MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fourth Session
May 9, 2007

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 9:32 a.m. on Wednesday, May 9, 2007, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark E. Amodei, Chair
Senator Maurice E. Washington, Vice Chair
Senator Mike McGinness
Senator Dennis Nolan
Senator Valerie Wiener
Senator Terry Care
Senator Steven A. Horsford

GUEST LEGISLATORS PRESENT:

Assemblyman Bernie Anderson, Assembly District No. 31
Assemblyman James Ohrenschall, Assembly District No. 12
Assemblyman David R. Parks, Assembly District No. 41
Assemblywoman Valerie E. Weber, Assembly District No. 5

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Brad Wilkinson, Chief Deputy Legislative Counsel
Lora Nay, Committee Secretary

OTHERS PRESENT:

Cotter C. Conway, Washoe County Public Defender
Scott Scherer, Dun & Bradstreet
James Jackson, Consumer Data Industry Association

William R. Uffelman, Nevada Bankers Association
David F. Kallas, Las Vegas Police Protective Association Civilian Employees, Incorporated; Southern Nevada Conference of Police/Sheriffs
Gary Peck, American Civil Liberties Union of Nevada
Phil Gervasi, Police Officers' Association of the Clark County School District
Raymond J. Flynn, Las Vegas Metropolitan Police Department; Nevada Sheriffs' and Chiefs' Association
Liz Sorenson, Communications Workers of America District 9; Communications Workers of America Local 9413; National Coalition of Public Safety Officers
Shaun E. Jillions, City of Henderson
Jason M. Frierson, Clark County
Bill Bradley, Nevada Trial Lawyers Association
R. Ben Graham, Clark County District Attorney; Nevada District Attorneys Association):
Barry Smith, Nevada Press Association
Kathy A. Hardcastle, Chief District Judge, Department 4, Eighth Judicial District
Ron Titus, Court Administrator and Director of the Administrative Office of the Courts, Office of Court Administrator, Nevada Supreme Court
Joan Neuffer, Administrative Office of the Courts, Nevada Supreme Court
Jonathan O. Mayes, State and Local Government Relations, Safeway Incorporated
Celia Kettle, Loss Prevention Manager, Safeway Incorporated
Shannon Humphrey, Organized Retail Crime Division, Walgreen Company
Samuel P. McMullen, Retail Association of Nevada

CHAIR AMODEI:
We will open the hearing on Assembly Bill (A.B.) 428.

ASSEMBLY BILL 428: Prohibits the use and acquisition of certain personal identifying information of another without the prior consent of that person. (BDR 15-1334)

ASSEMBLYMAN DAVID R. PARKS (Assembly District No. 41):
I ask you to consider A.B. 428 which prohibits pretexting. Pretexting is a term coined by the private investigation industry referring to the practice of obtaining personal information under false pretenses. Pretexting includes fraudulent statements and impersonations to obtain consumers' personal, financial and other information such as bank balances and credit information. Pretextors sell

this information to people who may use it to get credit in your name, steal your assets or investigate and sue you.

Assembly Bill 428 would make pretexting against the law in Nevada. Pretextors use a variety of tactics to get personal information. For example, a pretextor may call and ask you questions. When the pretextor has the information he wants, he uses it to call your financial institution, pretends to be you or someone with authorization access to your account and may claim he has forgotten his checkbook and needs information about the account. In this way, the pretextor obtains more of your personal information such as social security number, bank and credit card account numbers, information in your credit report and the existence and size of your savings and investment portfolio.

Some personal information may be public record, such as whether you own a home, pay your real estate taxes or have ever filed for bankruptcy. It is not pretexting for another person to collect this kind of information. Pretexting is a troubling and growing problem facing consumers. The disclosure of a consumer's bank account and other sensitive information is significant privacy invasion with potentially serious financial consequences. I hope you will act favorably on A.B. 428.

SENATOR WIENER:
In the definition of "person," does person also include business identity? In the past year, I had at least two experiences where someone has tried to steal my business identity information so they could go after my business account.

BRAD WILKINSON (Chief Deputy Legislative Counsel):
Yes, that definition would also include an artificial person.

SENATOR CARE:
It is a Category B felony to use personal identifying information to harm another person. Are we talking about representing or impersonating or obtaining access with the intent to harm? Can you think of any circumstances where somebody might be obtaining access or representing or impersonating but not with the intent to harm?

ASSEMBLYMAN PARKS:
There may be the nosy-neighbor syndrome where somebody wants to know as much information about their neighbor as possible. We also have situations

where persons want to find out more about an individual they may have a personal interest in and those type of applications may be at play. I tried to gear my bill strictly at the situation where somebody would be intending to commit some form of fraud.

COTTER C. CONWAY (Washoe County Public Defender):
Someone researching their genealogy could be looking into using other personal information to find marriages or children born by going through public records to establish that history. An individual from my office who was looking for an old friend used public records to find their current address and then mailed them a Christmas card. To avoid those persons being swept up in this bill, amendments have been proposed in an effort to alleviate concerns about the normal access of public records. These changes are to make sure the conduct we are trying to prosecute is of a criminal nature.

