MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
April 7, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:41 a.m. on Tuesday, April 7, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington

COMMITTEE MEMBERS ABSENT:

Senator Mark E. Amodei (Excused)

STAFF MEMBERS PRESENT:

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

OTHERS PRESENT:

Mark Woods, Deputy Chief, Division of Parole and Probation, Department of Public Safety
Josh Martinez, Las Vegas Metropolitan Police Department
Jason Frierson, Chief Deputy, Office of the Public Defender, Clark County
Steve Holloway, Associated General Contractors, Las Vegas Chapter
Richard Peel, Subcontractors Legislative Coalition
Christopher R. Childs, Real Property Law Section, State Bar of Nevada

Dan Musgrove, National Association of Industrial and Office Properties
John Sande, IV, Jones Vargas
Frank W. Daykin, National Conference of Commissioners on Uniform State Laws
David F. Kallas, Director of Governmental Affairs, Las Vegas Police Protective Association
Ronald P. Dreher, Government Affairs Director, Peace Officers Research Association of Nevada
Ron Cuzze, President, Nevada State Law Enforcement Officers' Association
Terrence McAllister, President, North Las Vegas Police Officers Association
Jutta Chambers, Police Chief, City of Henderson
Paul T. Howell, Undersheriff, Douglas County Sheriff's Department
Frank Adams, Executive Director, Nevada Sheriffs' and Chiefs' Association
James Miller, Sheriff, Storey County; President, Nevada Sheriffs' and Chiefs' Association
Pat Dolan, Washoe County Sheriff's Office
Mike Snyder, Director of Labor Relations, Human Resources Division, Las Vegas Metropolitan Police Department

CHAIR CARE:
We will begin the work session with Senate Bill (S.B.) 221. We all have our work session documents (Exhibit C, original is on file in the Research Library). Mr. Wilkinson, we have the amendment that was a rewrite of the bill, Exhibit C, pages 3-6. Please give us an idea what this bill would do.

SENATE BILL 221: Establishes a program of parole secured by a surety bond. (BDR 16-926)

BRADLEY A. WILKINSON (Chief Deputy Legislative Counsel):
As originally drafted, the bill is patterned closely after an existing program of probation secured by a surety bond. That program has not been used since first enacted in 1995 as part of S.B. No. 416 of the 68th Session. The proposed amendment would eliminate the substance of the bill as it is. Under the new proposal, someone who is eligible for parole would continue to be supervised by the Division of Parole and Probation. However, the person would be able to enter into a surety bond, which would guarantee that if the person absconded, for example, the surety bond company would track him down. If the person violated any condition of parole, there would be a penalty for each breach, Exhibit C, page 6. There would not be a privatization of the parole function as in the original bill.

SENATOR WIENER:
Often the family would help provide the funds for the surety bond. If the family pledged a house or something comparable for collateral to secure the security bond, would the family not be liable if there is a skip?

MR. WILKINSON:
The family would be liable. The intent is to encourage someone to comply with the conditions under penalty of having the family lose their house.

MARK WOODS (Deputy Chief, Division of Parole and Probation, Department of Public Safety):
We are concerned that in the amendments, it appears they would have no authority to do community work with the parolee out in the community or home visits. In speaking with Connie Bisbee of the State Board of Parole Commissioners, there does not seem to be a vehicle to advise the Parole Board of a parolee's inactions regarding some of his special conditions. If a parolee is arrested, we want to know who would advise the Parole Board—because the clock starts ticking at that time. They have federal rights at that time. That does not seem to be captured here.

SENATOR MCGINNESS:
If this is put in place, will the parolee be serving two masters?

MR. WOODS:
That is our understanding.

CHAIR CARE:
We will now address S.B. 262, Exhibit C, page 7. This bill prescribes penalties for the cultivation of marijuana in greater amounts than allowed for medical use. Senator Copening sponsored this bill. We have proposed amendments from Jason Frierson, Exhibit C, page 9, and the Las Vegas Metropolitan Police Department (LVMPD), Exhibit C, page 13.

SENATE BILL 262: Prescribes penalties for the cultivation of marijuana in greater amounts than is allowable for medical use. (BDR 40-1107)

SENATOR ALLISON COPENING (Clark County Senatorial District No. 6):
The primary concern of the Clark County Public Defender's Office was not to target the casual user of marijuana. This bill was designed for cultivators of

marijuana who are growing large amounts for profit. It does not have anything to do with the medical marijuana law. The language, "greater amounts than is allowable for medical use," was to protect those who are growing for medical marijuana purposes.

