

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-fifth Session
February 4, 2009**

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:34 a.m. on Wednesday, February 4, 2009, in Room 2149 of the Legislative Building, Carson City, 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 Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Kathleen Swain, Committee Secretary

OTHERS PRESENT:

The Honorable James W. Hardesty, Chief Justice, Nevada Supreme Court

CHAIR CARE:

We are privileged today to have the Chief Justice of the Nevada Supreme Court present for an informational hearing on matters relating to the Judicial Branch.

THE HONORABLE JAMES W. HARDESTY (Chief Justice, Nevada Supreme Court):

It is a privilege to act as a spokesperson for the Judicial Branch of government for the State of Nevada. I have a PowerPoint presentation outlining various bills the Judicial Council of the State of Nevada and the Nevada Supreme Court are presenting to the Legislature ([Exhibit C](#)).

I have chaired the Advisory Commission on the Administration of Justice (the Commission) that was created and revitalized by A.B. No. 508 of the 74th Session. I suggest you consider a joint meeting with the Assembly Committee on Corrections, Parole, and Probation. They have asked me to provide a presentation on the outcome of the Commission's work and its recommendations. A number of recommendations are being proposed to the Legislature.

Our first proposal is to amend the Nevada Constitution to allow the Legislature to establish an intermediate appellate court. We hope this Legislature passes the second leg of Senate Joint Resolution (S.J.R.) 9 of the 74th Session and presents it to the people in 2010 for a vote, [Exhibit C](#), page 1, slide 2.

SENATE JOINT RESOLUTION 9 OF THE 74TH SESSION: Proposes to amend the Nevada Constitution to allow the Legislature to establish an intermediate appellate court. (BDR C-661)

For clarification, S.J.R. 9 of the 74th Session amends the Constitution empowering this Legislature to structure the intermediate appellate court. The Supreme Court continues to have cases filed in record numbers. The disposition rate is significant in [Exhibit C](#), page 2, slide 3. The number of cases filed set a record in Nevada for the number of cases per appellate judge per year.

In January 2005 when Justice Ron Parraguirre and I took office, the inventory of the Supreme Court was 1,515 cases. Today, it is over 1,750. This is a concern to the Court, the Legislature and the people because it means a longer time for disposition of appeals. In the last four years, the Court has adopted a fast track for child custody appeals, streamlined our caseload and changed our docket management to improve efficiency.

Utah has three-member panels, an Intermediate Appellate Court and a Supreme Court of five. Look at the number of cases filed each year and the number of cases per appellate judge per year in [Exhibit C](#), page 2, slide 4.

The Intermediate Appellate Court Business Plan uses a unique system called a push-down court, [Exhibit C](#), page 3, slide 5. Under this system, we would take advantage of the existing administrative structure. A push-down court means cases would continue to be filed with the Nevada Supreme Court, and through our screening process, we would determine which cases should be heard by an

intermediate appellate court rather than the Supreme Court. These cases deserve an appeal, but they do not result in issues of first impression requiring the Supreme Court to address them. In our report, we identified approximately 900 of the 2,200 cases that could be heard by an intermediate appellate court.

We propose a three-judge intermediate appellate court to be located on the seventeenth floor of the Regional Justice Center in Las Vegas, which results in no facility cost. It would cost about \$1.6 million for personnel, [Exhibit C](#), page 3, slide 5. In this biennium, our Court will have reverted over \$3 million back to the State of Nevada. If the intermediate appellate court had been in place, we could have paid for it with our budget and the money we have reverted. This is almost a revenue-neutral issue. We hope this Legislature will allow funds generated from the judicial system to stay in the judicial system.

CHAIR CARE:

There was no resistance to S.J.R. 9 of the 74th Session. This Committee intends to get this out as quickly as possible. Language in S.J.R. 9 of the 74th Session empowers the Legislature to create an appellate court of at least three judges.

CHIEF JUSTICE HARDESTY:

Our report suggests a three-judge intermediate appellate court, but the Legislature could increase that number upon a showing of need by the court system.

We have had many meetings with county administrations to present a jointly agreed-upon judicial business plan, which would address the issue of how to pay for new judges. It also provides a needed resource for rural counties to deal with a number of judicial needs. We are asking the Legislature to revisit civil filing fees—not raised since 1993—for cases such as construction defects, class actions and Business Courts. We suggest the revenue from increased filing fees focus on needed judicial resources and new judges that would result in a shorter time to disposition.

