MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fourth Session
February 14, 2007

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 8:30 a.m. on Wednesday, February 14, 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 Mike McGinness
Senator Dennis Nolan
Senator Valerie Wiener
Senator Terry Care
Senator Steven A. Horsford

COMMITTEE MEMBERS ABSENT:

Senator Maurice E. Washington, Vice Chair (Excused)

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Brad Wilkinson, Chief Deputy Legislative Counsel
Barbara Moss, Committee Secretary

OTHERS PRESENT:

Frank W. Daykin, National Conference of Commissioners on Uniform State Laws
William R. Uffelman, President and CEO, Nevada Bankers Association
Kristin L. Erickson, Nevada District Attorneys Association
Gary Woodbury, District Attorney, Elko County
Howard Brooks, Nevada Attorneys for Criminal Justice
Lee B. Rowland, American Civil Liberties Union of Nevada
R. Ben Graham, Nevada District Attorneys Association

Bruce W. Nelson, Office of the District Attorney, Clark County
Brett Kandt, Executive Director, Advisory Council for Prosecuting Attorneys
Jason M. Frierson, Clark County
Robin L. Keith, President, Nevada Rural Hospital Partners Foundation
Robert Roshak, Sergeant, Las Vegas Metropolitan Police Department
Cotter C. Conway, Washoe County Public Defender

CHAIR AMODEI:
The hearing is opened on Senate Bill (S.B.) 44.

SENATE BILL 44: Enacts the Uniform Disclaimer of Property Interests Act. (BDR 10-754)

SENATOR TERRY CARE (Clark County Senatorial District No. 7):
The National Conference of Commissioners on Uniform State Laws (NCCUSL) consists of 250 to 300 members from every state, the Virgin Islands and Washington, District of Columbia. The organization meets once a year for eight days and promulgates uniform acts. Its mission is to go to various state capitals following legislative sessions and get uniform acts adopted. The idea is uniformity of commerce. The best example is the uniform commercial code. The intent is to have the same rules in all jurisdictions in commerce and other such matters.

The NCCUSL has been around for approximately 116 years. Present is Frank Daykin, former head of the Legislative Counsel Bureau, a uniform law commissioner for many years.

Two bills will be presented. The first is S.B. 44, the Uniform Disclaimer of Property Interests Act adopted by 14 states and approved by the American Bar Association. I submitted a packet of information regarding the Act (Exhibit C, original is on file in the Research Library). I am unaware of any controversy surrounding it. Nevada disclaimer statutes have existed since 1979 in *Nevada Revised Statute* (NRS) 120.010. The statute is not extensive with any case law annotations. This Act will bring Nevada up to date, particularly in provisions dealing with electronic filing as seen in uniform acts revised or recently enacted. We are here to enact in greater detail a concept on the books in Nevada since 1979.

Disclaimers may be used by heirs and beneficiaries of trusts and insurance policies. I will address the definition of disclaimer. A man creates a trust; his wife will receive all income from the trust until her death. Upon her death, everything passes to the remainder beneficiaries, which include a single son and two grandchildren. For purposes of estate planning, if the son does not want the inheritance, he disclaims it as though he never had any interest. In that event, it passes to the remainder beneficiaries, the two grandchildren.

The father may be a judgment debtor and afraid if any portion of the trust comes to him, it would be attached by judgment creditors. He does not want that to occur because he wants his son to enjoy the benefits; therefore, he steps away and indicates he wants nothing to do with it. That definition of a disclaimer is contemplated in the Act.

The Act clarifies authority for disclaimants to make disclaimers. It clarifies what interest may be disclaimed, when the disclaimers become effective and the effect on distribution of disclaimed property interest. It is not limited to inheritance; it can include a person's entitlement as a beneficiary under a trust or an insurance policy. The Act includes a provision not existing in Nevada law, wherein a person may disclaim powers of appointment. I am not referring to a power of attorney giving general or limited powers. In the general sense, powers of appointment are powers granted to handle the property of another person.

SENATOR CARE:
The Act clarifies powers of appointment become effective when the grantor may no longer revoke that interest, and almost always occurs at time of death. Obviously, when a person dies he cannot revoke an interest he agreed to pass on to another person. This Act allows no time limit for disclaiming an interest, although there is a provision for waiver and partial disclaimers. In example: If there is $100 and a person only wants half, he can disclaim it. A provision says fractions must be used and clarifies disclaimers are subject to limitations or bars that might exist in other law.

Sections 2 through 11 of S.B. 44 contain definitions. The ones to take note of are: disclaimant, disclaimed interest and disclaimer. The disclaimant is the person disclaiming a disclaimed interest, which is his disclaimer. Section 12 allows an interest in property to be disclaimed, which could be cash

or real property. Section 13 makes clear this is not an exclusive matter a person may disclaim, but a disclaimer under this Act may be restricted by other law.