ASSEMBLYMAN PARKS:
If the submitted recommendations make A.B. 428 a better bill without diluting its intent, then I am satisfied with them.

SCOTT SCHERER (Dun & Bradstreet):
We use records to conduct investigations on behalf of clients. Sometimes the public information available is negative about a particular potential business partner and may harm that other person. We are legitimately using public records so we suggested the inclusion of the intent to cause harm.

CHAIR AMODEI:
What are your thoughts on these changes in the context of Assemblyman Parks' statement that he is fine as long as they do not dilute the bill? We are trying to create a criminal conduct component.

MR. WILKINSON:
Those seem to be appropriate changes and would not dilute the effect of the bill.

JAMES JACKSON (Consumer Data Industry Association):
Our intention is to make it clear that there has to be an intent to commit fraud for an unlawful purpose.

WILLIAM R. UFFELMAN (Nevada Bankers Association):
We support A.B. 428 and the amendments.

SENATOR WIENER MOVED TO AMEND AND DO PASS AS AMENDED A.B. 428.

SENATOR NOLAN SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR WASHINGTON WAS ABSENT FOR THE VOTE.)

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CHAIR AMODEI:
We will open the discussion on A.B. 298.

ASSEMBLY BILL 298 (1st Reprint): Makes various changes to provisions concerning peace officers. (BDR 23-1027)

ASSEMBLYMAN JAMES OHRENSCHALL (Assembly District No. 12):
Assembly Bill 298 requests the state develop a uniform policy regarding suspension of peace officers for a noncriminal investigation. They shall not be suspended without pay due to the potential financial hardships and harm arising from an investigation that can drag on.

DAVID F. KALLAS (Las Vegas Police Protective Association Civilian Employees, Incorporated; Southern Nevada Conference of Police/Sheriffs):
We support A.B. 298. The policy of the Las Vegas Metropolitan Police Department is that if an officer is the subject of an internal investigation, they will not be placed on administrative leave without pay. The policies of other agencies in Nevada are based on the subjective nature of their administration. An internal investigation is not a criminal investigation. *Nevada Revised Statute* (NRS) 289.090 refers to a criminal investigation. The provisions of NRS 289.057 do not apply. Like in any other investigation or allegation, the individual should be considered innocent until proven guilty. Other agencies, including the school district, have investigations that may last three, six or nine months. We had investigations in our agency lasting 18 months to 24 months wherein the individuals found not in violation kept their jobs. Had they been suspended without pay, they would have had to file bankruptcy. If

there is a pending criminal investigation paralleling the internal investigation, it is the agency's decision whether to suspend the officer or place him/her on administrative leave without pay.

CHAIR AMODEI:
Is your last point that the agency decides whether it is suspension or administrative leave during the investigation?

MR. KALLAS:
The terminology is inconsistent; at Metro, we do not use the term "suspended"; we say "placed on administrative leave." There are two forms of administrative leave, with and without pay. Our policy dictates that if an officer is the subject of an internal investigation, he/she will be placed on administrative leave with pay until its outcome. Pursuant to NRS 289.090, if there is a parallel criminal investigation, such as an allegation of battery, domestic violence or burglary, then the agency, at its discretion, could place that officer on administrative leave without pay. Unless there is a parallel criminal investigation, our agency places officers on administrative leave with pay based on the idea they are innocent until proven guilty. That is not a statewide standard.

CHAIR AMODEI:
Give me examples of applicable administrative leave. The context of A.B. 298 does not concern criminal inquiries. What kinds of investigations are addressed?

MR. KALLAS:
There could be an allegation of discourtesy. Perhaps it has been the third time an officer was late for work and, based on the department's policy with progressive discipline, an officer could be subject to termination. An officer could receive a contact report, written reprimand, a 10-hour, 20-hour or 40-hour suspension or termination depending on the number of prior allegations the officer received. It depends on the allegation and how many times the officer has received some form of discipline.

SENATOR CARE:
Statute says any investigation of a peace officer may be conducted in response to a complaint or allegation the officer engaged in activities which could result in punitive action. Is punitive the same as a disciplinary action?

MR. KALLAS:
Absolutely.

SENATOR CARE:
Can the complaint be from someone outside the agency and not just a criminal allegation?

MR. KALLAS:
The allegation could be of discourtesy. The officer may have stopped someone for a traffic violation and they did not like the way they were addressed. A citizen may have not liked the way a response for service was handled. An internal complaint against an officer can be filed regardless of the circumstances.

SENATOR CARE:
The proposed language in section 1, subsection 2 says "until all investigations relating to the matter have concluded." Does that mean the investigation itself is concluded? Is there an avenue to review the conclusion of an investigation?

MR. KALLAS:
Yes, there is—not that I am supportive of it. If they do not like the conclusion of the internal investigation, they can go to the Citizen Review Board. There is no other evaluation process once the decision has been made by the Office of Internal Affairs.

SENATOR CARE:
Is the matter concluded upon the moment the Office of Internal Affairs has reached its conclusion or could an officer, under current law, remain suspended without pay pending the outcome of the Citizen Review Board? I am trying to nail down the point of conclusion.

