

**MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS**

**Seventy-Fifth Session
March 30, 2009**

The Committee on Government Affairs was called to order by Chair Marilyn K. Kirkpatrick at 8:04 a.m. on Monday, March 30, 2009, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda ([Exhibit A](#)), the Attendance Roster ([Exhibit B](#)), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblywoman Marilyn K. Kirkpatrick, Chair
Assemblyman David P. Bobzien, Vice Chair
Assemblyman Paul Aizley
Assemblyman Kelvin Atkinson
Assemblyman Chad Christensen
Assemblyman Jerry D. Claborn
Assemblyman Ed A. Goedhart
Assemblywoman April Mastroluca
Assemblyman Harvey J. Munford
Assemblywoman Peggy Pierce
Assemblyman James A. Settlemeyer
Assemblywoman Ellen B. Spiegel
Assemblyman Lynn D. Stewart
Assemblywoman Melissa Woodbury

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman Ruben Kihuen, Clark County Assembly District No. 11
Assemblyman John Ocegüera, Clark County Assembly District No. 16

STAFF MEMBERS PRESENT:

Susan Scholley, Committee Policy Analyst
Scott McKenna, Committee Counsel
Cynthia Carter, Committee Manager
Michelle Smothers, Committee Secretary
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

Vicenta Montoya, Chair, Sí Se Puede Latino Democratic Caucus,
Las Vegas, Nevada
Luis F. Valera, Director, Government Relations, University of Nevada,
Las Vegas, representing Las Vegas Latin Chamber of Commerce,
Las Vegas, Nevada
Raymond B. Bizal, P.E., Western Regional Manager, National Fire
Protection Association, Long Beach, California
James M. Wright, Chief, State Fire Marshal Division, Department of
Public Safety
Samuel P. McMullen, Las Vegas, Nevada, representing Altria,
Client Services Inc., Sacramento, California
Ernest E. Adler, Carson City, Nevada, representing Reno-Sparks Indian
Colony, Reno, Nevada
Alfredo T. Alonso, Reno, Nevada, representing R.J. Reynolds
Rusty McAllister, President, Professional Firefighters of Nevada,
Las Vegas, Nevada
Lea Tauchen, Director of Government Affairs, Retail Association of
Nevada, Carson City, Nevada
Dino DiCianno, Executive Director, Department of Taxation
Russell M. Rowe, Las Vegas, Nevada, representing American Council of
Engineering Companies of Nevada, Las Vegas, Nevada
K. Brad Van Woert III, President, Sheehan Van Woert Bigotti Architects,
Reno, Nevada; President, American Institute of Architects,
Northern Nevada Chapter, Reno, Nevada
Fred L. Hillerby, Reno, Nevada, representing American Institute of
Architects, Nevada Chapter, Las Vegas, Nevada
Kim A. Sloat, P.E., Vice President, Regional Manager,
Harris & Associates, Las Vegas, Nevada

Allen Gray, P.E., President, Gray & Associates, Reno, Nevada
Raymond Herweg, P.E., Principal Project Manager, Parsons,
Las Vegas, Nevada
Sabra Smith-Newby, Director, Department of Administrative Services,
Clark County, Nevada
Susan Martinovich, Director, Department of Transportation
Renny Ashleman, Chairman, State Public Works Board
Lee Thomson, Chief Deputy District Attorney, Clark County District
Attorney's Office, Las Vegas, Nevada
Chris Figgins, Chief Deputy District Attorney, Clark County District
Attorney's Office, Las Vegas, Nevada, representing Department of
Public Works, Clark County, Nevada
Ted Olivas, Director, Government and Community Affairs,
City of Las Vegas, Nevada
Karen Storms, City Clerk, City of North Las Vegas, Nevada
Jeff Fontaine, Executive Director, Nevada Association of Counties,
Carson City, Nevada
Javier Trujillo, Intergovernmental Relations Specialist, City Manager's
Office, City of Henderson, Nevada

Chair Kirkpatrick:

[Roll called.] Good morning. We are going to open the hearing on Assembly Bill 301.

Assembly Bill 301: Requires the Governor to proclaim March 31 as "Cesar Chavez Day" in the State of Nevada. (BDR 19-530)

Assemblyman Ruben Kihuen, Clark County Assembly District No. 11:

Thank you for the opportunity to present this important piece of legislation. Madam Chair, could we present the video first, and then I could go into the testimony and to some of the presenters? [He presented a video, a copy of which is not provided].

Thank you, Madam Chair, for making these accommodations to view the video. I know it is not common to show videos or Power Points in your Committee. As you can see, the video better illustrates who César Chávez was and it better illustrates much more than what my words can say.

I will, however, touch on a few points that were not in the video. This is a simple bill, with a very symbolic meaning. It establishes César Chávez Day in the State of Nevada. For clarification for those folks who have asked, this does not make it a holiday, so students and employees will not get the day off. Due to the economic crisis, we cannot afford to do that at this moment. It will,

though, once a year, allow the governor and our city governments to proclaim March 31 as César Chávez Day, which is his date of birth. This has been done in many other states, including California, Texas, Utah, Colorado, New Mexico, Wisconsin, and Michigan, so we would be the eighth state to make this a César Chávez Day.

I want to touch on a few points that were missing from the video that I think all of you should know about. César Chávez was not just a civil-rights leader; he was also a community organizer and a veteran of World War II. He is what many consider to be a true American hero. When Senator Robert Kennedy was running for president, he called Chávez one of the most symbolic figures of our lifetime, and I think that is important to know.

In 1966, César Chávez led a 340-mile walk from the California farm town of Delano to Sacramento calling on state government to pass laws that would permit farm workers to organize into a union and allow collective bargaining agreements. In 1968, he went on a water-only fast in order to reaffirm the strike's commitment to nonviolence. Dr. Martin Luther King, one month before his death, sent a telegram to César Chávez during his fast. In the telegram Dr. King stated, "As brothers in the fight for equality, I extend the hand of fellowship and good will and wish continuing success to you and your members. You and your valiant fellow workers have demonstrated your commitment to righting grievous wrongs forced upon exploited people. We are together with you in spirit and in determination that our dreams for a better tomorrow will be realized." After 25 days of fasting, César Chávez received the pledges to nonviolence that he sought.

In 1975, César Chávez called for a new international boycott of grapes and, once again, millions honored the United Farm Workers (UFW) cause. A national poll estimated that 17 million citizens participated in the boycott. That same year, the UFW again made history by winning legislation that outlawed the short-handled hoe and by the passage in the California Legislature of the Agricultural Labor Relations Act, the first law governing farm laborers organized in the continental United States.

By the 1980s, tens of thousands of farm workers had won UFW contracts with higher wages, family health coverage, pension benefits, and other protections. Child labor was challenged, sexual harassment of women workers was fought, and campaigning against pesticides was all integral to the UFW battles. Millions followed César Chávez on his journey, which won monumental gains for farm workers, for civil rights, political representation, and for racial minorities and environmental justice. These achievements placed him as one of the most outstanding leaders of the 20th Century. César Chávez was admired by all

races, nationalities, all ages, and men and women alike. He helped all of us stand tall with dignity, and he helped to unite us. We organized against economic injustice, racial, sexual, and anti-immigrant discrimination. For Latinos, César Chávez was a Nelson Mandela, Dr. Martin Luther King, or Mohandas Gandhi. On April 23, 1993, César Chávez died in his sleep at the age of 66 near Yuma, Arizona, not far from where he was born.