Section 14 is the essence of the Act because it allows disclaimers in whole or in part to disclaim even if the instrument—the trust—says the person is not allowed to disclaim. It includes spendthrift, in which the beneficiary does not have powers of alienation, cannot move assets around or invade the principal. Powers of appointment and fiduciaries are also included, making it clear a person cannot alter the parameters of his fiduciary duty. It must be in writing or other record, including electronic which is new to Nevada.

Section 15 of S.B. 44 consists of rules for disclaimers, which take effect at the time creating an irrevocable instrument. Section 16 allows for disclaimers wherein a holder of joint property, right of survivorship or a person does not want all or part of his or her entitlement upon death of the joint holder. Section 17 allows trustees to disclaim. Section 18 allows appointees to disclaim, regarding powers of appointment mentioned earlier. Section 19 clarifies when powers of appointment may be disclaimed. Section 20 indicates when a disclaimer by a fiduciary becomes effective. A fiduciary might want to disclaim the power because he is also a beneficiary and wants to invade the principal.

Section 21 of S.B. 44 discusses delivery or filing of disclaimer, a provision in which a person files with the court if there is no one to receive a properly delivered disclaimer. Section 22 discusses when a disclaimer might be barred or limited. Section 23 indicates a disclaimer is valid if valid under federal statutes concerning federal gift and estate tax. Section 24 deals with the recording currently not required in Nevada, but allows a document recording where permissible. Section 25 indicates the Act becomes effective October 1; the language clarifies the effective date of the Act would not revive any bar disclaimers prior to October 1.

SENATOR WIENER:
Other than addition of the electronic component, do any other aspects impact Nevada law?

SENATOR CARE:
Section 26 of S.B. 44 says, "This chapter modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce ...," found in other uniform acts and elsewhere on the books.

SENATOR WIENER:
Is the disclaimer of powers of appointment the only new impact on current Nevada law?

SENATOR CARE:
That provision is not contained in any other uniform act. Uniform acts in the late 1970s dealt with probate and the like, but these were never adopted. Disclaimer of the powers of appointment was never discussed at that time. When the National Conference created this uniform act, a disclaimer of the powers of appointment was added. The disclaimer is new to Nevada as well as to any uniform act.

SENATOR WIENER:
How would the Act affect people who are already beneficiaries of a trust?

SENATOR CARE:
If a person wanted to make a disclaimer on an existing instrument such as a trust, the Act could be used unless the disclaimer had already been waived or barred. Passage of this Act would not revive it.

FRANK W. DAYKIN (National Conference of Commissioners on Uniform State Laws):
I have nothing to add because Senator Care covered it very well.

SENATOR HORSFORD MOVED TO DO PASS S.B. 44.

SENATOR McGINNESS SECONDED THE MOTION.

SENATOR WIENER:
I am the beneficiary of a trust. Having talked to counsel, we do not see any way I would be affected any differently. For the Committee vote, I will be prepared to vote. If we find a problem, I will address that on the floor vote.

THE MOTION CARRIED. (SENATORS NOLAN AND WASHINGTON WERE ABSENT FOR THE VOTE.)

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CHAIR AMODEI:
The hearing is opened on S.B. 46.

SENATE BILL 46: Enacts the Uniform Custodial Trust Act. (BDR 13-753)

SENATOR TERRY CARE (Clark County Senatorial District No. 7):
I submitted a packet of information on the Uniform Custodial Trust Act (Exhibit D, original is on file in the Research Library). I defer to Mr. Daykin to explain the act.

MR. DAYKIN:
The Uniform Custodial Trust Act is designed to cover transfer of property to another person; it permits a person who owns property to transfer it to another as trustee for the benefit of the person who makes the transfer. Under ordinary trust law, that may be done. The Act provides a statutory mechanism for people to make the transfer in Nevada without complication. It is sometimes used in other states to make the beneficiary of a trust eligible for a welfare program or federal enactment for which he would otherwise be ineligible. It gets rid of property as far as legal title is concerned; however, the custodial trustee would step in if he were in want and apply his own property to his own benefit.

WILLIAM R. UFFELMAN (President and CEO, Nevada Bankers Association):
The Uniform Custodial Trust Act is a 1997 uniform law adopted by one other state. It is my understanding this law would run parallel to existing Nevada trust law. There is operational concern regarding the do-it-yourself aspect without benefit of counsel.

SENATOR McGINNESS MOVED TO DO PASS S.B. 46.

SENATOR HORSFORD SECONDED THE MOTION.