MR. KALLAS:
The conclusion is based on the outcome of the internal investigation. The Citizen Review Board does not impact the administrative leave with or without pay. Once the investigation is completed by the Office of Internal Affairs with recommendations made and memorialized in adjudication through the chain of command, the internal investigation is considered complete.

SENATOR CARE:
What happens if an officer is suspended with pay, the investigation lasts two months and at the conclusion of the investigation, the determination is disciplinary action or even termination? Can the department seek to recover that two-month salary?

MR. KALLAS:
I assume the department would not seek to have monies reimbursed because the officer is on administrative status with pay. They move forward from the time adjudication is completed.

GARY PECK (American Civil Liberties Union of Nevada):
The American Civil Liberties Union (ACLU) of Nevada supports A.B 298, not only for uniformity but also because police officers have certain due process rights that have a constitutional dimension since they are public employees. Police officers are entitled to be treated fairly, just like everyone else. This bill talks about internal investigations into possible misconduct that does not rise to the level of criminality. I am disappointed Mr. Kallas does not support the Citizen Review Board which is an agency helping to inspire public confidence in law enforcement. Assembly Bill 298 is a good bill and the right thing to do.

PHIL GERVASI (Police Officers' Association of the Clark County School District):
We support A.B. 298. When the investigation is completed and just cause is found, the suspension without pay can continue. We would not want any criminal activity included.

RAYMOND J. FLYNN (Las Vegas Metropolitan Police Department; Nevada Sheriffs' and Chiefs' Association):
Assembly Bill 298 mirrors Metro's policy which has been in place and has worked for us for years. We are in support of this bill as written.

LIZ SORENSON (Communications Workers of America District 9; Communications Workers of America Local 9413; National Coalition of Public Safety Officers):
We support A.B. 298.

SHAUN E. JILLIONS (City of Henderson):
We had concerns with A.B. 298. Its language does not make clear it concerns internal investigations only, and we worried about cross-jurisdictional investigations. If the intent is only internal investigation, we are fine with the bill since that is our policy.

CHAIR AMODEI:
What if you added "employing agency" before investigations?

SENATOR CARE:
That clarifies it to some degree.

MR. JILLIONS:
That was my suggestion to the proponents before the hearing.

MR. KALLAS:
I cannot see under any circumstances where an agency would be conducting an internal investigation of an employee of another agency. If they were, it would be because they were investigating a criminal allegation. The language contained in NRS 289.057 and NRS 289.090 differentiates between criminal and internal. Only the individual agency conducts an internal investigation of the employee.

CHAIR AMODEI:
I did not see "internal" anywhere. In section 1, subsection 1, it says investigation and in subsection 2, it says an investigation and in subsection 3, after conclusion of the investigation.

MR. KALLAS:
It is the pleasure of the Committee. According to NRS 289.057, the investigation of a peace officer may be conducted anytime there is a complaint or allegation of misconduct by a police officer by their own agency unless it is criminal. Another agency would not conduct the investigation.

JASON M. FRIERSON (Clark County):
Clark County is opposed to A.B. 298 in its amended form. Anytime an employer's hands are tied in dealing with workplace issues, there is a concern. Clark County has had cases involving instances, such as a hostile workplace environment allegation, that needed to be addressed. In most instances of an

allegation, there is not a leave without pay situation, but anytime an employer's hands are tied in trying to creatively deal with an internal investigation, there is a concern.

In Clark County, if the allegations are unfounded, there is an opportunity after the completion of an investigation for the officer to use the collective bargaining agreement to get back pay. If the investigation is proved founded and there is a termination or resignation, there is no opportunity for the employer to recoup those costs.

I understand concerns about the impact of loss of pay upon an individual, particularly when the allegations are deemed unfounded; however, that is addressed and after it is unfounded, they can recoup those monies through the collective bargaining agreement. It is Clark County's position that as an employer, they should look at the entire set of circumstances and deal with it creatively. In some instances, it might be appropriate for leave without pay right away and, in particular, those circumstances involving discrimination or a hostile work environment allegation.

SENATOR CARE:
Are you saying that depending upon the severity or repulsiveness of the allegation even before the investigation or its conclusion, a determination could be made there would be suspension without pay?

MR. FRIERSON:
Regardless of the amount of evidence and the number of facts, there still needs to be an investigation; if the facts on the front end are strong enough and if the employer is comfortable in immediate action, they would like to have that opportunity.

SENATOR CARE:
Do you want to retain a discretionary standard?

MR. FRIERSON:
That is correct, Senator. It is rarely the circumstance at the beginning where there is a suspension without pay within Clark County. Usually, there is an investigation and action is taken at the end, but Clark County would like to exercise that discretion depending upon the circumstances.

MR. PECK:
I urge you to seriously contemplate inserting the term "internal investigation." If you look at the constitutional dimension there is a balancing act folks have to do and until you prove the allegation, the employee is entitled to receive their pay while on administrative leave or suspension.

CHAIR AMODEI:
We will close the hearing on A.B. 298. We will open the hearing on A.B. 519.