On a personal note, many people do not know this, when my parents first arrived in the United States, they were both farm workers. My father had been a teacher in Mexico, but when he arrived here, he had to revalidate his degree, so his first job was as a farm worker in the fields of California. Thanks to the work that César Chávez did during his days as a leader, my parents were able to have better conditions. Some of those earlier farm laborers had been working up to 18 hours a day, under 110 degree temperatures in the middle of summer, not having the right working conditions. Thanks to the work that César Chávez did, not only my parents but millions of other kids' parents were able to have great working conditions and make a living wage as well. With that, Madam Chair, I want to say thank you and I am open to any questions you may have.

Chair Kirkpatrick:

Does anybody have any questions?

Assemblyman Munford:

Being a history teacher myself, I commend you for bringing this bill before us. This is an opportunity for many Hispanic students to identify with someone as a model or a hero, or as someone who has made great sacrifices and it could impact young people very much. I remember those days in the 1960s, as were shown in the video. I can remember those types of scenes coming across the 5:30 p.m. news every day. I was a strong supporter of César Chávez, and I think this is a great bill.

Assemblyman Stewart:

Like Mr. Munford, I am old enough to remember those days and the sacrifice that Mr. Chávez made. One of the things I liked about him was he never capitalized on his name or his fame for monetary gain, and I believe he died in quite humble circumstances, never having gained the financial stability that he perhaps deserved.

Chair Kirkpatrick:

Does anyone have any questions? [There were none.] We are going to move to Las Vegas.

**Vicenta Montoya, Chair, Sí Se Puede Latino Democratic Caucus,
Las Vegas, Nevada:**

As a teenager, I lived during those turbulent times of the 1960s. It filled me with pride to be able to see César Chávez, Martin Luther King, and Robert Kennedy pursue dignity for all Americans and to pursue the beliefs of Gandhi of nonviolence. It provided dignity to those of us who were so angry at what we saw going on with our country. It provided a steady hand for those of us who saw the injustice around us. As a teenager, I lived through the riots. We had riots in Las Vegas, and I marched with other people from the west side after the death of Martin Luther King. César Chávez never turned to violence as a means of addressing what he saw was wrong. As a young Latina, it filled me with great pride to be able to see such leadership. He is a hero. He is a hero for labor and for human dignity. He is a hero for the rights of all human beings.

The name of my club is Sí Se Puede Latino Democratic Caucus. The Sí Se Puede portion is a commemoration of that phrase from the United Farm Workers' struggles. Dolores Huerta, who cofounded the National Farm Workers Association with César Chávez, utilized that phrase when, at the lowest point in their struggle, the farm workers faced such huge obstacles. The question was asked, can we do this, and she said, Sí, se puede, which means, yes, we can. This has been a phrase that has given so much hope to so many people. It is the idea that in the face of adversity, we can accomplish great things. César Chávez did that, and I am proud as an individual and as a member of my organization to support the establishment of March 31 as César Chávez Day.

Chair Kirkpatrick:

Does anyone have any questions? [There were none.] Is there anyone who would like to testify in support of Assembly Bill 301?

**Luis F. Valera, Director, Government Relations, University of Nevada,
Las Vegas, representing Las Vegas Latin Chamber of Commerce,
Las Vegas, Nevada:**

For those of you who may not be familiar with our chamber, we represent over 3,000 members, many of whom are from Latin America. Enacting this legislation would be a source of tremendous pride for the Hispanic community, not just in Las Vegas, but throughout the State of Nevada. This bill is timely, and we strongly support A.B. 301.

[Received Resolution in support of A.B. 301 ([Exhibit C](#)).]

Chair Kirkpatrick:

Are there any questions? [There were none.] Is there anyone else who would like to testify in support of A.B. 301? [There were none.] Is there anybody

who is neutral on A.B. 301? Is there anyone who is in opposition of A.B. 301?
[There were none.]

Assemblyman Kihuen:

This date has also been recognized in the City of Reno, the City of Las Vegas, and Clark County; they have all recognized it within their own municipalities.

ASSEMBLYMAN STEWART MOVED TO DO PASS
ASSEMBLY BILL 301.

ASSEMBLYMAN AIZLEY SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMEN CHRISTENSEN AND CLABORN WERE ABSENT FOR THE VOTE.)

Chair Kirkpatrick:

We will go ahead and open the hearing on Assembly Bill 229.

Assembly Bill 229: Enacts provisions governing fire-safe cigarettes.
(BDR 42-568)

Assemblyman John Ocegüera, Clark County Assembly District No. 16:

[Read from prepared statement ([Exhibit D](#)).]

Chair Kirkpatrick:

Does anybody have any questions?

Assemblywoman Pierce:

I thought they put a chemical in cigarettes to make them burn. I thought all you had to do was take the chemical out and they would not burn.

Assemblyman Ocegüera:

We have three fire professionals who do not know the answer to that. Apparently they are all nonsmokers.

Assemblyman Goedhart:

How many cigarettes currently sold in the State of Nevada have fire standard compliant (FSC) ratings on them? Do most of the major brands have it, and is it just the minor brands that do not have the rating? How many states have passed similar legislation?

Assemblyman Ocegüera:

Thirty-eight states and the District of Columbia have passed similar legislation, and I will have to defer to one of my colleagues for the second part of your question.

Chair Kirkpatrick:

I appreciate the samples of cigarettes; I am trying to figure out the difference between them and other cigarettes without the FSC rating.

Raymond B. Bizal, P.E., Western Regional Manager, National Fire Protection Association, Long Beach, California:

If I can remember the question right, did you ask how many cigarettes in Nevada are sold?

Assemblyman Goedhart:

I was wondering how many brands have the FSC rating built into them, and would they have to completely change all the cigarettes they are selling in Nevada?

Raymond B. Bizal:

We do not really know. At this point, there is no requirement in Nevada that they sell cigarettes with an FSC rating, and they are still manufacturing the noncompliant cigarettes, so the number could be high. R.J. Reynolds Tobacco Company has announced that by the end of 2009, all of their cigarettes will be compliant.

Chair Kirkpatrick:

Does anybody else have any questions? [There were none.] Your testimony may answer a lot of the questions that are out there, so welcome to Government Affairs.

Raymond B. Bizal:

I really appreciate the opportunity to be here to provide you with some information ([Exhibit E](#)). I am speaking in support of [A.B. 229](#), because it will save lives. The fire-safe technology has a significant ability within the cigarette to reduce the likelihood of fire, and that will save lives. You heard the statistics. Each year about 700 to 900 people die due to fires initiated by smoking materials. That is about a quarter of the fire deaths annually in the United States. It is a significant problem, and a quarter of the victims, as you already heard, are not necessarily the ones smoking the cigarette that lit the fire.

This bill will significantly reduce the fires. In the past few years, 38 states and the District of Columbia have passed laws similar to the one that you are considering. That means over 85 percent of the U.S. population is now protected by similar laws. And you are not alone this year, because 11 other states are now considering similar legislation. We at the National Fire Protection Association (NFPA) and the Coalition for Fire-Safe Cigarettes have worked with both Altria and R.J. Reynolds on these laws, particularly this one in Nevada, so I believe that we have come up with a law that we are all comfortable with. I hope they will be here as well to testify.

If you look at the cigarette props in front of you, you will see three bands that are a few millimeters wide at both ends and in the middle of the cigarette. If you have a highlighter, run that highlighter over the cigarette, and you will see those three bands very clearly. The way most cigarette manufacturers have decided to address this is by adding these bands, or speed bumps, that basically allow less air into the tobacco and keep it from burning, sort of like a cigar. If you do not puff on a cigar, it goes out, and the reason is because the air does not get through to the tobacco leaf surrounding the tobacco. In this case, I do not want to say it is a thicker paper, but it is a little bit thicker, and that prevents the air from getting inside. So if you leave your cigarette somewhere or fall asleep, and it falls on the mattress, when it hits that speed bump, the cigarette will go out most of the time.