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

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CHAIR AMODEI:
The hearing is opened on S.B. 37.

SENATE BILL 37: Makes various changes to provisions governing the testimony and evidence of a witness who is granted immunity in a criminal proceeding. (BDR 14-278)

KRISTIN L. ERICKSON (Nevada District Attorneys Association):
I am here with Mr. Gary Woodbury, District Attorney of Elko County for the past 12 years. He will explain S.B. 37 and inform the Committee why and how difficult decisions are made.

GARY WOODBURY (District Attorney, Elko County):
Senate Bill 37 deals with immunity for persons whose testimony the prosecution wants to compel. The Fifth Amendment in the *Constitution of the United States of America* provides that a person is not obliged to incriminate himself. The United States (U.S.) Supreme Court in *Kastigar v. United States*, 406 U.S. 441 (1972), changed from its original position in order to compel testimony needed to provide what is called use or derivative use immunity. Use or derivative use immunity means a person can be compelled to testify, but the prosecutorial authorities may never use the testimony or the fruits of that testimony. If they are going to charge the person who testified with the crime the immunity covered, they must show an independent source for finding the evidence.

Nevada Revised Statute 178.572 was enacted by the Legislature in 1967 when the U.S. Supreme Court had a different attitude regarding how much immunity a person must be given to compel testimony and comply with the Fifth Amendment. The statute says any offense shown by this testimony can never be prosecuted and the person must be granted transactional immunity. This creates a dilemma for those who must make the decision whether to allow the person's testimony. We never know what will come up in cross-examination. Prosecutorial authority may ask a narrow series of questions, but lower courts are loath to limit cross-examination by a criminal defendant's

attorney. At times, cross-examination may exceed the scope of direct examination, although it is not allowed under Nevada rules.

Transactional immunity may be granted for something unknown. An independent source of testimony, along with forensic science, makes it possible to convict a person granted transactional immunity. The situation typically arises in preliminary hearings from the first appearance of a defendant. A person is arrested and 15 days later a preliminary hearing is held without all facts. In addition, there may be a witness who is a predicate to the conviction of the defendant. The reason he is granted immunity is unknown, but his testimony is needed.

The federal government enacted statutes granting use and fruit immunity, or use and derivative use immunity conforming to what the U.S. Supreme Court held in 1972. Use and fruit immunity means that when the court enters an order granting immunity in exchange for testimony, the person may not refuse to testify on the basis of his Fifth Amendment privilege against self-incrimination; his testimony and any information directly or indirectly derived from that testimony may not be used against him in any criminal case, except prosecution for perjury or failure to comply with the court's order. The "use" part of the phrase means direct testimony may not be used against him in a criminal case. The "fruit" part of the phrase means information directly or indirectly derived from his direct testimony may not be used against him.

A majority of states have enacted the use and fruit immunity statute. Oregon and Alaska enacted transactional immunity statutes and disallowed testimony to be compelled on a use and fruit immunity due to peculiarities in their own constitutions. Arizona, California, Colorado, Idaho and Utah enacted the statute allowing use and fruit or use and derivative use immunity. It is not, by any means, a unanimous point of view among the states.

MR. WOODBURY:
Nevada's proposed change differs from federal rules. Under federal rules, if it can be shown by a preponderance of the evidence that evidence was gained in order to prosecute a defendant for whom there is an independent source, it would be sufficient. In this event, S.B. 37 requires clear and convincing evidence this has been done. It is difficult to define the differences between

"clear and convincing" and preponderance. The District Attorneys Association adopted this higher standard for the protection of potential criminal defendants.

Under NRS 199.090, use and fruit or derivative use immunity is provided in cases of bribery and corruption, which means the general immunity statute provides for transactional immunity. The statute in this case allows use and fruit immunity to compel testimony under that circumstance. The Nevada Supreme Court in *Lucky v. State*, 105 Nev. 807 (1989), interpreted that statute to use the use and fruit immunity. Although the statute addresses use immunity, it is not sufficient; it must be use and fruit. The Nevada Supreme Court decided the use and fruit immunity to compel testimony in Nevada is not contrary to the *Constitution of the State of Nevada*.

Those involved in homicide or other high-stake cases realize truth is hard to acquire. There are 15-day preliminary examinations in Elko County. Forensic evidence and autopsies are submitted to the Washoe County crime laboratory and reports cannot be returned within 15 days; consequently, laboratory results are not available for preliminary examination. We are limited to witnesses, eyewitnesses or circumstantial witnesses.