ASSEMBLY BILL 519 (1st Reprint): Enacts provisions concerning the sealing of certain court documents. (BDR 1-1404)

ASSEMBLYMAN BERNIE ANDERSON (Assembly District No. 31):
Assembly Bill 519 is an issue about which I am deeply concerned. Today, I am before you to discuss the merits of this bill. Assembly Bill 519 addresses the issue of public safety and access of information. The measure does three essential things: It prohibits the district court from sealing a judicial public record unless certain circumstances exist, it requires the district court to hold a hearing before judicial public records may be sealed and the judicial public record must be unsealed once the reasons for its sealing no longer exist.

In sealing judicial public records, specific factors must exist: information about a public hazard will not be concealed; sealing the record is in the best public interest; serious danger to the public interest will result if the information is released; sealing is the only way to avoid any prejudice the information may create; sealing will protect the public interest from a perceived danger; and the sealing is reasonably necessary.

The judicial public records discussed do not include ones that are confidential for some other reason. The records that are confidential will remain confidential even if some of the other records in the case cannot be sealed. Although not a new issue, the practice of sealing court records was recently highlighted in a five-day series of news articles in the *Las Vegas Review-Journal* (Exhibit C). According to the *Review-Journal* investigation, at least 115 civil cases have been completely sealed in Clark County district court since 2000. The *Review-Journal* noted that many of the sealed lawsuits involve well-known, influential public people including doctors, real estate developers, politicians, casinos, executive lawyers and judges.

Sealing court records can hide threats to public safety. If the public was aware of particular dangers, lives could be saved. For example, lawsuits filed against Firestone Tire and Rubber Company about defective tires were sealed until a Houston television station discovered the trend.

Nevada is not the only state that recognizes this issue. The language in A.B. 519 is patterned after an Indiana law. Additionally, Florida and Washington State have similar statutes. Many believe the Nevada Supreme Court decision in former District Judge Jerry Carr Whitehead's discipline case fostered the idea that judges can seal entire case files without a public examination.

Assembly Bill 519 seeks to limit the amount of court records that are sealed. It also requires a legitimate purpose before a court record is sealed and requires the court to disclose that purpose to the public. We have amended the bill slightly to reinforce this, and section 1, subsection 1 prohibits the district court from sealing unless there is a preponderance of evidence in the case.

BILL BRADLEY (Nevada Trial Lawyers Association):
The Nevada Trial Lawyers Association supports A.B. 519. The condition of receiving documents or obtaining a settlement, particularly in product liability cases, is often conditioned on a confidentiality or secrecy agreement. Because of that, our client needs to resolve their case and we are coerced into making secret products that pose a substantial risk to the general public. This area has led to more accidents and tragedies because dangerous products are not allowed to be publicly mentioned as to their danger. Assemblyman Anderson's example of the Firestone Tire case is a good one as is the Ford Pinto case; numerous reproductive and women's contraceptives were for a long time kept secret.

This bill is a positive way to prevent the sealing of records that the public is entitled to know present risk; consequently, we are in full support of this bill.

CHAIR AMODEI:
One of our handouts (Exhibit D) is a news release from last month talking about the Nevada Supreme Court creating a Commission to Study Procedures for Preservation, Public Access and Sealing of Court Records. What do you think about it?

MR. BRADLEY:
The Eighth Judicial District has concerns over this bill. The Nevada Supreme Court feels they have addressed the concerns raised in the *Las Vegas Review-Journal*. I am aware of this Commission and happy to see this Commission appointed. In fact, my brother and partner are members; it is a good way to go about analyzing that, but this bill indicating an attentiveness by the Legislature is also important. They are meant to accomplish the same goal.

CHAIR AMODEI:
In the context of the courts doing something about court orders, are we doing the same thing and has anyone discussed the concept of separation of powers? Is this one of those situations where the courts will politely thank us for our recommendation, but it is under their purview?

MR. BRADLEY:
Whenever the Legislature tries to speak to the Judiciary Branch, there is that issue; but I often see it happen in our statutes and it seems to generally work. There is room for a statute that accomplishes the same goal. While there is a reason to seal certain records, that practice is currently being abused.

ASSEMBLYMAN ANDERSON:
I am a strong believer in the concept of separation of powers and recognize—even as the third president of the United States did—this as an inherent problem when the courts become involved in the legislative process. This is a legislative issue and, with all due respect to the courts, their press release was later than the introduction bill draft. It is not that they may have anticipated we were going to ignore the issue, because we have not, but they have been waiting around for a long time to address this issue and have not.

R. BEN GRAHAM (Clark County District Attorney; Nevada District Attorneys Association):
We have respect for the separation of powers issue; however, the Legislature from time to time gives the court guidance within their purview and this could be one of those situations.

My initial thoughts on the legislation dealt with district attorneys, criminal bars and court efforts to seal criminal records. Our office participates in sealing about 1,500 of those a year dealing from simple arrests all the way to felony

convictions. The provisions under NRS 179 would not be altered by this legislation and we would continue to service the needs of the community with our record-sealing process.

SENATOR CARE:
Is the allegation one of favoritism when sealing court records or the potential for the concealing of a public hazard? What are we trying to prevent being sealed? Is it the public hazard issue as opposed to all of those cases where there is allegation of favoritism?