Assembly Bill (A.B.) 64 will add one general jurisdiction judge to the Second Judicial District. It proposes seven new general jurisdiction judges and two family judges in Clark County, [Exhibit C](#), page 3, slide 6. That mix could change based on caseload and case configuration. Nevada is experiencing a downturn in criminal case filings for felonies and gross misdemeanors, which

has resulted in our prison population flattening and declining since the Seventy-fourth Session. It also allows the judicial system to address serious civil needs where the filings are increasing.

ASSEMBLY BILL 64: Increases the number of judges in the Second and Eighth Judicial Districts. (BDR 1-371)

You received a report regarding the Business Court and the five recommendations to the Legislature by the Legislative Commission's Subcommittee to Study the Benefits, Costs, and Feasibility of the Implementation of Courts of Chancery. The fundamental issue the Subcommittee needed to resolve was whether the Legislature embark upon a chancery court system or support and promote the Business Court system that began several years ago. Your Subcommittee concluded the Business Court in Nevada has been extremely successful. It has attracted business to Nevada and allowed a shorter time to disposition.

Your Subcommittee encouraged the Nevada Supreme Court to adopt rules requiring Business Courts to issue written opinions and set rules on the citation and precedential value of those opinions, [Exhibit C](#), page 4, slide 7. The Supreme Court is receptive to that request. However, an opinion with precedential value requires an enormous amount of judicial resource. There are two Business Court judges in Las Vegas and two in Washoe County. Their heavy caseload prevents them from preparing opinions with published quality. They need additional law clerks and resources to accomplish that. The Judicial Business Plan would promote and respond to this request and expand Business Court capabilities with funds generated through civil filing fees.

The Subcommittee also offered legislation requiring the publication of Business Court opinions. I urge you to reject that proposal. There are alternatives for presenting opinions. Federal Supplements are issued by the United States District Court. We are considering that approach. The Business Court judges have discussed three other approaches. The Supreme Court would like to select the best approach rather than have the Legislature set it out by statute or resolution. I ask you to accept the representation of the Chief Justice of the Supreme Court that if we have the resources, we will initiate rules to accomplish published opinions in the Business Court.

The rule-making authority of the Court is a separation of powers issue, and we urge you to support that approach. We ask the Legislature to allow for flexibility and let the Court, working with its Business Court judges, develop an appropriate system for the publication of opinions.

CHAIR CARE:

We realize this is a tricky subject. We do not want to infringe on the powers of the Judicial Branch. Senate Bill (S.B.) 5 contains the language as to the publication of written opinions. It has not been scheduled for a hearing.

[SENATE BILL 5](#): Requires the publication of the written opinions of a business court under certain circumstances. (BDR 1-179)

CHIEF JUSTICE HARDESTY:

I have reviewed the bill. I am not sure you need a commitment on the record from the Chief Justice of the Supreme Court that if resources are provided through the Judicial Business Plan as we suggest, a primary focus of the Court will be to expand and respond to Business Court needs and recommendations of the Subcommittee on which you sat.

I want to identify areas of concern to the citizens of this State, particularly the citizens in Clark and Washoe Counties. Litigants in a lawsuit want to know when their lawsuit will come to an end. The American Bar Association (ABA) prescribed time to disposition standards. In civil cases, the court should dispose of all cases within 24 months; in criminal cases, within 12 months. In Clark County, with the 13 civil judges, just under 50 percent of cases are resolved within 12 months, but less than 80 percent of cases are resolved in 24 months, [Exhibit C](#), page 4, slide 8.

In Clark County, it takes over three years to get a trial date in most civil cases. We are concerned about this. By adding five civil judges, we can achieve the ABA standards as in [Exhibit C](#), page 4, slide 8. The Seventy-fourth Legislature added five Family Court judges in Las Vegas. The Family Court represents over 45 percent of case filings in the State. We need additional Family Court judges. Under the judicial business plan, these judges would be added in January 2011. The same holds true with criminal cases in the Eighth Judicial District Court, [Exhibit C](#), page 5, slide 9. By adding three additional criminal judges, we can achieve the ABA standards.

Time to disposition in the Second Judicial District Court in civil and criminal cases falls short of ABA standards, [Exhibit C](#), page 5, slide 10. It is interesting to note the number of lawyers in our State is increasing by 6 percent per year, [Exhibit C](#), page 6, slide 12.