Tomorrow, I have a bail hearing on a lady charged with first-degree homicide in Elko. The case is three years old and circumstantial with no forensic evidence. The lady has a boyfriend and a husband. I have access to a telephone conversation in which the lady said, "My boyfriend has it all put together. He knows what happened and I do not know what he knows." At the bail hearing I must decide whether to grant the boyfriend transactional immunity under the statute. He is cagey. Sometimes we are able to work around the question of transactional immunity. In all probability, when he is asked on the witness stand, "According to the defendant, you have it all figured out. What is it you know?" I expect his response to be, "I refuse to answer on the grounds it might tend to incriminate me." If I grant him transactional immunity and his next words are, "I hit Mr. X in the back of the head four times, transported him to Salt Lake City and dumped him into the Jordan River," nothing can be done; he will walk and it will be over. That is an unreasonable outcome.

The use and fruit immunity requested in S.B. 37 is in accord with the U.S. Constitution and the Nevada Supreme Court. In effect, use and fruit immunity is accepted under the Nevada Constitution. Transactional immunity originally part of Nevada law has long since passed. There is no reason the use

and fruit immunity would not provide adequate protection. I urge you to pass S.B. 37.

CHAIR AMODEI:
If the proposed change was on the books, how would it impact the situation you face tomorrow?

MR. WOODBURY:
If the boyfriend will not testify based on the Fifth Amendment, I will ask the court to grant him use and fruit immunity and require his testimony. If independent evidence can be obtained against him, at some point he can be prosecuted. He cannot be granted transactional immunity because there is no evidence he committed a crime; there is also no evidence he did not.

CHAIR AMODEI:
Is it possible to give forensic evidence before a preliminary hearing in 15 days even if you do not have a laboratory report? How important is the deoxyribonucleic acid (DNA) aspect?

MS. ERICKSON:
It is extremely difficult because DNA testing takes several weeks, and it is rare to receive forensic evidence by the preliminary hearing date.

SENATOR MCGINNESS:
Should S.B. 37 pass, could your cagey defendant decide not to testify and take his Fifth Amendment rights? Could he be forced to testify?

MR. WOODBURY:
Yes, if I grant him transactional immunity under the present statute.

SENATOR MCGINNESS:
Does he have to testify if he is not granted transactional immunity?

MR. WOODBURY:
No.

SENATOR CARE:
Twice, the language in S.B. 37 says, "pursuant to the order." What is the scope of the order, and how does it work in a criminal context?

MR. WOODBURY:
In most cases, we do not know if the person is going to invoke his Fifth Amendment rights; we ask the court to grant him immunity for testimony he is obliged to give. How broad is the scope? We try to make it as narrow as possible.

SENATOR CARE:
Let us suppose the person is a co-conspirator in the murder of Mr. X. At trial, he is asked how did you meet co-conspirator defendant Mr. Y. In response, he says he met him when they conspired to kill Mr. Z. There is now another crime that heretofore was not evident. What do you do about this new crime?

MR. WOODBURY:
The Nevada Supreme Court has not addressed scope. The current statute is broad and says facts may be given transactional immunity with regard to offenses shown by testimony; therefore, if Mr. X says he conspired, nothing can be done. I surmise the Nevada Supreme Court would say even though the testimony was not expected and marginally or collaterally relevant to what he was asked, he would have been granted transactional immunity.

SENATOR CARE:
Under existing law, it is conceivable the state might grant immunity for an unrealized crime. Senate Bill 37 does not guarantee this would not happen, but it decreases the likelihood.

MR. WOODBURY:
If the legislation passes with use and fruit immunity, the rules governing what directly drives that testimony are complex. It does not change the outcome; it only provides a chance to prosecute some time in the future. For example, a person provides compelled testimony in a crime of rape. Through DNA analysis, the man's semen is discovered in the vagina of the victim. This would be independent evidence that could theoretically convict the rapist.

SENATOR CARE:
Section 2, subsection 2 of S.B. 37 also says, "Evidence that is discovered as a result of, or otherwise derived from, testimony or evidence compelled by an order issued pursuant to NRS 178.572 is not admissible in a proceeding against the witness ... ." Would a crime in which there is a cause of action for wrongful death on the civil side preclude testimony in a civil action?

MR. WOODBURY:
Yes.

CHAIR AMODEI:
Could transactional immunity be achieved by including every direct and indirect thing in cross-examination testimony?

MR. WOODBURY:
Yes it could; if the culprit was that smart, he probably would not be caught. I do not support that theory because it suggests a situation that does not often occur.

CHAIR AMODEI:
In my understanding, the person brought the focus upon himself through compelled testimony, but there was already some focus in most instances. If the person refuses to testify after being granted immunity, what is the sanction? Is he jailed until ready to testify?

MR. WOODBURY:
It would be contempt of court.

CHAIR AMODEI:
I suppose that would bring attention to the person's potential activities in an investigative sense.