ASSEMBLYMAN ANDERSON:
The question relative to hazardous materials is clearly a legislative issue. We are mindful of the questions of judicial prerogatives and separation of powers. With this legislation, we would be on safer ground. Courts can continue to seal records with a finding setting forth these particular declarations of confidentiality. In the process of the dissemination of information, the courts have to find each of those factors in order to seal the records and end this practice.

That may be the reason why the court, recognizing this problem and the criticism from the press, decided to do their own study. We encouraged them to go forward. We need to make a clear statement relative to hazardous materials.

SENATOR CARE:
It may be there is a products liability. Let us take another tire case. If a complaint gets filed and remains unsealed, it is a public document. It may well be you get an answer and now we are off to discovery. It may be there are a number of depositions taken that could be harmful to the manufacturer because they might demonstrate they knew the tires were unsafe. Unless somebody files a motion and attaches an excerpt of those depositions to the motion, the court is never going to see them. What records are you talking about that would not be sealed? Is it only the motions, with or without exhibits, and the pleadings?

MR. BRADLEY:
You are correct; typically, in the motion practice, those documents are becoming attached to the harmful documents. I have an example of a case involving an exploding coffee pot. The particular manufacturer of those coffee pots knew every one of them would fail within six months of their use life.

When they had hot coffee, they would typically explode when they were being poured over an unsuspecting patron. The first case was settled shortly before trial. The settlement conditioned upon sealing the entire record. In that particular record, there were motions to compel and motions to establish punitive damages that had important documents attached to them. Because of the sealing order, those records were not available. Unless depositions are attached to a document, they will not become part of the court record. Settlement agreements, return of all the evidence agreements and many settlement documents filed with the court would no longer be available under this sealing provision.

SENATOR CARE:
The way A.B. 519 is drafted, section 1, subsection 3 says "at the hearing, the district court shall allow the parties and members of the public." How is the public going to know or even suspect there are documents relating to a public hazard? How do you envision this working? Can anyone who has standing show up to the hearing?

MR. BRADLEY:
According to this bill, you are correct. In cases involving product liability, one, two or three reporters generally carry the courthouse watch. They will ask to be kept informed on the developments of a particular case. There are reports that aggressively watch some of the product liability cases and would have information. The reporter goes to an organization like the Nevada Press Association that generally wants to keep records open. They would go to the hearing and ask why the proponent for sealing the records is making the case why the records should be sealed. The press, consumer advocates, consumer attorneys and even clients may be unwilling to sign settlement agreements based on the condition the file be sealed.

SENATOR CARE:
Do you think a trade secret or intellectual property can pose a public hazard if it is used as the underlying formula for the defective product? The only time I have ever gotten anything under seal is when I dealt with a trade secret formula. If a formula gives rise to an unsafe product, then in filing a trade secret under seal, is the counsel going to be concerned it might be unsealed?

MR. BRADLEY:
No, because there is an exception for trade secrets. I fought a trade secret concerning the construction of the roof in a Japanese automobile manufacturer's vehicle. Even though there was an attempt to qualify that roof as a trade secret, the court said the roof can be looked at by anyone so it could not be called a trade secret. Lawyers may be unwilling to fight the issue of whether it truly is a trade secret, and many things have been allowed to be classified as trade secrets that actually were not. The true trade secret such as the secret recipe for Colonel Sanders' Kentucky Fried Chicken or Coca-Cola should remain protected under the trade secret law of Nevada.

SENATOR WASHINGTON:
Section 1, subsection 4 says, "any judicial public record that is sealed pursuant to this section must be unsealed at the earliest possible time after the circumstances necessitating the sealing no longer exist." Have the records already been sealed prior to the judicial review?

ASSEMBLYMAN ANDERSON:
It was anticipated there may be circumstances where the courts have sealed records based on a particular finding within their opportunity that no longer exists that would enable the press to learn what happened. The record will become unsealed unless the court moves to continue keeping it sealed.

SENATOR WASHINGTON:
This is after the hearing, so I guess that is in subsection 3, "At the hearing the district court shall allow the parties and members of the public to present evidence and submit written briefs."

BARRY SMITH (Nevada Press Association):
I have provided you with a written statement (Exhibit E) and a copy of a *Las Vegas Review-Journal* story so you have some background. I am in support of A.B. 519. It sets the default standard for the courts on open and sunset procedure for closing. It goes beyond product liability cases to all things, but it is consistent with our Open Meeting Law. It acknowledges there are reasons court case files should be closed, but there needs to be a record of why a case was closed.

The Seattle Times did a similar investigation to the *Review-Journal* and found there was a scam artist who was going from state to state, getting sued and

closing the case. There was no record or trail of what he was doing around the country because he was successful getting civil cases closed.

SENATOR CARE:
When parties settle a lawsuit, there is often a confidentiality provision and the terms of the settlement agreement are not to be disclosed. The settlement agreement is not even filed with the court. Litigators may be concerned that if the settlement agreement—even though not filed with the court—might have an effect on potential litigation. Does this bill go to the terms of the settlement agreement even if the settlement agreement has not been filed with the courts?