The Court wants to address the issue of revenue by increasing civil filing fees across the board for various issues and subject matters. We also propose a discretionary fee of \$20 for court security that counties may opt into or not, [Exhibit C](#), page 7, slide 13. The chart in [Exhibit C](#), page 7, slide 14 compares Nevada filing fees with those of other western states and shows our proposed filing fees.

We do not charge any fee for a summary judgment motion and other civil motions, which often require more time than a trial. A great example is the motion for a complex designation, which changes the character of the case from a usual civil complaint to a complex case. The level of responsibility of the judicial system to deal with these complex cases is higher, and the filing fee should be appropriately increased for costs associated with that effort.

I asked former probate Judge Peter Breen the amount the Second Judicial District Court monitors in dollars and trusts. His response was close to \$6 billion. Our probate fee is significantly below the probate fee charged in other jurisdictions. We propose raising it to a more comparable level.

The chart in [Exhibit C](#), page 8, slide 15 shows an estimated increase in the civil filing fee revenue by district with an estimate of \$100,000 per year in the Seventh Judicial District Court. The Seventh Judicial District Court does not need another judge, but they do need new courthouse facilities. This source of revenue provides opportunities for bonding purposes and technology needs. The revenue would allow other rural districts to get into the twenty-first century.

Last December, the Nevada Supreme Court entered a rule requiring all courts in this State to conduct hearings in routine civil matters by telephone or videoconference. This enabled lawyers to attend their hearings by telephone or videoconference rather than traveling all over the State, which saved money. This is an enormous benefit to litigants. Most importantly, we make urban lawyers available to rural counties, which provides access to justice and pro bono help to the poor in those communities.

We discovered counties that do not have telephone systems capable of handling a conference call. These are areas where we can improve the system with resources generated by increased filing fees.

I urge the Legislature to consider the expansion and continuation of the Senior Judge Program. The Senior Judge Program has been an enormous benefit to the court system. We have 21 senior judges who are paid between \$88 and \$100 per hour, depending on their salary when they took senior status. If the Legislature extends the critical need statute, these judges can remain in the Public Employees' Retirement System while they continue as senior judges in our system.

I present my testimony summarizing contributions to the judiciary provided by senior judges in [Exhibit C](#), page 9, slide 17. If we did not have Judge Breen and Judge Archie Blake, some counties would not have drug and mental health courts. Senior judges in Clark County developed a program to help settlement programs in Family Court, which enabled the sitting elected judges to handle trials, [Exhibit C](#), page 9, slide 17.

The Seventy-fourth Session of the Legislature adopted Nevada Revised Statute (NRS) 484.37941, which recognized a successful program in Clark County dealing with third-time, driving under the influence (DUI) offenders. Upon successful completion of the program, the felony consequence of the third-time DUI is reduced to a misdemeanor. Prior to the Seventy-fourth Session, there was no statutory support for that.

An issue developed in rural communities questioning the implementation and constitutionality of that statute. I have provided copies of *Stromberg v. Dist. Ct.*, 125 Nev. Adv. Op. No. 1, January 29, 2009 ([Exhibit D](#)), and *Savage v. Dist. Ct.*, 125 Nev. Adv. Op. No. 2, January 29, 2009 ([Exhibit E](#)). These cases resolve some uncertainties surrounding NRS 484.37941. The Court held that the statute is constitutional. The Court also resolved the issue of whether the offense had occurred before or after July 1, 2007.

Most significantly for rural communities, the Court resolved the issue of whether a county was required to set up an unfunded mandate for a DUI program. From the plain language of the statute, the Court concluded that was not necessary, and the Legislature did not require it. Instead, the court can compel a program as a condition of probation by the Department of Public

Safety, Division of Parole and Probation. The individual defendant has to arrange the treatment program, and the Division of Parole and Probation must supervise them.

As a result of the *Stromberg* and *Savage* cases, you may not have to consider S.B. 33 in [Exhibit C](#), page 9, slide 18, and the program you envision will carry forward under these new rulings.

SENATE BILL 33: Revises the provisions governing the administration of programs for the treatment of alcoholism or drug abuse for certain offenders with third offenses of driving under the influence. (BDR 43-399)

SENATOR MCGINNESS:

Let me reaffirm that you said if someone is in Caliente or Panaca, and there are no DUI programs there, it is still their responsibility to find or get to a program.