The last thing I would like to say is that in New York, which was the first state to pass such a law, we have some reports for the first six months. There was a scare that cigarette tax revenue would not be coming in because people would not want these fire-safe cigarettes. There has been no reduction in New York's cigarette taxes, and in the first six months, we saw a one-third reduction in cigarette-related fire fatalities and an even higher reduction in the number of cigarette-related fires. And that comes from the New York Office of Fire Prevention, so some statistics are just starting to come out that prove fire-safe cigarettes actually work. We believe that this will be a good thing for the citizens of Nevada.

Assemblyman Settlemeyer:

Is the band simply made of thicker paper, in your belief, or do you know what it is made of?

Raymond B. Bizal:

I do not know.

Assemblyman Settlemeyer:

I am curious as to what it is made of.

Raymond B. Bizal:

I believe it is a different type of paper. But I would also like to point out that this does not increase the toxicity of the cigarette whatsoever. People who have smoked these fire-safe cigarettes have told me they did not even know that the cigarettes had changed, by the flavor. Smokers just got upset the first time these cigarettes went out.

Assemblyman Settlemeyer:

Does it raise the price of the cigarettes?

Raymond B. Bizal:

As far as I understand it, the fire-safe material does not significantly raise the cost of the cigarettes. I think they can change their manufacturing line relatively easily. About five years ago, the question was, is there availability of paper? That was the big question not only for the big manufacturers, but for the small manufacturers as well. Several manufacturers have patents on the paper, and I believe the paper is very much available to manufacturers.

Assemblyman Settlemeyer:

A lot of people roll their own cigarettes. Is that paper required to be sold in the State of Nevada as well? If not, why not? If it is a good thing, why shouldn't we require that too?

Raymond B. Bizal:

I believe that the starting point would be with the mass cigarette, which is the most sold. I think it covers 98 percent of the cigarettes that are smoked.

Assemblyman Ocegüera:

I want to point out that A.B. 229 is one of those bills that I have worked on for a while, and I would like to thank the manufacturers and all the folks from the National Fire Protection Association (NFPA), for their efforts over the last six to nine months, sending drafts back and forth and having several lawyers look at the language. But I think a lot of your questions are aimed at the manufacturers who probably can answer some questions more specifically than we can.

James M. Wright, Chief, State Fire Marshal Division, Department of Public Safety:

I am here in support of A.B. 229. Last year in Nevada, there were 29 fire fatalities, and nearly half of those were attributed to cigarette smoking. In 2007, there were 21 fire fatalities, and about one-third of those were attributed to cigarette smoking. This is a definite rising trend, and we think this bill will certainly help save lives. We are already starting to see these fire-safe

cigarettes showing up here. Our staff has been canvassing stores in the local area, and we have found some of the cigarette brands with the FSC rating on the side of the pack being sold in the Carson City area.

Assemblyman Stewart:

Is there a way to quickly identify the pack, whether it is has the FSC rating on it or not?

James M. Wright:

Yes, you will find the markings on the packaging near the UPC symbol. You will see three letters, FSC, which does not stand for fire-safe cigarettes; it stands for fire standard compliant. Besides the individual packs, the cartons and the large shipping cartons are also to be marked with that designation.

Assemblyman Stewart:

I think you could have a little better marking on the packaging, so people would not have to search for it.

Chair Kirkpatrick:

Does anyone else have any questions? I am saving my questions for the manufacturer.

Samuel P. McMullen, Las Vegas, Nevada, representing Altria, Client Services Inc., Sacramento, California:

I am here today on behalf of Altria, which is the parent company of Philip Morris USA. They have been a strong supporter on this issue for well over a decade. They have been a participant and a partner in the passage of this bill in a number of states. The genesis was that there was always an interest in getting a national standard. When the federal government did not do that, the National Fire Protection Association picked up the effort. We have gone state by state, and now we have 39 out of the 51 jurisdictions in the United States. We are here to support the bill. If you want me to, Madam Chair, I could walk you through the key parts of the bill. We strongly support it and urge the passage of A.B. 229.

We are aware of a couple of things that may come up later. One is that there was an interest on behalf of the retailers for access to the list of the directory of fire-safe cigarettes and fire-safe manufacturers. That is a plus for compliance, so we do not have a problem with that. When the Department of Taxation finds cigarettes without the FSC rating after the effective date of this law, we want to make it clear that those cigarettes would be subject to seizure. It is the normal process they would take to confirm that a case that is not clear needs to

be made clear. Those are the only two issues we have heard about, but we think those would be fine additions to this as well.

The effective date for fire-safe cigarettes would be one year from the passage of the bill, other than the pieces that would be required for regulation and starting the system. So this would not start until one year after the passage and approval of this bill. I have passed around a carton of cigarettes, and you can see the FSC rating on it. I bought those yesterday in California, so that is an example of what you would find on the retail level. I would be happy to walk you through the bill if you wish me to.

Chair Kirkpatrick:

I think that would be helpful for everyone. I am curious as to how we will move into the new cigarette.

Samuel P. McMullen:

I will quickly take you through some of the highlights of A.B. 229. Most of these sections would be in effect beginning a year from passage and approval, other than the ones related to regulations, and I will take you through those. Sections 2 through 9 are the definitional sections. I will not take much time on those. Section 10 is the primary section of the bill that would restrict anyone from selling or offering to sell any cigarettes in this state unless they have been tested under subsection 1, paragraph (a) and that they have, under paragraph (b), a written certification that the cigarettes have been tested; you will see the additional features of the certification in later sections. They have been marked, as you saw on the package that was passed around this morning. Subsection 2 would set forth the testing of the cigarettes. There are a number of very technical sections that have been incorporated into this bill. I would reiterate at this point that this is a de facto creation of a uniform standard across the United States. That has been the primary interest in making sure that the language is very similar in all these provisions, so that the standards across the states are the same and there is an effective nationwide standard.

In subsection 5, line 22, on page 4, it talks about "lowered permeability bands"; those are just a higher density paper that allows less oxygen to travel through and starves the cigarette at that point to shut it down. Subsection 6 allows for alternative testing, as long as the State Fire Marshal believes it is substantially similar to the test that is set forth, and allows the State Fire Marshal the opportunity to create additional standards by regulations if he feels those are appropriate. Subsection 9, on page 5, makes sure that it does not prohibit existing inventory, which goes to your question, Madam Chair. They will be able to sell off their existing inventory, and there will be no economic harm because of that. The bill tries to provide as much of a transition as possible,

with a lot of lead time and a lot of ability to adapt to a system that works for this purpose. Also, it would not prohibit the lead time for purposes of consumer testing.

Section 11, on page 6, covers the written certification, which obligates the manufacturer to provide certification of the standards and present that to the State Fire Marshal. On page 7 of A.B. 229 there is a fee, and a fiscal note attached, but there is an understanding that you need to try to make it something that comes close to having the fees cover the costs of the regulation and registration. In Section 12, on page 7, it describes the markings. These started years ago and are basically standard, so that there is not a different labeling standard for every state. In subsection 3, line 36, manufacturers have the obligation to provide a copy of the certification to the wholesale dealer, so that as it goes through the chain, not only will all of the packaging—the cartons and the cardboard boxes—be marked, but they will also have the certification, so that people can be sure that those are, in fact, the fire standard compliant cigarettes.