SENATOR NOLAN:
Should counsel advise a defendant to take immunity, but inform him additional evidence from an independent source could be used against him, does that defeat the purpose of this bill? It seems a defendant would not accept immunity knowing evidence may later work against him.

MR. WOODBURY:
The immunity question arises when a person has not been charged, but his testimony is needed. In general, he would not consult counsel if he has not been charged. A grant of immunity is mandatory; if counsel gets the court to grant him use and fruit, derivative use or transactional immunity, he must testify.

CHAIR AMODEI:
Is this immunity almost always offered in a multiple-suspect situation?

MR. WOODBURY:
Yes.

HOWARD BROOKS (Nevada Attorneys for Criminal Justice):
I have been an attorney for 20 years, worked on more than 2,000 criminal cases and litigated in excess of 100 murder cases. There are two types of immunity: transaction and use. Both are legal, both are real, neither is illegal. For 40 years, Nevada has had transaction immunity.

Mr. Woodbury cited a 1972 case which says use immunity is all right. In my 20 years as a lawyer, I have never heard a prosecutor complain about the transaction immunity statute. In my 100 murder cases, I have never seen a prosecutor use immunity statutes to grant immunity. Prosecutors generally do not use these statutes to give immunity and will do everything possible not to use them. The circumstances described by Mr. Woodbury regarding a preliminary hearing will never happen in a courtroom. A prosecutor will never give a witness on the stand transaction immunity. It will not happen. If the prosecutor does not know enough about his case, the witness will not be on the stand, particularly at a preliminary hearing.

There is arguable need to have some use immunity, even though prosecutors will not use it, just as they do not use transaction immunity. If the statute is to be changed, let the bill allow prosecutors both types of immunity as bargaining tokens. There is a problem with going to a more restrictive type of immunity. A witness faced with coercion into an immunity situation will be more resistant to use, rather than transaction immunity. The prosecutor should have the flexibility to offer both types of immunity.

Senate Bill 37 is a poorly drafted bill that does not follow federal law. Anyone challenging an immunity grant would have more to work with in this statute than following the language of a federal statute. I am surprised S.B. 37 was proposed. This situation is not a problem, and prosecutors are not concerned. I would be surprised if there were more than one or two cases, or none at all, in Nevada within the last two years in which prosecutors granted transaction immunity pursuant to statute.

LEE B. ROWLAND (American Civil Liberties Union of Nevada):
I echo Mr. Brooks' comments. In speaking with Clark County lawyers, the immunity statute is never used. Prosecutors have more authority to work out

independent deals with witnesses. The American Civil Liberties Union (ACLU) is concerned any time the Fifth Amendment is weakened, which would happen if transaction immunity is mandatory.

Prosecutors have the bargaining chip to use both. The system is working with no indication it is broken. This legislation would compel defendants to testify when there is no evidence against them and use immunity makes it easy to get around the testimony. If use immunity is deemed legal by the Nevada Supreme Court, there are concerns that making it mandatory weakens the Fifth Amendment in a situation with no crisis. There is no need to reduce constitutional protections when the system is working.

CHAIR AMODEI:
It is my understanding current law in Nevada is transactional immunity. Availability of both use and transactional immunity would be a major negotiation point to force testimony, which would have to be ruled upon by a judge. Is my assumption correct?

MR. BROOKS:
It is an interesting question; I submit it will never be used.

CHAIR AMODEI:
Although your experience is extensive in Clark County, we must also consider the other counties as well as testimony of the Elko district attorney.

Would a judge rule in that situation?

MR. BROOKS:
The defense attorney and prosecutor would negotiate. The prosecutor would have flexibility to offer either use or transaction immunity. Realistically, a prosecutor has some idea what a witness knows and will negotiate and offer use immunity. If the prosecutor knows what the witness has done, transaction immunity may be offered. A judge will not order immunity unless the prosecutor agrees. If the prosecutor has flexibility, he can offer either one. If the prosecutor does not know what the witness knows, he will not put him on the stand. However, it might be attempted with a grand jury.

CHAIR AMODEI:
In granting use or transaction immunity, would a witness's experience be laid out from the day he was born until a week after the hearing?

MR. BROOKS:
I do not know the answer to that question.

MR. WOODBURY:
The issue of transactional immunity, as addressed by Mr. Brooks, does not come up because no prosecutor wants to give it. As the statute exists, if the prosecutor does not ask for immunity, the court has no power to grant it. Senate Bill 37 would not change that, and it would not matter whether it is transactional or use immunity.

SENATOR WIENER:
Ms. Erickson, what is your opinion of this discussion with regard to Washoe County?