CHIEF JUSTICE HARDESTY:

Yes. Rural district court judges work with urban district court judges to transfer supervision of those defendants. I acknowledge that if an individual is living or working in a rural community, access to those programs is a problem. The Commission is going to discuss this issue. These two cases say the judge should consider the individual's right to the ultimate reduction in that penalty from a felony to a misdemeanor if they successfully complete the program. Judges in rural communities want to make sure the individual is supervised. These cases impose that obligation on the Division of Parole and Probation.

SENATOR WIENER:

That was my bill. Thank you for the clarity. I appreciate the Court's support to make sure we had statutes to support practices. Thank you for making it a better program. The evidence was overwhelming in support of continuing this option for people who could be rehabilitated.

SENATOR MCGINNESS:

When drug courts were only in Clark County, I wondered whether it was fair for those picked up for drugs in Pershing, Churchill or Humboldt Counties. They just went to prison. Are we setting up the same situation for a person who has a third-time DUI and lives in a rural community or county that does not have those

programs? Are we establishing a double standard if the programs are unavailable in a rural community?

CHIEF JUSTICE HARDESTY:

That is precisely the point of these cases. Indeed, justice should be fair and equal throughout the State and not just in urban counties. Defense lawyers can find programs for people in the rural communities. It may require the individual to go to some extra effort. These programs are expensive, and they are a long-term commitment.

The Division of Parole and Probation needs the help of this Legislature. The Commission report states they are understaffed and lack resources, which is a public safety issue.

Assembly Bill 63 in [Exhibit C](#), page 10, slide 20 allows the appointment of masters by justice courts to hear certain cases pursuant to rules for adoption by the Supreme Court. The masters would be available to hear many routine traffic cases. It is critical to have additional judicial resources to deal with those cases. Your support of this bill would be an enormous help, especially to the limited jurisdiction judges.

Senate Bill 34 is proposed by the Judicial Council of the State of Nevada. This bill makes certain changes to the statutes concerning the use of court reporters in certain proceedings, [Exhibit C](#), page 11, slide 21. It would permit justice courts to use sound recording equipment rather than a court reporter at the discretion of the court. This rule would not apply in capital cases because daily transcripts are needed.

ASSEMBLY BILL 63: Makes various changes to provisions regarding justice courts. (BDR 1-398)

SENATE BILL 34: Makes certain changes concerning the use of court reporters in certain court proceedings. (BDR 14-397)

SENATOR WIENER:

In the event of a technical problem with these recordings, is there a backup to ensure the record is preserved?

CHIEF JUSTICE HARDESTY:

Yes. Numerous courts throughout the State use the Jefferson Audio Video Systems. They are successful and have good backup systems. This bill allows the courts to exercise their discretion, which improves availability and addresses some costs.

Assembly Bill 99 makes changes relating to the security and safety of participants in the legal process, [Exhibit C](#), page 12, slide 23. The primary champion of this bill is Family District Court Judge Chuck Weller. District Judge Weller was the victim of a shooting in connection with a Family Court matter. This bill puts federal legislation adopted in January to protect federal judges at a state level. The Legislature should be aware that threats against judges or their staff or witnesses are a real phenomenon in the State of Nevada.

ASSEMBLY BILL 99: Makes various changes relating to the security and safety of participants in the legal process. (BDR 15-410)

SENATOR WASHINGTON:

You indicated this bill mirrors federal legislation already enacted.

CHIEF JUSTICE HARDESTY:

Yes. It codifies the first portion of the federal legislation dealing with increased penalties for offenses in the legal process. It prohibits threats against those in the legal process and the filing of false liens.

SENATOR WASHINGTON:

What protection aspect provides security for threats?

CHIEF JUSTICE HARDESTY:

We have proposed an optional \$20 security fee to deal with that subject in A.B. 65, [Exhibit C](#), page 7, slide 13. The district courts have bailiffs, but bailiffs are not available to deal with some of the necessary personal protections.

ASSEMBLY BILL 65: Provides for the collection and disposition of additional court fees. (BDR 2-372)

SENATOR WASHINGTON:

Are there any federal funds to provide protection or security?

CHIEF JUSTICE HARDESTY:

Federal funds are allocated, but not funded. We have made requests for federal funds, and we will continue to do so, but it is not funded.

CHAIR CARE:

I suggest amendments may not be acceptable on that bill because A.B. 99 is being considered in the Assembly.