The penalties start with section 13 and cover the whole range. Section 14, on page 9, is a passage and approval section, because it allows the State Fire Marshal to adopt the regulations they determine necessary. In section 15, it provides the Department of Taxation the ability to conduct inspections and everything that they need to do. If there is an issue with the inspections, clearly, there would be no problem, in that it would allow a seizure, just like all other counterfeit, contraband, or unstamped cigarettes. Section 16 is the right of the state, in its various forces, to examine the books and records of anybody who has these cigarettes on the premises. Section 17 creates the fund into which the money would go to pay off the cost of the program's administration. Section 18 is a legislative report every year on the effectiveness of the provisions of A.B. 229, once passed. Section 19 is a standard that would allow provisions to be interpreted and construed to effectuate their uniformity. Subsection 2 makes it clear that the bill does not have any restrictions against manufacturing or selling for purposes other than sales inside the State of Nevada. Section 20 makes sure there is uniformity through one consistent state standard. Section 21 notes the effective dates. I will be happy to answer any questions.

Assemblywoman Spiegel:

I have a question in section 11, subsection 4, line 5, where it says "each cigarette certified under this section must be recertified every three years." Is that "brand"? I do not understand. If something is produced and certified, goes into the distribution channel, and for some reason it is not sold within three years, how it could it then be taken back and tested?

Samuel P. McMullen:

I believe the answer is it is each cigarette and within a brand family, even though the permitting of the fee is paid based on the brand family. The restriction goes to each particular cigarette. If you look at page 3, the testing is in relationship to each cigarette. Cigarette, in that context, would mean the difference between a Marlboro regular and a Marlboro medium, so that each cigarette itself is tested. The fire-safe issue is cigarette by cigarette.

Assemblywoman Spiegel:

So are you talking about the brand?

Samuel P. McMullen:

Yes. If you look at page 4, it is statistically reliable sampling and testing. That is why these specifics are here, because there are criteria for scientific testing that fit the reliability standards.

Assemblyman Stewart:

Is there any differentiation on smoke shops? Will they be automatically included in the bill, or do we need special language on that? Regarding fees, do you have a ballpark figure of how much the price per pack will increase?

Samuel P. McMullen:

I will answer the second question first. I do not believe there is any material change, even immaterial change, in the cost of the cigarettes. There are so many things affecting the price of cigarettes that this would be a small factor. From Philip Morris's point of view, this has been one of the things they have been working to accommodate in their manufacturing process for a long time without any significant costs.

In answer to the first question, section 6 has the definition of "retail dealer." Normally, we define "retail dealer" and then "tobacco retail store" to differentiate between smoke shops and the other stores that incidentally sell tobacco products. This definition in section 6 would cover, through "retail dealer," all stores.

Assemblyman Settelmeyer:

Are you telling me that you will have the ability to affect the cigarettes that are sold in the tribal smoke shops? I did not think we had the power to tell the tribes what to do.

Samuel P. McMullen:

I think they are covered under the state laws. I understand the issue; I will have to check on that for you.

Ernest E. Adler, Carson City, Nevada, representing Reno-Sparks Indian Colony, Reno, Nevada:

The Reno-Sparks Indian Colony is a major retailer of cigarettes for the Indian colonies, and we fully intend to comply with this law when it is passed by the Legislature. All the other Indian Tribes will follow suit. Technically, I do not think we have to, but it is good public policy, so we are going to do it.

Chair Kirkpatrick:

Does anybody have any questions?

Assemblyman Goedhart:

How would this affect the importation of specialty brands from around the world? Would they have to comply with the new FSC standards?

Samuel P. McMullen:

My understanding is that it is all inclusive, for any cigarettes to be sold in this state. It would probably affect them.

Chair Kirkpatrick:

Does anybody else have any questions? Are these cigarettes safe with regard to health? In 20 years is somebody going to come back and say oops? I know there is a warning on the packages, but I am wondering if the new material is safe.

Samuel P. McMullen:

My understanding, from what they tell us, is that these paper changes are not to have any effect on the health side, or any additional effects.

Chair Kirkpatrick:

I know that sounds like a ridiculous question, and I understand the warning, but I do not want to find out in 20 years that the paper was soaked in something that I should have known about.

Samuel P. McMullen:

That is my understanding, that the major method is to just use denser paper, and I do not think there are any glues in that.

Alfredo T. Alonso, Reno, Nevada, representing R.J. Reynolds:

We support the Majority Leader's attempt to bring Nevada into the fold with the rest of the country. One of the issues that we have had over the years has been the paper. There was only one manufacturer, so no one could get it unless they had an agreement with this manufacturer, which made it very difficult for other companies to get involved. With respect to the statute itself,

A.B. 229 will allow some continuity across the country. We are at a point where you will not see a whole lot of change between the existing and the new cigarettes.

Ernest E. Adler:

Currently, the Department of Taxation has various tax rates for tobacco products on their website. It would really be helpful to all the retailers if the website also had information as to which cigarettes were the fire-safe cigarettes and authorized for sale in the State of Nevada. The reason we may have a problem is that, in northern Nevada, none of the retailers buy their cigarettes from a Nevada wholesaler; they buy them out of California. There are huge warehouses where there are cigarettes going to states that do not have this law. There is a fairly significant chance for error, in shipping the wrong cigarettes into Nevada, and then a clerk selling those cigarettes illegally to a customer. That could be a real possibility if we do not have good data on which cigarettes are legal and which are not.

Chair Kirkpatrick:

So Mr. Adler, are you in support of A.B. 229 but suggesting an amendment?

Ernest E. Adler:

We support the bill, but we need some adjustments.

Chair Kirkpatrick:

If you are proposing an amendment or any changes to the existing bill, then you have to come back to the table in the neutral position. It is easier for the Committee and it is only fair to the bill sponsor to know what the changes are. Does anybody have any questions? [There were none.]

Samuel P. McMullen:

There has been some forwarding of language to us ([Exhibit F](#)). I do not know if the sponsor has seen it, but I will be happy to work through this with the parties to make sure that we have exactly what they need or what they think makes sense.

Chair Kirkpatrick:

It makes more sense to come back at neutral, especially if the sponsor has not seen it. We want to see it all at once.

Samuel P. McMullen:

I will be happy to take care of that for you.

Chair Kirkpatrick:

Is there anybody else who would like to testify in support of A.B. 229?

Rusty McAllister, President, Professional Fire Fighters of Nevada, Las Vegas, Nevada:

From the firefighters' standpoint, a large number of fires are attributed to smoking, and we support anything we can do to reduce the number of fires and deaths. We have also talked about property damage, whether it is houses or cars. We get calls for car fires that are caused by cigarettes. People will come out of their house and find their car on fire in the middle of the night, because they were smoking on their way home and dropped the cigarette between the seats and then went into their home. When they come back out three hours later, their car is fully ablaze. So anything we can do to reduce that is good. Also, this could reduce the wildfire possibilities here in Nevada, which would be a tremendous benefit for all of us. It makes it safer for not only the public, but for me and the people I represent, as firefighters doing our jobs. We fully support this bill.

Chair Kirkpatrick:

Does anyone have any questions? [There were none.] Is there anybody else who would like to testify in support of A.B. 229? [There were none.] Is there anybody who is in opposition? [There were none.] Is there anybody in Las Vegas who would like to testify on A.B. 229? [There were none.] Is there anybody in the neutral position? Mr. Adler, you can come back in the neutral position now.

Lea Tauchen, Director of Government Affairs, Retail Association of Nevada, Carson City, Nevada:

We are neutral, but we are technically in support of A.B. 229. While the market appears to be already moving in the direction of fire-safe cigarettes, we want to ensure that the retailers have the information necessary to determine which brands of cigarettes have been certified fire-safe by the standards established in this bill. As Mr. McMullen mentioned, we have brought forth an amendment ([Exhibit F](#)) that we believe will enhance the enforcement component by allowing the Department of Taxation to promulgate regulations in which retailers would have a method available to verify which brands are FSC certified. As Mr. Adler mentioned, this would be similar to the method that is currently used to notify retailers of which brands are participating in the master settlement agreement.

