would have a difficult time naming all of the subcontractors. How does this increase the liability that is not currently in place? The owner of the property still has the same level of exposure to the contractor, the subcontractor, and the material holders. How does this change that, if in fact the trust benefits are part of the wage benefit of the group?

Steve Holloway:
The trust is a whole level removed. All of the different contractors are there working on the property or providing material or equipment. All of the other parties on the project have a contractual relationship with the prime contractor. That prime contractor is essentially the owner's representative. There is no contractual relationship with the trust. It is several steps removed from the owner or the prime contractor. There is no way to be aware of whether or not payments were made to that trust by the subcontractor. That is the difference. It puts a liability on the owner, the residential owner in some cases that he has absolutely no control over. There are other remedies for these trusts and we have established them intentionally. They have been available and have been working for the last 30 years that I have been around.

Assemblyman Horne:
What about the retention provisions that are in the contract? A property owner is on notice that there may be wages due later which he is going to retain until everything is done. I realize that the provisions are outside the trust fund contractual lien, but it seems that the property owner is aware that they are there.

Steve Holloway:
Yes, they are aware there are these possibilities and that is why retention is retained up until the entire project is completed. We do not always know until well after a project is completed whether or not trust funds have been paid. It

can sometimes take six months to a year. I have seen trust funds go after general contractors for money that was not paid on projects from several years ago. That does not always happen, but there is a time delay. Often the retention money is already gone. We try to make sure it is paid out in a timely manner. According to statute, retention is due upon occupancy or when the prime contractor notifies the owner that the property is available for occupancy. It can also be due upon the final inspection of a property.

Assemblyman Mabey:
If a worker performs his labor and part of his pay he receives directly and part is what the trust will get, it still seems like it is due him. Even though it does not come directly to his wallet, it is still reimbursement for a labor that he performed. How many times is it that the laborer gets paid but the trust does not?

Steve Holloway:
This is not a common occurrence. It comes up fairly frequently for those of us who have to deal with it, but it is not an everyday occurrence. There is a contractual relationship and a remedy between the contractor and the subcontractors for the trust money in NRS 608.150. There is not that contractual relationship with the owner. The subcontractor does not have a contractual relationship with the owner who is somewhat unsuspecting. The owner cannot really know if the trust money is being paid or not. That is my only concern. We want to see the money recovered as much as the carpenter's union does. There is not that contractual agreement with an unsuspecting owner.

Assemblyman Mabey:
Before this change happened last session, this problem did not occur?

Steve Holloway:
Usually this problem is addressed through NRS 608.150. The trusts themselves will go after the subcontractor. If the subcontractor is bankrupt, then they will go after the general contractor. They are permitted to do so.

Chairman Anderson:
The contractor or the subcontractor is expected to pay social security, Federal Insurance Contributions Act (FICA) and all of the other federal withholdings. The worker assumes those deductions are being taken out. They also assume that there is a healthcare plan that he is putting dollars into. The worker realizes that is going to be a deduction. The homeowner assumes that the contractor or subcontractor is doing the right thing.

I have NRS 608.150 here and it looks like it provides some pretty clear remedies.

Steve Holloway:
Nevada Revised Statutes (NRS) 608.150 provides not just a remedy for trusts, but it provides for the State in the event unemployment is not paid, the workers compensation is not paid, or for any of the fringe benefits that are not paid for a worker. The remedy is there. This creates a duplicate remedy for a homeowner who is not in a contractual relationship with the subcontractors or the unions or the trusts. The prime contractor and the subcontractors are in a contractual relationship with the trusts.

Assemblyman Segerblom:
When does the trust fund give notice to the property owner?

Steve Holloway:
Under the lien law, the laborers have 180 days from completion to file a lien.

Assemblyman Segerblom:
From completion of the job, or from completion of that particular part of the job?

Steve Holloway:
The completion of their work, but I would have to look it up.

Assemblyman Segerblom:
They do have to give notice, they cannot just wait two years then file a lien.

Steve Holloway:
They cannot.

Assemblyman Carpenter:
What happens if the general contractor files for bankruptcy?

Steve Holloway:
Then the trust has got a real problem. If we cannot get to the subcontractor or the general contractor, I do not believe there is any other remedy.

Chairman Anderson:
I think that the homeowner is going to have to pay.

Steve Holloway:
I am not jumping up and down about this one, I just wanted point out my concerns.

Dylan Shaver, Vice President, AMS Government Relations, representing the Construction Industry Coalition, Reno, Nevada:
We are happy with the way the law is working as it stands. We agree with this bill in concept, but do not believe it is necessary to start tinkering with the existing law just yet.

Trevor Hayes, Attorney at Law, Government Affairs Manager, Lionel, Sawyer, and Collins, representing the Molasky Companies, Las Vegas, Nevada:
I offer a hypothetical situation. Let us say I own a piece of land and a friend of mine wants an office building. I tell him I have a great piece of land for his office building. He then says he does not know anything about office buildings and tells me to build it and sell it to him for a 10 percent profit. I go out and find a general contractor to build my building. That contractor hires a subcontractor to do the landscaping. That subcontractor hires another subcontractor to bring the rocks in for the landscaping. I pay my general, he pays the subcontractor, he pays the subcontractor for the rocks, and then one of the employees working for the subcontractor doing the rock work claims that his benefits were not paid. I have paid everything. The trust could go and file a lien against my building. The burden of proof to file a lien is zero. Once we are in court, the situation can last a couple of years. I end up paying for a dispute that may or may not be legitimate. I must do this in order to sell my building to my friend.

We believe that people should be paid for what they are contracted for. They should be paid their benefits, we just think that the remedies available under NRS 608.150 are adequate without pulling those people in who are four or five times removed from the dispute.

Assemblyman Horne:
Could you as the property owner that had this building built, have contracted in an indemnity clause to your general contractor, your subcontractor, to cover you in such an event?

Trevor Hayes:
You could.

Assemblyman Horne:
Theoretically, whatever dollar amount is needed to remove the lien so the trust is filled, you could have a provision within your contract with the general

contractor and the subcontractors saying, "Should I have to do this because you failed your obligations, you have to make it right."

Trevor Hayes:
That is possible. Our contention is that it should not be our responsibility when there already are provisions in NRS 608.150 that allow for a remedy when there are disputes of this nature. This bill would pertain whether or not there was a bankruptcy, which does not happen often.

Chairman Anderson:
We will close the hearing on A.B. 359. Ms. Pierce, I suggest that you speak with members of the Committee and see if they are comfortable with it. We will potentially discuss it in tomorrow's work session.

Meeting adjourned [at 10:56 a.m.].

RESPECTFULLY SUBMITTED:

_____
Janie Novi
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 29, 2007 Time of Meeting: 8:11 a.m.

Bill	Exhibit	Witness / Agency	Description
	A	Assembly Committee on Judiciary	Agenda
	B	Assembly Committee on Judiciary	Attendance Roster
A.B. 306	C	James D. Earl	Testimony
A.B. 344	D	Robert D. Fisher	Testimony