CHIEF JUSTICE HARDESTY:

I offer the same advice on our civil-filing fee bill because when you see a revenue source in this environment, the inclination is for everyone to participate. There is a direct connection between the revenue generated and the improvements from funds generated within the system.

An issue that arose during the Conference of Chief Justices was a need to improve the collection of fees, fines and victim restitution. In the 110th Congress, a bill was proposed to extend the federal intercept that intercepts child support obligations from tax refunds to cover fees, fines and victim restitution owed to a state. The Conference of Chief Justices unanimously passed a resolution urging Congress to adopt the federal intercept bill and extend it to the collection of fees, fines and victim restitution.

I will ask this Legislature to adopt a resolution to send to our Congressional Delegation urging them to do this as part of the proposed stimulus package. A significant amount of money collected through the federal intercept program could go to the State Permanent School Fund.

SENATOR AMODEI:

Last session we heard a proposal requesting the addition of a district court judge at no cost to the State. We passed it out of this House, and then it got killed in the Assembly. I see A.B. 64 talks about more judges. Was there any discussion of that issue in Nye and Mineral Counties? What is the status of that?

CHIEF JUSTICE HARDESTY:

The Judicial Council considered resubmitting that bill, but we did not have a consensus from the judges or county commissioners in Nye, Mineral, Churchill and Lyon Counties on how to proceed. I understand another bill has been submitted like the one that failed last session. Our analysis after the last session

indicated they did not need another judge. However, there would be a benefit to realigning the districts, such as access to justice and travel issues.

SENATOR WASHINGTON:

Has a concern come up at the municipal or justice courts that deals with giving judges the discretion to determine the sentence for domestic violence?

CHIEF JUSTICE HARDESTY:

I am not aware of that concern. There is a tendency on the part of the Legislature to restrict a judge's discretion in sentencing. I caution against doing that. I will investigate this and get back to you.

SENATOR WASHINGTON:

I am anxious to hear your report regarding sentencing structure.

CHIEF JUSTICE HARDESTY:

The conclusion is, truth-in-sentencing statutes have worked out pretty well. We have identified some consequences. When you decide to criminalize behavior, you must also debate the sentencing length. As a consequence, you do not always set appropriate sentencing ranges for criminal behavior. The Commission suggests that—while it is not recommending a reconfiguration of crimes within Category B—their first responsibility is to reconfigure crimes within other categories and reevaluate sentencing lengths.

SENATOR WASHINGTON:

The overall intent in 1995 was to make sure those violent criminals served the appropriate time. I hope the Commission followed through with that intent.

CHIEF JUSTICE HARDESTY:

The Commission asked, "What is a Category E offender doing in the Nevada State Prison?" The concern was whether that is an appropriate use of money and whether that offender could have been dealt with differently if programs were available.

CHAIR CARE:

Every session we receive several bills with language saying the court "shall," and we discuss whether the word should have been "may." We need to determine how the sponsor of a bill decides what conduct is a Category B, as opposed to Categories C or D.

CHIEF JUSTICE HARDESTY:

That is one of the recommendations of the Commission. If the Legislature does not debate that, you have the unintended consequence of an individual being sentenced to a Category B length whereas it could have been a Category C or Category D. You may have a person serving a sentence longer than necessary, and that is a cost to the State.

SENATOR WASHINGTON:

Is there a cost shift from the State prison to Parole and Probation with a sentence reduction if that individual goes on probation? Are we really saving money or shifting the cost from one department to the next?

CHIEF JUSTICE HARDESTY:

The Legislature will have to face this problem. There might be an opportunity to shift money from the Department of Corrections to Parole and Probation for supervision. The problem is that the Department of Corrections is not adequately funded. The Department of Corrections is spending \$8.2 million in overtime costs. Our analysis said if the vacant positions were filled and people were on straight time, \$2.1 million could be saved. The Department of Corrections and the Division of Parole and Probation are not adequately funded. That is a public safety issue.

SENATOR PARKS:

Following up on your comment, not only do we need additional funding for both the Division of Parole and Probation and Department of Corrections, but we also need to provide for these programs to help people put their lives back on a proper course.

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CHAIR CARE:

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

RESPECTFULLY SUBMITTED:

Kathleen Swain,
Committee Secretary

APPROVED BY:

Senator Terry Care, Chair

DATE: _____