Chair Kirkpatrick:

Does anyone have any questions?

Ernest E. Adler:

We fully support this method, because I think it does inform retailers of what brands they can sell. In section 13, manufacturers and wholesalers incur penalties only if they sell cigarettes in the State of Nevada. However, none of them sell cigarettes in the State of Nevada, so it appears to me, by the wording of A.B. 229, the only penalties that can be assessed against sales of these cigarettes is against retailers. Wholesalers and manufacturers may ship cigarettes to the state for sale, but because they are not retailers, they do not sell cigarettes within the State of Nevada. I do not understand why the penalty clause for the manufacturer is there. The way I read it, it does not really constitute a penalty.

Chair Kirkpatrick:

Are you saying there are no local distributors here in our state?

Ernest E. Adler:

In the northern part of the state there are no wholesalers. This provision imposes heavy penalties on wholesalers for selling cigarettes in the state, which is not effective because the only people who sell cigarettes are the retailers. There is not a penalty that strongly discourages a wholesaler from putting these noncompliant cigarettes into the stream of commerce. That makes it more likely that one of these retailers, if it has a young and inexperienced employee, may accidentally sell these cigarettes.

Chair Kirkpatrick:

Maybe the Commission on Economic Development needs to go out and find us a wholesaler in northern Nevada. How can we, without violating the commerce clause, fine someone in California for selling their cigarettes to our state?

Ernest E. Adler:

You could put a penalty in there for someone who ships noncompliant cigarettes into the state for resale.

Samuel P. McMullen:

In response to the concerns raised about section 13, we are trying to use the word "sale" or "sell" from the chain to the retailer. If you notice in the transition from page 7 to page 8, it actually says the words, "other than through retail sale." It is trying to enforce section 10, which is the prohibition against any sale, wholesale or otherwise, of the cigarettes without the certification. I would be happy to work with you to clarify that, but I think it is correct as it is written. To the extent that a manufacturer, wholesaler, agent, or other person knowingly sells cigarettes other than by retail sale—by transfer, sales, exchanges, or whatever the transaction —may be in violation of this act,

then that would be a penalty on them too. I do not want to delete it because it is an effective portion of the enforcement mechanism. It is designed to catch everything other than retail sale. I would also indicate that Mr. DiCianno, who I believe is here to testify on A.B. 229, could give you some additional help on exactly how all this works.

Ernest E. Adler:

I would want to make it clear, though, that the wholesaler in Sacramento, where the sale to the retailer occurs, is still responsible for complying with this law the way this is written; that would be my only concern.

Someone brought up cigarettes made from hand-rolled loose tobacco; those are now a thing of the past because Mr. McMullen's client, in the new cigarette tax bill in Congress, put such a heavy tax on it that they are now going to be more expensive on April 1, 2009, than regular cigarettes.

Chair Kirkpatrick:

There comes a time when the responsibility lies on the business owner to verify what they are receiving.

Samuel P. McMullen:

We would be happy to add language that clarifies it, but it basically gives the Department of Taxation, the tools to ensure compliance. As in other states, one of those tools would probably be a directory or a listing of those certified fire-safe cigarettes. We think that would be a very good compliance technique and very worthwhile to have retailers looking at whether the cigarettes are fire-safe or fire standard compliant. It is going to be a very normal thing. I have already talked to Mr. DiCianno about it, and I am sure that whatever is appropriate, we will do.

Assemblyman Stewart:

If the 11 other states pass this measure in the next couple of years, is it safe to say that by 2012, or so, all cigarettes will be fire-safe cigarettes, or will you still manufacture some to be sold out of the country? What is the intent? Do you have any thoughts on that?

Samuel P. McMullen:

It is clearly the intent of the major players in the industry that all cigarettes sold become fire standard compliant. In a way they are already moving ahead of the curve in the states that have not, and they very well may be selling those whether the law passes or not. Regarding the allocation of plant space and manufacturing space, and the fact that they may manufacture some that are for non-fire standard compliant jurisdictions, I am not sure whether all the plants are

changing or not. I know they have made a significant retooling in that most of the cigarettes that they manufacture now, at least in the United States, are FSC.

Assemblyman Aizley:

Does it somehow go beyond the civil penalty if someone knowingly manufactures an unsafe cigarette, someone knowingly buys it, and there is a fire leading to a death? Does that sound more like a Class A felony than a civil situation?

Chair Kirkpatrick:

We could probably have Legal give you that answer tomorrow. Are there any questions? [There were none.] Is there anybody else who would like to testify in the neutral position?

Dino DiCianno, Executive Director, Department of Taxation:

The department is neutral with respect to A.B. 229. We have talked to the Retail Association of Nevada, and we have no issue with the amendment. It actually strengthens our enforcement capability. We talked with Mr. McMullen about section 15, with respect to the seizure of noncompliant cigarettes. We would consider them as contraband and would seize them just like any other contraband cigarette.

Chair Kirkpatrick:

Is section 15 okay the way it is?

Dino DiCianno:

Madam Chair, if we could have it clarified that we would have the authority to seize it once we find it. We currently already list, with respect to the master services agreement (MSA), the manufacturers of cigarettes, and if a wholesaler does bring in cigarettes that are not on that list, we would seize them anyway.

Assemblyman Goedhart:

How much revenue do you think is going to be generated by this fee structure?

Dino DiCianno:

I do not know. That is probably a better question for the sponsor of the bill.

Chair Kirkpatrick:

About how many different types of cigarettes are there in the state? Do we have it broken down by that?

Dino DiCianno:

I do not have that information with me here today. That is something that we can put together and send to your staff. Or it may be quicker to have the representatives of the manufacturers here in the hearing go over that with you.

Chair Kirkpatrick:

Are there any other questions? [There were none.] Is there anyone else who would like to testify in the neutral position on A.B. 229?

Assemblyman Ocegüera:

The amendment proposed by the Retailers Association is fine by me; they talked about it with me beforehand. As far as the enforcement parts that Mr. DiCianno was talking about, I am okay with clarifying that for his office as well.

Chair Kirkpatrick:

Are there any questions? [There were none.] We will close the hearing on A.B. 229 and open the hearing on Assembly Bill 483.

Assembly Bill 483: Revises the provisions governing the terms of certain contracts between public bodies and certain design professionals on public works. (BDR 28-932)

Russell M. Rowe, Las Vegas, Nevada, representing American Council of Engineering Companies of Nevada, Las Vegas, Nevada:

Assembly Bill 483 should be a simple bill in the context that we are trying to clarify what we worked out with public entities back in 2005. The language in the bill is really just a clarification of what that agreement was and the intent of the Legislature. Unfortunately, it involves a rather complex area of insurance laws, so I am going to take a bit of time to walk through this to make it clear.

This bill deals with *Nevada Revised Statutes* (NRS) 338.155, which governs contracts between design professionals and public entities. Design professionals are engineers, architects and landscape surveyors. It essentially says what can and cannot be done in these contracts between design professionals and public entities. I need to walk you through a little bit of insurance law 101, not that I am an expert on it, but it really helps put things into context.

There are generally two types of obligations that you can incur as an individual or a business. There are legal obligations, and there are contractual obligations. Legal obligations are imposed by law; by force of law you are liable whether you

sign a contract or not. A good example is professional negligence, such as engineers, attorneys, doctors, and architects. They do not have to sign a contract saying they are going to indemnify somebody; if they are negligent and their negligence causes damage, the law imposes liability on them. The other type is a contractual obligation, where two parties agree that they are going to do something, and if one does not perform under the contract, there is damage. I want to make that distinction, because under insurance law, insurance policies—and specifically professional liability policies, such as for design professionals—cover only legal obligations.