MS. ERICKSON:
The issue has come up in Washoe County and across the state, which is the reason the statewide Nevada District Attorneys Association supports S.B. 37. Transactional immunity is rarely used because it is risky for a prosecutor to offer it to a defendant. The issue has been at the top of Washoe County's list for some time.

SENATOR WIENER:
Please comment on use immunity.

MS. ERICKSON:
Use derivative immunity specifies that whatever the witness says cannot be used against him, which protects his Fifth Amendment right. Any evidence brought by the state must be completely independent of a witness's testimony. The state cannot use a lead from testimony; it must be completely independent. If there is any question, the state has the burden of proof to show by clear and convincing evidence the information was not received from a statement of the witness.

SENATOR WIENER:
Would you comment on the Chair's hypothetical comment regarding the witness declaring every fact from birth until a week after the hearing?

MS. ERICKSON:
I agree with the Chair's assessment that use immunity opens the door to grant the witness immunity for everything he has done. It has not been decided by the Nevada Supreme Court, but the language as indicated by Mr. Woodbury says "any," which would be difficult to overcome.

CHAIR AMODEI:
I request Mr. Wilkinson to confer with Mr. Brooks, Ms. Erickson and Mr. Woodbury to compare S.B. 37 with federal statute and return with a recommended amendment, after which the bill will be noticed on the Committee's first work session.

The hearing is closed on S.B. 37 and opened on S.B. 35.

SENATE BILL 35: Revises certain provisions relating to the admissibility of certain affidavits and declarations in certain proceedings. (BDR 4-507)

R. BEN GRAHAM (Nevada District Attorneys Association):
Over the past 15 years, the prosecution and law enforcement community—with the defense bar pushing in the opposite direction—worked out an effective way to prosecute driving under the influence (DUI) cases by closing technical loopholes. In the 2005 Legislative Session, a Nevada Supreme Court decision challenged affidavits for DUIs regarding some technical aspects of prosecution, which still protected the rights of defendants.

The Nevada Supreme Court looked at cases to include recent U.S. Supreme Court cases, decided they did not like the affidavit process and removed it. Ms. Erickson, this Committee and others spent hours putting something together to effectively continue to prosecute.

After removing the affidavit process, the 2005 Legislative Session ended after which the Nevada Supreme Court changed its decision. We now request reinstatement of what we spent 15 years creating. This piece of legislation is crucial to the continued effectiveness of DUI prosecution. The defense will talk about various issues. Constitutionally, S.B. 35 is sound and the Nevada

Supreme Court recognized this. The bill also enables simultaneous audiovisual transmissions.

BRUCE W. NELSON (Office of the District Attorney, Clark County):
I have submitted an overview of the summary, relevant changes, position and analysis of my testimony regarding S.B. 35 (Exhibit E).

I am with the Clark County Vehicular Crimes Unit; we handle all DUI cases in Clark County. Last year, there were approximately 7,200 misdemeanor DUI cases in Las Vegas Justice Court and another 5,000 in Las Vegas Municipal Court. This does not include Henderson, Boulder City or North Las Vegas. In two-thirds of those cases, blood drawn by a nurse was an integral part of the process. Senate Bill 35 indicates the nurse, whose testimony includes a statement they are a nurse, drew blood and gave it to the police officer, can supply an affidavit and their appearance in court on every occasion would not be mandated.

Approximately a year-and-a-half ago, operations were suspended in the emergency room at the University Medical Center in Las Vegas because the only nurse working had to appear and testify in a misdemeanor case. There is no reason to require a nurse to appear in court, although the defense will say they have the right to bring these people into court.

They do not have that right. For example, the U.S. Supreme Court recently ruled that in certain cases involving 911 calls, they do not have the right to bring in the person who made the call. The 911 call can be presented without having the person testify. If a person is charged with driving without a valid license, they do not have the right to bring in the head of the Department of Motor Vehicles (DMV) to testify records were checked and there was no license for the person. It can be done by affidavit or letter.

If the defense wants the nurse to appear, they can subpoena the nurse. The defense can also require the prosecutor to bring in the nurse if they can show a substantial or bona fide dispute, which is a legitimate reason to include them. There was a question whether the nurse could put different things in the affidavit. The answer is no because the *Nevada Administrative Code* sets the form of the affidavit. If the defense does not like the form, they can go before the Committee on Testing for Intoxication and get it changed.

MR. NELSON:
The affidavit form limits testimony by nurses to the following: "I am a nurse; I drew blood and gave it to the police officer." The police officer impounds evidence and ensures the blood goes into the refrigerator where it is later tested by the crime laboratory. If the defense wants the chemist who analyzes the blood to appear, the prosecution must produce the chemist. A legitimate reason must be shown for the nurse or the person who calibrates breath machines to appear in court.