MR. SMITH:
No, I do not think so.

SENATOR CARE:
Are you more concerned about the hazard itself, disclosing and identifying the hazard?

MR. SMITH:
And also for having some record up front on a case as to why it needs to be sealed and there be cause showing the default setting is open, reason for closure and a record of that finding.

SENATOR AMODEI:
Since you are one of the members on the Nevada Supreme Court Commission, has the Commission had a meeting?

MR. SMITH:
The Commission will meet May 21 for the first time.

SENATOR AMODEI:
Do you have an indication on what the Commission will be doing and how long it will exist?

MR. SMITH:
I do not know.

MR. PECK:
I am here for another exercise in light lifting. The ACLU supports A.B. 519 as it serves a broader public interest in ensuring transparency. Courts are a part of our democratic system, and to the extent possible—there is not a compelling reason to operate otherwise—the activities of the courts ought to be sunshined so the public knows what the courts are up to when the courts are conducting their business.

With respect to the separation of powers issue, it raises no constitutional separation of powers issues. It may limit the discretion of the courts but not in a constitutionally impermissible manner. We have concerns about A.B. 519 where section 1 says that the records may be sealed anytime the court determines a preponderance of the evidence indicates sealing the judicial public record furthers a public interest. That language is so vague that it allows the court almost unfettered discretion to seal any record it thinks is in the public interest. I prefer tighter language that is more limiting with respect to the court's discretion. Also, the bill should include language making it clear that partial records can be sealed and not the entire judicial record when some section falls within one of the exceptions. Assembly Bill 519 is a step in the right direction. It seeks to democratize and sunshine the business of the courts.

KATHY A. HARDCASTLE (Chief District Judge, Department 4, Eighth Judicial District):
My position is not in total agreement with Assemblyman Anderson on this bill. Courts are a place for citizens to bring their private disputes to obtain orderly resolutions. Citizens should not be required by A.B. 519 to give up all rights of privacy in their own case. A person suffering from an embarrassing injury could find their pictures, which are not part of a confidential medical record, available to anyone or even posted on the Internet. A stalking or domestic violence victim who is injured in an accident and forced to seek redress in the courts could not prevent his or her stalker or abuser from having access to personal information in the file including addresses, workplace and personal habits. An undercover police officer who testifies at trial could not prevent the trial video from dissemination to other criminals on the street under this bill.

A complaint filed in a lawsuit is merely an allegation. No evidence is required to make that allegation; no probable cause exists to support that allegation. An allegation is not evidence of anything. Yet, a child may wrongly accuse a teacher of misconduct, the parents could sue that teacher, then the parents

upon determining that accusation was false could dismiss the case. Under A.B. 519, that case could not be sealed and the untrue allegation and accusation would always be out there in the public domain haunting that teacher's career for the rest of his or her life.

In the last five years, the courts in Las Vegas have handled over 110,000 cases and have only sealed approximately 115 cases. I would venture to guess that in all but maybe one or two of those cases, those cases were sealed pursuant to stipulation of the parties. However, there are thousands of cases where a document or pictures in a case have been ordered sealed. The interest of justice in individual cases is best served when judges have discretion to protect the parties and the process.

The need to seal a document or a court file when justice will be served and the question of when and to whom to allow access to sealed records are complex issues that should be addressed in a comprehensive manner. Chief Justice A. William Maupin is doing just that with the formulation of a Commission to study and develop court standards and rules to address these issues and protect the rights of our citizens. I ask this bill be set aside so the Commission will have time to do its work.

SENATOR CARE:
At what stage in the proceedings is the hearing about whether the records are going to be sealed? Will it be after the verdict, after dismissal, after settlement or perhaps during the proceedings themselves because an issue has arisen during the course of the proceedings and the parties request something be sealed? Does notice need to be sent? How would this work?

CHIEF DISTRICT JUDGE HARDCASTLE:
I have the same concerns about the timing of the public hearing, plus why are strangers invited into the litigation? We are always concerned about the cost of litigation to the parties, especially those who may have limited means, what type of notice needs to be given and what is the effect of public notice. If we rule to seal the case, do strangers to the litigation have a right of appeal? It is not clear as to the timing and notice of the hearing; it would be extremely hard to deal with this type of provision.

SENATOR CARE:
The implication is the public has a right to know of a public hazard. I want to know how you envision the hearing being conducted.

CHIEF DISTRICT JUDGE HARDCASTLE:
This bill is not limited to just cases involving public hazards.

SENATOR NOLAN:
Did you have an opportunity to review the bill in its entirety and bring these objections up in the Assembly in its hearing on this bill?

CHIEF DISTRICT JUDGE HARDCASTLE:
I was aware of the bill and met with Assemblyman Anderson the day before the hearing, but at that time, I was not authorized to take a position on the bill.

SENATOR WASHINGTON:
Are you saying the association opposes the bill or are they neutral?

CHIEF DISTRICT JUDGE HARDCASTLE:
I am here on behalf of the Eighth Judicial District Courts in opposition to the bill and I am also here on behalf of the Second Judicial District Courts to express their concerns about the bill.

SENATOR WASHINGTON:
They just have concerns or are they in opposition?