With respect to a professional engineer who obtains a professional liability insurance policy, that policy covers their professional negligence. If the design professional contracts with another party for anything outside the scope of that legal liability, it is not covered necessarily by the insurance contract. It is a key point that I will return to later. That is an introduction to the law that governs these contracts. In NRS 338.155, in subsection 5, it talks about the indemnification provision in relatively standard language. It says that a public entity may require design professionals "to defend, indemnify, and hold harmless" the public entity for any damages caused by the design professional's negligence.

Let me point out two things that relate back to the legal versus, contractual obligation. The term "indemnify" means that the design professional is going to reimburse the public entity for any damages caused by that design professional's negligence. That is exactly what the professional liability insurance policy covers—their legal obligation for damages caused by their negligence. So the contractual provision of indemnification, between the public entity and the design professional, matches the legal obligation of the design professional; in other words, that obligation in the contract is covered by the insurance policy. They match 100 percent, so we are good.

The other reason I want to make that point is to clarify that A.B. 483 in no way gets design professionals out of any liability for damages they cause anybody. We are not talking about them. The problem has been the word "defend." The defense obligation is not a legal obligation, it is not imposed by law, and it is not necessarily covered by the design professional's insurance policy if he has a contract with a public entity and something goes wrong, and there is an allegation of negligence on the design professional's part. And if the public entity says, well, you signed a contract that says you will defend us, and now we are being sued—and we think the claims are due, in whole, to your alleged negligence, and we want you to defend us—the insurance policy of the design professional does not cover that, and the insurer does not have to defend the design professional. The insurance policy of a design professional does not

require the insurer to defend the public entity. Sometimes they will, depending on the facts of the case, but most times they will not, for obvious reasons. If a claim is being made and the public entity thinks it is the design professional's negligence that is at fault, they are obviously conflicted, so the insurance company has an obligation to defend their insured first.

The statute allows public entities to be added as an additional insured on a separate insurance policy of the design professional—not the professional liability policy, but the general liability policy. That is typically done so public entities can be defended by the design professional's insurer. That is on nonprofessional negligence claims. I do not want to make this too complicated. The end result is we have a situation where we have an uninsurable risk. Public entities are saying, defend and indemnify us. Design professionals are saying, we can indemnify you all day—we have insurance coverage for that—but regarding the defense obligation, we cannot guarantee that our insurer is going to defend you; it is not within our control to do that. We can sign contracts all day, and they do sign them, because the choice is take the work or walk away from the job.

So they are going to take the work, and the risk, and it is a very bad idea because nobody is really covered here. The design professional is completely exposed potentially needing to pay out-of-pocket to defend a local government for something they may or may not be liable for. The local government is really at risk, and I say local government because these issues usually come up in the local government context. But the public entity is really exposed, too, because if push comes to shove, most engineers and architects are small business and cannot afford to pay out-of-pocket and defend a local government in a potentially massive lawsuit. Like the Regional Justice Center in Las Vegas, for example; they simply cannot afford to do that. They will end up filing bankruptcy, and the local government is not covered anyway, so no one is covered. Our original legislation, back in 2005, actually just eliminated the word "defend." You cannot put that into these contracts anymore.

There were significant issues with that, so we worked with the Nevada District Attorneys Association and the purchasing agents' association. We came up with a really good compromise. This is what the statute says now. We did not eliminate the word "defend"; you can still put that in the contracts between design professionals and public entities, but we added, if the insurance company for the design professional elects not to defend the public body, then the design professional shall pay the attorney's fees of the public entity in proportion to their liability. You would probably ask, why would design professionals agree to that? They are still on the hook. The difference is, when there is an adjudication of liability and a requirement in the law that the

attorney's fees be paid by the design professional, which is a legal obligation. It wraps back under the professional liability policy, and now it is a covered risk. So we covered the risk that we were once uninsurable for. If we, the design professionals, are liable for 100 percent, 50 percent, or whatever, we shall pay the attorney's fees.

Prior to that statute being changed in 2005, it was the discretionary decision of the judge or jury. You took away that discretion and made it mandatory, so the public entities got covered. They are going to have to pay their attorney's fees up front in the beginning of the case, but in the end, the design professional is liable, and the public entity gets reimbursed its costs in proportion to our liability, so they are covered. The design professional is covered because now it is under his insurance policy. The only problem, since that was adopted, is that we did not say crystal clear that, under that situation, the obligation to defend under the contract would be relieved because you do not need it anymore. That was the whole intent of requiring attorney's fees, because we were going to pay them in the end. We are guaranteeing public entities. We are going to pay your attorney's fees; it is no longer discretionary. Do not make us sign a contract saying we are still going to defend you in that limited circumstance. So all this bill does is make that clarification, that when that situation occurs, and the insurance company elects not to defend the public body, our obligation to defend under the contracts is relieved, but we have to pay their attorney's fees still, if we are liable.

Chair Kirkpatrick:

Does anybody have any questions? [There were none.] NRS Chapter 338 applies only to local government or public works, is that correct?

Russell M. Rowe:

I believe NRS Chapter 338 applies to all public entities, state and local. I am going to have to double-check that, but I think that is correct.

Chair Kirkpatrick:

I remember the legislation from 2005, and it was very contentious. How many of these cases actually happened? Do you know?

Russell M. Rowe:

Not many. And we really would rather that none of them happen because it is such a substantial problem. We do not want to come back to you in a couple of years and say, we had a couple of firms go bankrupt because this happened, and could you please make this change. We would rather address the issue now.

Chair Kirkpatrick:

Does anybody have any questions? Is there anyone who would like to testify in support of A.B. 483?

Russell M. Rowe:

We do have some engineers here and in Las Vegas, and I believe some architects as well.

K. Brad Van Woert III, President, Sheehan Van Woert Bigotti Architects, Reno, Nevada; President, American Institute of Architects, Northern Nevada Chapter, Reno, Nevada:

I am here as an architect, private businessman, and president of an architectural firm in Reno. I am also the president of the American Institute of Architects' chapter for northern Nevada. I am here representing the entire state in this regard as well. We are in favor of Mr. Rowe's comments in total. It is a very fair bill, and as he was saying, it does not get the professional off the hook, but it allows a case to be adjudicated to assign liability. That is where the fairness comes in. With that, I will leave my comments in support.

Chair Kirkpatrick:

Does anyone have any questions? [There were none.]

Fred L. Hillerby, Reno, Nevada, representing American Institute of Architects, Nevada Chapter, Las Vegas, Nevada:

We are in support of A.B. 483. One of the things that might put a real life example to this is something that happened to Mr. Van Woert's firm. It shows what can happen if this law is not changed. I will let Brad describe that to you.

K. Brad Van Woert:

In 2005, we had a contract with a municipal entity. We had a contract disagreement with our landscape architect, and he brought suit against us and the city as well. We were forced, through this indemnification and defense clause, to pay the attorney's fees for the municipality even though it was nothing more than a contract dispute between our firm and the landscape architect. The case went on for three years, and we were successful in winning that case, but we had paid up-front all the attorney's fees for the municipality. Our liability insurance carrier did not cover those defense costs, and in the end, our victory actually left us hanging, because we would have had to counter-sue our landscape architect so they would be liable for those attorney's fees, and we did not. It was an exhausting experience. I enjoyed reading A.B. 483 and understanding the fairness of it. Let the cards be played face up before liability is assigned.

Chair Kirkpatrick:

Does anyone have any questions? [There were none.] Is there anyone else who would like to testify in support of A.B. 483?