I have done in excess of 25,000 DUI trials where the appearance of a nurse is required, at which time there are no questions. There is nothing a nurse contributes to the search for truth. We know the statute as ruled on by the Nevada Supreme Court is constitutional.

The Nevada and U.S. Supreme Courts ruled that at a preliminary hearing, there is no right to cross-examine. The U.S. Supreme Court went so far as to say there is no need for a preliminary hearing. A police officer could type out a complaint, file it with the court and set the person for trial, which has been law for the past 30 years. Nevada chose to give people preliminary hearings, but there is no requirement to bring in the nurse or chemist. The defense cannot bring them in at a DMV hearing; if they show substantial and bona fide dispute, the defense can bring them in at trial, which is where the right to confrontation exists.

BRETT KANDT (Executive Director, Advisory Council for Prosecuting Attorneys):
I submitted a memorandum from the Advisory Council for Prosecuting Attorneys to the Senate Committee on Judiciary regarding S.B. 35 (Exhibit F).

We are asking to repeal the amendments from 2005 because the statutes, in their pre-2005 form, have been found constitutional by the Nevada Supreme Court. From a public policy standpoint, requiring the calibrator, nurse or chemist to appear in court for every DUI is unnecessary and an impediment to the administration of justice.

The number of cases handled by Mr. Nelson's office indicates how many there are statewide. While not every case goes to trial, many do; without these requested changes, all those individuals will be required to appear for every trial. They must leave work and sit in court for several hours waiting to testify. Many cases are dismissed when personnel cannot make it to court. It is particularly

burdensome in rural counties because it can require traveling hundreds of miles to make an appearance. It also exacerbates the chronic nursing shortage in Nevada.

Repealing the changes from 2005 will allow Nevada to return to the statutes held constitutional by the Nevada Supreme Court. The addition of audiovisual testimony will promote efficient administration of justice.

MR. GRAHAM:
Every prosecutorial unit from Mesquite, East Fork, Jarbidge, Sparks, Henderson and Reno urges you to reinstate the affidavit process. It costs rural communities approximately $1,000 for every DUI trial to require these individuals to appear in court. In addition, constitutional rights are not denigrated.

SENATOR MCGINNESS:
To clarify, the statute was in place, the Nevada Supreme Court ruled the parameters were not right and removed them. After they were removed, the Nevada Supreme Court changed its decision. Is that correct?

MR. GRAHAM:
Yes, that is correct.

SENATOR HORSFORD:
Are the provisions in sections 2 and 3 of S.B. 35 limited to DUI or is it more inclusive?

MR. NELSON:
It is limited to DUI cases because it refers to a breath machine and the nurse drawing blood, which does not come up in any other crime. Theoretically, it could apply to something else; as a practical matter, I do not see it happening.

SENATOR HORSFORD:
What about a person who is under the influence of a controlled substance?

MR. NELSON:
That would also be a DUI case in which a nurse draws blood and the chemist tests and declares the amount of whatever substance is present. The rules are the same regarding an affidavit from the nurse. The defense requires the chemist to appear in court.

SENATOR HORSFORD:
How many cases are related to drugs rather than alcohol?

MR. NELSON:
The overwhelming majority are either alcohol alone or alcohol and drugs. Perhaps one-sixth or one-seventh would be drugs alone, either prescription medication or illegal street drugs.

SENATOR HORSFORD:
Please provide that information.

MR. NELSON:
I will do that.

MR. BROOKS:
With regard to S.B. 35, Mr. Nelson was correct in saying the Nevada Supreme Court used language to be placed back in the statute. I add a note of caution. Litigation concerning *Crawford v. Washington*, 541 U.S. 36 (2004) is still in flux. I do not think the Nevada Supreme Court, in their revision of *City of Las Vegas v. Walsh*, 121 Nev. Adv. Op. 85, 124 P.3d 203 (2005) said this is the final word. I predict more cases two years from now on this issue which may or may not be consistent with *Walsh*. My advice to the Committee is to stick with current statute, which is conservative and protects the fundamental, constitutional rights in *Crawford*. Changing it now could mean changing it again in two years. The proposal in the bill is consistent with the Nevada Supreme Court's most recent decision.

MS. ROWLAND:
I submit my testimony on S.B. 35 (Exhibit G) relating to use of written testimony in criminal trials.

I echo Mr. Brooks' testimony. Senate Bill 35 micromanages rules of evidence to place burden on the defendant to show a witness should be present. That is not the correct way to go. In terms of the future legal landscape indicated by Mr. Brooks, placing burden on the prosecution to show evidence in the form of an affidavit would not be prejudicial to the defendant. If what the District Attorneys Association says is true, there is no need for that person to be present. They should be able to submit an affidavit rather than appear in person

and place the burden on the defendant to show a need to have the person present.