CHIEF DISTRICT JUDGE HARDCASTLE:
They have not taken an official position in opposition, but we have discussed it.

RON TITUS (Court Administrator and Director of the Administrative Office of the Courts, Office of Court Administrator, Nevada Supreme Court):
I am here to provide you with some information on what action the Court is taking to address the issue of sealing court records. The Nevada Supreme Court has created a Commission by court order.

SENATOR AMODEI:
We are familiar with the existence of the Commission and the related press release. Can you tell us what they are doing, when they plan to do it and if you have any thoughts on the ACLU's opinion?

MR. TITUS:
The first meeting of the Commission is May 21, and they hope to have a report within 90 days. All meetings will be open to the public. Because the Commission is made up of judges, attorneys and media representatives, they are in the best position to address these issues from all perspectives of the public, the litigants and the courts. Since the bill may raise issues concerning the separation of powers between the Legislative Branch and the Judicial Branch and potential conflict between legislation and rules of court, the Nevada Supreme Court is not taking a position on this bill.

CHAIR AMODEI:
That is all good, except for the part you said they were in a better position to deal with this than the Legislature.

MR. TITUS:
The Commission is chaired by District Judge Brent T. Adams in the Second Judicial District, and Justice James W. Hardesty is the Nevada Supreme Court liaison. I would expect some rules of court coming out of this within three months and the Court taking relatively quick action on it after that.

JOAN NEUFFER (Administrative Office of the Courts, Nevada Supreme Court):
With all due respect, whether this bill or legislation impacts the separation of powers doctrine would be a question for our Nevada Supreme Court to determine. The Commission would give the Judicial Branch the opportunity to exercise their power and take the lead in establishing the rules allowing courts to make decisions on a case-by-case basis. They would establish procedures and policies and be responsible for enforcement once the court has a court ruling. Although we are remaining neutral, I wanted to point out the benefits of having the Commission take action.

CHAIR AMODEI:
We will close the hearing on A.B. 519. We will open the hearing on A.B. 421.

ASSEMBLY BILL 421 (1st Reprint): Establishes the crime of participating in an organized retail theft ring. (BDR 15-1292)

ASSEMBLYWOMAN VALERIE E. WEBER (Assembly District No. 5):
I am here to present A.B. 421 which establishes the crime of participating in an organized retail theft ring. This is a fascinating area of criminal activity which

you will hear by those who are testifying here today. These are professional theft rings. This is not ordinary shoplifting that we are addressing in this bill. They are individuals who are recruited, trained, supervised and paid by a criminal fence and move quickly from community to community and across state lines to steal large amounts of merchandise that is then repackaged and sold back into the marketplace. It is relatively easy for these thieves to make great profit without much risk because they steal merchandise from crowded, understaffed stores. Most of the stolen merchandise seems to be high-priced, widely used products routinely sold in chain stores, such as over-the-counter medicines, razors, film, music and movie disks, baby formula, diapers and anything easily sold in the secondary market. Other schemes involve creating high-quality fake receipts in order to return stolen goods for cash.

This crime affects all of us in several ways: the health and safety of consumers because of unsafe storage and handling of some of these products in the secondary market; putting the employees of targeted retail establishments including grocery stores, drug stores and mass merchandisers at risk because sometimes violence is a common feature; the fiscal impact as far as the loss to consumers by the raising of prices and the loss of tax revenue. The estimated loss to Nevada is $16 million annually and on a national basis, it is estimated to be between a $30 billion and $36 billion loss each year. The law enforcement community is also affected. It is considered a more profitable crime than burglary with much less penalties. Due to the sophistication of these theft rings, they can keep their thefts below the felony threshold and only be charged with a misdemeanor. Seven states have passed organized retail theft crime legislation to date.

JONATHAN O. MAYES (State and Local Government Relations, Safeway Incorporated):
We strongly support A.B. 421 which has been passed in seven states with similar legislation pending in Texas, California, Hawaii, Illinois, Delaware, Alaska, Arizona, Washington and other places. Organized theft rings are an emerging problem that needs solutions, and this bill seeks to address some of the problems.

CELIA KETTLE (Loss Prevention Manager, Safeway Incorporated):
I am here to testify in support of A.B. 421 and present written background information (Exhibit F). I would like to illustrate what retailers are doing to fight organized retail crime. We are locking up much of our high-theft merchandise

and educating our employees and management. We are getting into the community and educating law enforcement and district attorneys. We are getting involved in legislative issues. We are developing organized retail crime units within our company to investigate these crimes. We plan to investigate all incidences of organized retail crime. We set up surveillances, and we work towards getting boosters in custody and identifying to whom they sell the merchandise.

What we need to help us in this fight is a law to educate police officers on organized retail crime that we can easily reference when a responding officer comes to help us when we have a booster in custody.

CHAIR AMODEI:
You are speaking from the perspective of a grocer/retailer, what are you locking up?

MS. KETTLE:
We are locking up anything from toothpaste, baby formula, razor blades and over-the-counter medications. There are hundreds of items and as we lock one item up, they just move on to another item or break into the locked cases.