Kim A. Sloat, P.E., Vice President, Regional Manager, Harris & Associates, Las Vegas, Nevada:

We are in support of A.B. 483. We want to accept liabilities for our actions. I do not think this bill changes that. We are a small engineering firm and deal with the big guys, like Clark County and other entities. We are supposed to be able to negotiate contracts, but it is difficult because we are small, and in the case of Clark County, there is no negotiation on an indemnification clause. You either take it or you leave it. In today's market, it is tough for any of us to leave it. We have to sign these contracts at the risk of losing our companies, and we do not think that is fair. This bill allows us to accept our liabilities but not totally risk our companies every time we sign a contract. If we go bankrupt, we would put a lot of people out of business and out of jobs. It is a defense issue, as Mr. Rowe mentioned, and it makes us responsible for our negligent actions, our errors and omissions, and we will stand behind that, as we have in the past. Thank you for allowing us to provide support.

Allen Gray, P.E., President, Gray & Associates, Reno, Nevada:

We are a very small civil engineering firm; we employ fewer than 10 people. We provide services to both public and private sector clients, and we are in support of this language, in the sense that the entire issue boils down to the term "defend." If we are required to front the defense cost of a lawsuit against a public entity, our firm has no resources whatsoever to contend with those types of expenses, and it would, in fact, put us out of business. If that were to occur, then it would be a lose-lose situation for everyone, because now we have people on the street and the public agency winds up not defended anyway. By removing the word, "defend," the costs are apportionate to the level of liability and covered by insurance. We can remain in business, the public entity can recover its defense fees, and we all move forward from there. So we support that language change.

Raymond Herweg, P.E., Principal Project Manager, Parsons, Las Vegas, Nevada:

We are one of the ten largest engineering firms in the world. We have concerns with the way the law's current terminology is stated. Even as a worldwide firm, should something happen, our local offices are usually asked to bear the burden of litigation costs, including defense. That could have detrimental effects, even to a local office, because our corporate people would say, it is your office and you need to take care of the situation. We are very much in favor of this legislation being passed. It is to our best benefit. We are not shirking our responsibilities for professional liability whatsoever, but we certainly

need a little protection, because it could not close Parsons, but it could certainly impact our staff and/or our presence in the Las Vegas area.

Chair Kirkpatrick:

Does anyone have any questions? [There were none.] Is there anyone who would like to testify in opposition to A.B. 483?

**Sabra Smith-Newby, Director, Department of Administrative Services,
Clark County, Las Vegas, Nevada:**

Both Mr. Figgins and Mr. Thomson are with the Clark County District Attorney's Office and can speak to this issue much better than I can, so I would like to cede time to them.

Susan Martinovich, Director, Department of Transportation:

[Read from prepared statement ([Exhibit G](#)).]

Chair Kirkpatrick:

Does anyone have any questions? [There were none.] So you do not like a particular section on page 2, line 39? Could someone go back and sue the architect, as well as the state?

Susan Martinovich:

Yes, we could. This brings them initially in to help defend the position, as opposed to the state defending and then losing, and then having to go back against the design professional, instead of everybody being in there at the same time working on the same issue. To answer your first question, we are concerned about lines 21 and 22, but also in subsection 4 of section 1 where it says the contract "must not require the design professional to defend, indemnify, and hold harmless."

Chair Kirkpatrick:

Does anybody have any questions? [There were none.]

Renny Ashleman, Chairman, State Public Works Board:

Our counsel could not be here this morning because she is involved in a lawsuit and they are having a settlement discussion. I know others are going to go into great detail on this topic, so I will try to be very brief. We have not had a lot of litigation. The kind we do have tends to be very large. Since I have been Chairman, and I am on my third term, we have not had any litigation that did not involve, in part, design professional problems. We have very good design professionals; however, it is pretty tough to design these big buildings and not have some problems. This is about marshaling all of the insurance you can to get a settlement. If they are not held liable until later in a separate action or

until after the case is tried, this is not very helpful in marshaling insurance money for a settlement. I noticed that Mr. Rowe, on all but one occasion, was very careful to say insurance companies do not necessarily cover, but A.B. 483 deprives us of the times when they do cover, and that they could be used to marshal coverage. I would be happy to answer any questions.

Chair Kirkpatrick:

Does anyone have any questions? [There were none.] I think the Committee is trying to get their arms around A.B. 483. I remember in 2005 it was hard to understand the beginning of this bill.

Lee Thomson, Chief Deputy District Attorney, Clark County District Attorney's Office, Las Vegas, Nevada:

I have been representing the Department of Aviation since 1985, and I have had more than a little experience with major construction projects in that time. Aside from the billions of dollars of work done at the airport, I was also asked to be involved, at some level, with the Clark County Detention Center and Regional Justice Center projects in the downtown Las Vegas area. I could not agree with Ms. Martinovich and Mr. Ashleman more, speaking specifically to Mr. Ashleman's statements. When we are involved in construction at the Department of Aviation here in Clark County, these are very large jobs, and while we do our best to involve local designers, the designers generally have national sub consultants who are also insured. If this bill were to be passed in its present form, there would be no incentive at all for these insurance companies to ever come forward and participate in settlement negotiations in good faith. We already have an extreme problem getting insurance companies to come to the plate. We have a very large disconnect here.

Under NRS Chapter 338, it is mandatory that public entities arbitrate construction claims with the contractor. There is no similar requirement that the designer be a party to those arbitrations. Designers and the insurance companies will not participate in those arbitrations. We have an arbitration situation where there may be some adjudication of liability, as to the county or other public entity; there is no adjudication of liability to the designer because the designer is not a party. That would require us to go through another, second round of litigation. Litigation of construction claims is tedious, it is long, it sometimes involves millions of documents, and it is expensive.

To ask public entities to foot the bill when quite frankly, the vast majority of construction claims are related to design issues, is unfair. And, for the public entities to ask the taxpayers, who support the public entities, to take care of this problem for the designers, and the insurance companies, is unfair. Let's not kid ourselves that those are the people being protected here most of all. I know

the designers, and I have the greatest respect for people who design communities. They carry a terrible burden, but the fact is, if something gets built and it is designed incorrectly, somebody has got to pay. And this Committee and the Legislature have to allocate who has to pay those costs. The cost to defend is not just attorney's fees; there also is a lot of legwork involved. The design professional, whom the allegation of design error or omission has been made against, has to dig into his records and provide time, staff, and effort. Are we, the county, or another public entity supposed to pay these people to come in and defend their own alleged mistakes? That does not seem fair.

In addition, there are huge defense costs related to expert witnesses. In the Regional Justice Center matter that the county was involved with, there were millions of dollars of costs for expert witnesses brought in to try to defend design issues. Yet there is nothing here that provides for any reimbursement for any of those costs. Is it fair for the taxpayers to not only front but be stuck permanently with all these costs? I would think the answer is no.

I also question whether this bill, as it is written, is intended to be prospective only, or does it apply to current contracts? One of the designers mentioned he did public and private work. There is no such limitation on private contracts. Why should the taxpayers take on this obligation when a private owner can require a designer and his insurance company to do what has been required for years and has more fairness to it?

Chris Figgins, Chief Deputy District Attorney, Clark County District Attorney's Office, Las Vegas, Nevada, representing Department of Public Works, Clark County, Nevada:

I represent the Clark County Department of Public Works. I have negotiated a lot of these professional design contracts, and we are very concerned about the language. All we have asked of these contracts, and the language in the statute, is that the design engineers be responsible for their actions. We have not asked them to go beyond those actions and defend the county for what the county has done; we are asking them to step up to the plate and be responsible for their actions. I am not sure why it was mentioned that we are asking design professionals to bear the burden; we are not. We are asking them to be responsible for what they have caused and what they have created.