The defendant has a right to have anyone offering testimony against him present in the courtroom. If the prosecution shows an affidavit as adequate evidence and not prejudicial to the defendant, it would be appropriate. Rather than send a message to the defendant of the burden to have their Fifth Amendment rights honored, it would be the prosecution's burden to say this person does not need to appear. Although default is in the wrong position, I am mindful of concerns noted by the other side.

JASON M. FRIERSON (Clark County):
I echo the comments by Mr. Brooks and Ms. Rowland. There are a couple issues with S.B. 35; one is the teleconferencing option addressing travel costs, particularly in rural areas. Teleconferencing relieves people from traveling long distances to provide testimony.

The other concern is that often at a preliminary hearing or misdemeanor trial, the defense realizes inconsistency with the procedure. If a nurse deviates from the normal method of taking blood, it is discovered in cross-examination. That option is not available if there is only an affidavit.

The language is permissive in the sense if the defense raises a bona fide issue, the court may require the state to produce the witness. In most instances, these cases resolve; in a few instances, they do not. If the issue is raised and the justice of the peace decides not to require the state to produce that witness, the *Crawford* issue has not been resolved. The current way works, and the telecommunication option resolves concerns requiring witnesses be produced.

ROBIN L. KEITH (President, Nevada Rural Hospital Partners Foundation):
Nevada Rural Hospital Partners, a nonprofit organization supporting the viability of Nevada's small and rural frontier facilities, supports passage of S.B. 35. We incur consequences of the current law in several ways. Mr. Nelson captured them in his testimony, and I will summarize my points.

The role of the nurse or phlebotomist is to accept the kit provided by law enforcement containing the tube, needle and tourniquet. The individual accepts the law enforcement officer's word this prisoner is to be tested, then inserts the

needle, captures the blood in a tube and hands it back to the officer. That is the extent of his or her role.

Nevada Rural Hospital Partners provides this service because it is often the only facility in town with qualified people. At the present time, they have health care labor shortages; there are not enough nurses, phlebotomists and laboratory technicians. When cases go to court and these individuals are subpoenaed to appear, it is burdensome for hospitals and the individual. The hospital incurs the cost of covering for the missing person. There are not always people to cover absences, which means some patients do not receive care and laboratory work is not timely.

In view of the shortages and inconvenience these cases cause rural phlebotomists, nurses and/or laboratory technicians, we support S.B. 35. We want to continue serving our communities.

ROBERT ROSHAK (Sergeant, Las Vegas Metropolitan Police Department):
We support S.B. 35. The affidavit process would assist us in handling demands to bring these individuals to trial. There is one person each in southern Nevada and northern Nevada to serve the entire state in this endeavor.

COTTER C. CONWAY (Washoe County Public Defender):
I am opposed to S.B. 35 to the extent it impacts on *Crawford* and confrontation issues. I echo the comments of Mr. Brooks, Ms. Rowland and Mr. Frierson with regard to those issues.

CHAIR AMODEI:
The two issues on the table are to leave the statute as is or change it. Is that a correct assessment?

MR. FRIERSON:
There are options with respect to S.B. 35. If the current statute is changed and the defense raises a bona fide issue, the language could be changed from permissive to "may" or "shall." This ensures if the defense raises a bona fide issue, *Crawford* rights are not violated. The option treats misdemeanor trials like felony trials. Either treat them the same—which is once they raise the issue, the court requires production of the witness to testify—or in misdemeanor trials, the defense must raise a bona fide issue and show it is necessary. At that point, the justice of the peace shall require the state to produce the witness.

CHAIR AMODEI:
Unless there is objection from the Committee, S.B. 35 will be scheduled for the first work session. My understanding is the issues are the affidavit and audiovisual transmission provisions. If there are concerns regarding the audiovisual provision, please let us know before the work session. If there is an appetite to offer an amendment, please do so. We want to narrow the issues in order for Committee members to make individual value judgments on each item before voting. It is acceptable for both sides to stick to their positions; we do not expect agreement. Ms. Eissmann and Mr. Wilkinson will prepare the work session with suggestions from the various testifiers.

MR. FRIERSON:
For the record, "I don't believe that we oppose the audiovisual portion of the amendment in any way at all."

CHAIR AMODEI:
The hearing is closed on S.B. 35.

There being no further business to come before the Committee, the hearing is adjourned at 10:11 a.m.

RESPECTFULLY SUBMITTED:

_____
Barbara Moss,
Committee Secretary

APPROVED BY:

_____
Senator Mark E. Amodei, Chair

DATE:_____