SHANNON HUMPHREY (Organized Retail Crime Division, Walgreen Company):
I am an organized retail crime investigation supervisor covering 14 states including Nevada. Today, I will explain and provide an example of an organized retail crime case as well as provide insight into the scope of the problem and safety issues as well as the impact on Nevada's economy. I have written testimony (Exhibit G).

Walgreens had a case in Lexington, Kentucky, where over-the-counter merchandise and health and beauty items were stolen and then fenced to a couple in Nashville, Tennessee. That couple purchased from the boosters and then the merchandise was sold to a repack warehouse in New York. The product was cleaned of all markings, removing all traces of the markings from the original owners. Once the product was cleaned—what we call laundered—it was sold to a legitimate wholesaler. These types of investigations and prosecutions are possible in Nevada with the enactment of A.B. 421 providing a tool needed to arrest and prosecute these criminals.

As America's largest retail pharmacy, we understand the importance of product integrity. For example, formula has strict temperature controls which failing to control may result in the spoilage of infant formula; however, it is not going to kill a child, it will deplete the nutritional value of the baby formula. In many cases, stolen over-the-counter products and infant formula are exposed to extreme temperatures that would affect the product integrity. We have witnessed this on several cases.

I will address the economic impact of organized theft rings. In the last 12 months ending in March, the Nevada Walgreens Company reported self-serve sales, excluding pharmacy sales, at $223.5 million. With the Federal Bureau of Investigation shrink rate at an estimated 4 percent, if you calculate that by Clark County's sales tax rate at 7.75 percent, Nevada citizens were robbed of approximately $690,000 in lost tax sales revenue from just Walgreens in Clark County alone. If you add in the thousands of businesses in Nevada, you can see the economic impact. This is not only loss related to sales tax, it is also considered losses associated with jobs not available because of lost sales, state programs that went underfunded due to lost tax revenue or individuals who were injured or made ill by receiving relabeled, expired over-the-counter product or infant formula.

In conclusion, I want to emphasize that the organized retail crime legislation will not—and is not intended to—shut down legitimate vendors but rather only venders selling stolen merchandise and products that pose a threat to consumers. Consumers and taxpayers will benefit greatly from A.B. 421 as more and more states pass organized retail crime legislation. We do not want Nevada to be a dumping ground for stolen products or dangerous products. I would hate to see that happen, and I hope you share that opinion.

SENATOR CARE:
The definition of an organized retail theft ring means three or more persons. When I read the bill, I was reminded of a conspiracy law which is two or more; this is three or more. Do you know why it says three or more? Is that what is done in other jurisdictions?

MR. MAYES:
At least one or two incidents were families with the parent and a child involved in organized retail crime, and we have tried to amend the language to address

those types of concerns. More typically, in organized retail theft rings, there is an upper-level fence and people who are working for that fence.

SENATOR CARE:
What if you have five people, but they do not all know each other. Is that a possible conspiracy? In other words, you have got A, B and C operating over here; B, C and D over there; and C, D and E elsewhere. It may sound a little esoteric, but believe me, I can see what could happen with that language with just three or more.

MR. MAYES:
The language as written in the bill talks about individuals who associate for the purpose of engaging in this conduct. Even though the upper-level fence may not personally know the boosters—as they call those who are stealing the product, they are still part of the conspiracy to remove product from stores.

SENATOR CARE:
A participant could be in on planning and not require an affirmative act such as driving a vehicle, entering the store or helping to sell the merchandise later. Just participating in the organization would be all it would take?

SAMUEL P. MCMULLEN (Retail Association of Nevada):
I was involved in crafting the language in A.B. 421. The reason for three people instead of two was that normally, shoplifting can involve one person and sometimes two, a lookout and another person who steals. We were differentiating this from, and elevate it above, a normal shoplifting type of offense covered under NRS 205. We were trying to create one overarching statute criminalizing the enterprise of committing a series of thefts against more than one merchant. The heart of this statute is to enhance the penalties with an opportunity to give law enforcement the chance to investigate the whole enterprise.

SENATOR CARE:
How did you determine the 90-day period, the range between $2,500 and $10,000 and the amount involved in a single theft shall be deemed the highest value by any reasonable standard? Is that retail or wholesale?

MR. MCMULLIN:
There was concern in the other House about the level of penalty at Category B and its impact on imprisonment. Statutes in other states have led to a collective period of 180 days for purposes of aggregating the series of thefts. They thought that might be a little bit long, so we moved it down to 90 days. They tried to make the minimum tag between $250 and $2,500. This is supposed to be an aggregate, an enhanced series of crimes, not just a single shoplifting. Additionally, they reduced the time to one year. A shoplifting of $250 is a Category C; to enhance the penalty, we had to move it up to a Category B to conform with our interest in having this bill. The stiffer the penalties and the more we can hook people, the greater effect we will have in getting these criminal enterprises shut down.

CHAIR AMODEI:
We will continue the testimony on A.B. 421. This meeting is adjourned at 11:09 a.m.

RESPECTFULLY SUBMITTED:

_____
Lora Nay,
Committee Secretary

APPROVED BY:

_____
Senator Mark E. Amodei, Chair

DATE: _____