With respect to the trier of fact, in saying that you could recover these attorney's fees if the design professional is not part of the litigation, I do not know of any court that is going to rule that the design professional will be responsible for this percentage of the case. They do not do that. Unless you are a party to the proceedings, the courts are just going to rule against the

county and whoever the parties are. As Mr. Thomson said, that opportunity is not even available to us in arbitration, because they are not required to be in those proceedings. So I support what has been said in opposition. We are strongly against this. Assembly Bill 483 as it is written would be unfair to the county and to any local government entity and to the taxpayers. We are simply asking the design professionals to step up to the plate.

Chair Kirkpatrick:

Does anyone have any questions? [There were none.] Just so you two gentlemen know, I asked Legal, and this bill would be prospective. If everything is already in place, you cannot attach a law to make it work.

Ted Olivas, Director, Government and Community Affairs, City of Las Vegas, Nevada:

We are opposed to A.B. 483. Clearly, Mr. Thomson and Mr. Figgins, who I have worked with for many years, are the experts on this topic and have been involved in this at the grassroots level. I was here in 2005, and it was my recollection that the agreement we had was the current legislation that you see in NRS 338.155. So I am a little concerned that we are now trying to go back and make even more changes. This bill is very complex and complicated. If you look on page 2 in subsection 4, you "must not require" the design professional to do things, and then you look in another section and it says "may require" this.

The bottom line here is that the design professionals are performing a service for the local government, and they need to be held accountable for that work. The taxpayer should not bear the burden of an issue they have with their design professional. As Mr. Thomson mentioned, as written, the insurer has no incentive to offer this, so they are not going to. Why? There is risk. So who does that risk go to? It goes to the local government to assume that responsibility. And who are we? We are the taxpayers. So should the taxpayers defend architects and engineers and design professionals? If that is the case, should we then have local governments defend all of the people who we have contracts with? If we have a problem with a contractor on a public works project, should we assume that responsibility as the first step? The answer is absolutely not. I do not know why this would be any different than any other contract that we have.

Karen Storms, City Clerk, City of North Las Vegas, Nevada:

The City of North Las Vegas opposes enactment of Assembly Bill 483 because it relieves the design professional, and certain design-built projects, from a contractual liability to defend a municipality against liabilities stemming from the design professional's negligence, or misconduct, when the professional's insurer

refuses to defend the municipality. A.B. 483 provides an incentive for insurers to refuse to defend public bodies in lawsuits brought about by the design professional's alleged errors.

Jeff Fontaine, Executive Director, Nevada Association of Counties, Carson City, Nevada:

I am also a professional registered civil engineer in the State of Nevada. The Nevada Association of Counties (NACO) is opposed to A.B. 483 for all the reasons that have been stated. County governments hire consulting engineers to provide a service to design a project, whether it is a bridge or building, and if there is a problem with that design and it results in, say, a construction issue in the field that has caused some damage or injury to somebody, now all of a sudden, we have put the county governments in a situation where they have to defend themselves. As was stated previously, these lawsuits are very complex. They drag on for years and in many cases they are very costly. You have to bring in expert witnesses and technical consultants. If a county government hired a design consultant in the first place, it probably means it does not have either the technical capability or the resources to design a project in the first place. But now we have put them in a position where they have to expend all these resources to defend themselves. The other question is, what happens if these cases are eventually not settled, or they are settled but there is no assignment of responsibility or blame. Who gets left holding the bag, in terms of the costs for defending the county? It is the county government; so again, we are in opposition of A.B. 483.

Chair Kirkpatrick:

Does anyone have any questions? [There were none.] I am sure we will have questions after all the testimony is heard. The Committee is just trying to understand the bill. Is there anyone who would like to testify in opposition to A.B. 483?

Javier Trujillo, Intergovernmental Relations Specialist, City Manager's Office, City of Henderson, Nevada:

I want to echo the comments from my local government counterparts. We definitely oppose this bill due to the fiscal impact that we would have as a local government. It would definitely affect our taxpayers. Most of all, A.B. 483 would encourage insurance companies to deny that tender of defense as it currently exists in statute today.

Chair Kirkpatrick:

Does anyone have any questions? [There were none.] Is there anyone else who would like to testify in opposition in either Las Vegas or Carson City? [There were none.]

Russell M. Rowe:

Thank you for your indulgence on this issue. I know it is not the easiest issue to get your arms around, but it does come down to a simple matter. How are you going to proportion this burden, and when does it fall? What was agreed to in 2005, and what this Legislature deemed appropriate, was that rather than have this risk that leaves everyone exposed, let's guarantee the attorney's fees at the end. No one is left hanging with the bag. If the design professionals are liable, they pay. There is not even a question anymore of whether they pay the attorney's fees. The only difference is that you determined it was in the best public policy to have the public entities absorb those costs up front and then, in the end, guarantee their reimbursement. The reason that works is, now it is covered by the design professional's insurance policy. We are covered, the local governments are covered, and the state is covered. There is no reason for us to pay attorney's fees to defend them when we are not liable, but right now, it would fall to that.

In fact, there was a recent Supreme Court decision in California that has separated the indemnification and defense provision, so even if the design professional is not liable, the fact that they signed a defense contract that has a defend clause, they have to pay the entire defense anyway, even if they are not liable. It makes no sense. What we agreed to with the District Attorneys Association, in 2005, guaranteed them their attorney's fees. I was not smart enough to make it crystal clear in the statute that our obligation in that situation would be relieved. When it comes to negotiating those contracts since 2005, nothing has changed. We are still being required to sign the contract, even though we said we will guarantee you attorney's fees in statute. It just does not make any sense. Maybe the solution is that we just take that provision back out; I do not know. What makes sense is what has been proposed here. Get the fees back under the insurance provision for the design professional. Guarantee those attorney's fees of the public body in the end, then everybody is covered.

Chair Kirkpatrick:

Does anyone have any questions?

Assemblyman Goedhart:

One of the opponents of the language said that this was completely different than what is done currently in the private sector, as it relates to design professionals. I saw you shake your head a little bit, so I want to see what the other side of that is.

Russell M. Rowe:

I am glad you brought that up. The difference is in the context between a design professional and a private entity, there is a negotiation that occurs between the two parties, and they work out the language. I can show you hundreds of emails from design professionals to DAs over the last three years, saying, "do you remember what we agreed to on that defense provision, we would like you to take out the requirement to defend in this particular circumstance." The answer is no. There is never a negotiation. However, there is a negotiation in the private sector. That just comes down to leverage. That is what this really comes down to. Particularly for engineers for whom 80 percent of their work is public works projects, they do not have any position to walk away from that work because of a risk that they may be forced to defend; they roll the dice. We are trying to fix that situation, and our legislation in 2005 put it back under the insurance policy. It covers the design professional, and it covers the public entity.

Chair Kirkpatrick:

Does anybody else have any other questions? [There were none.] With that, we are going to go ahead and close the hearing on A.B. 483. Is there any public comment? Is there anything from the Committee? [There was none.]

Meeting adjourned [at 10:05 a.m.].

RESPECTFULLY SUBMITTED:

Michelle Smothers
Committee Secretary

APPROVED BY:

Assemblywoman Marilyn K. Kirkpatrick, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Government Affairs

Date: March 30, 2009

Time of Meeting: 8:04 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 301	C	Luis F. Valera	Resolution letter and newspaper article
A.B. 229	D	Assemblyman John Ocegüera	Prepared testimony
A.B. 229	E	Raymond B. Bizal	Prepared testimony and pictures
A.B. 229	F	Lea Tauchen	Proposed amendment
A.B. 483	G	Susan Martinovich	Prepared testimony