The LVMPD and the Public Defender's Office are not in agreement with their amendments. The LVMPD's amendment made 1 to 25 marijuana plants a gross misdemeanor, Exhibit C, page 14. In the original bill, it was a felony. The amendment made 25 to 75 marijuana plants a Category E felony, Exhibit C, page 14. They have exempted everything else below that.

Jason Frierson of the Clark County Public Defender's Office's amendment, Exhibit C, page 9, has 25 to 50 marijuana plants listed as a gross misdemeanor, which is in conflict with LVMPD's amendment. They want that to be a Category E felony. Under section 2, Exhibit C, page 10, Mr. Frierson's amendment has a different penalty for one ounce to one pound of marijuana. It says, "... a person who is convicted of the possession of greater than 1 ounce but less than 1 pound ...," is a gross misdemeanor on the first offense. Currently, the law says anything over one ounce is a felony. This eases up on the law some. These are the differences between the amendments.

CHAIR CARE:
I have difficulty that we did not receive any testimony regarding the proposed section 2 from Mr. Frierson, Exhibit C, page 10. This is an effort to relax the law more. The only other difference is 25 to 50 plants is a gross misdemeanor in Mr. Frierson's amendment, Exhibit C, page 9, and 1 to 25 plants is a gross misdemeanor in LVMPD's amendment, Exhibit C, page 14. Do you have a recommendation?

SENATOR COPENING:
My recommendation is to go with LVMPD's amendment. It is reasonable that 1 to 25 plants is a gross misdemeanor, and 25 to 50 plants is a low-grade felony. They did work with the Public Defender's Office to increase the number of plants, thus addressing their concern that the casual user would not be targeted as a cultivator.

CHAIR CARE:
Please refresh our memory. I am trying to understand the difference between the one and five plants as the threshold and the size of the plant. There was testimony about how many ounces are on a typical plant.

JOSH MARTINEZ (Las Vegas Metropolitan Police Department):
It can vary on a plant, but my testimony was from two ounces to one pound. It all depends on the size of the plant and how well you can grow it. Some could get one pound off a plant and make $4,500 on one plant, depending on the market price. Nowadays, there are many varieties of marijuana.

JASON FRIERSON (Chief Deputy, Office of the Public Defender, Clark County):
My recollection was a mature plant could yield one to two pounds. Part of the difficulty is different types and maturity levels of plants create discrepancies in yield. We received direction to get an idea of the typical cases. Some might yield a pound or two, and some might yield significantly less.

MR. MARTINEZ:
One to 25 plants would address the concern of immediately jumping into felony land. Starting off with a gross misdemeanor would be adequate.

CHAIR CARE:
I will entertain a motion.

> SENATOR COPENING MOVED TO AMEND AND DO PASS AS AMENDED S.B. 262 WITH THE AMENDMENT FROM THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT.
>
> SENATOR WIENER SECONDED THE MOTION.

SENATOR PARKS:
Is the April 3 proposed amendment the wording from LVMPD, Exhibit C, page 13?

SENATOR COPENING:
Yes, that is correct.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARE:
We will now address S.B. 350, Exhibit C, page 18. This is the bill from the Business Law Section of the State Bar of Nevada. I received an e-mail from Robert Kim saying there is no need to revise sections 1, 81 and 82 of the bill regarding the attorney-client privilege, Exhibit C, page 20. We have the clarifying amendments from Mr. Kim, Exhibit C, page 21.

SENATE BILL 350: Makes various changes relating to business. (BDR 7-1118)

LINDA J. EISSMANN (Committee Policy Analyst):
We also have the amendment from Scott Anderson at the Secretary of State's Office, Exhibit C, pages 31-35.

CHAIR CARE:
We have the two proposed amendments from the Business Law Section of the State Bar of Nevada, but that has changed with the e-mail from Mr. Kim, Exhibit C, page 20, and the amendments proposed by the Secretary of State's Office, Exhibit C, pages 31 through 35. I will entertain a motion.

SENATOR WASHINGTON MOVED TO AMEND AND DO PASS AS AMENDED S.B. 350 WITH BOTH AMENDMENTS FROM THE SECRETARY OF STATE'S OFFICE AND MR. KIM WITH SECTIONS 1, 81 AND 82 TO REMAIN IN THE BILL.

SENATOR PARKS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARE:
We will now address S.B. 352, Exhibit C, page 36. We have a mock-up, Exhibit C, page 38.

SENATE BILL 352: Makes various changes to provisions governing mechanics' and materialmen's liens. (BDR 9-866)

STEVE HOLLOWAY (Associated General Contractors, Las Vegas Chapter):
We have met and reconciled the differences between the groups testifying against our proposed bill. We propose to substitute the language from Assembly Bill (A.B.) 501 for the language in S.B. 352. We provided you with proposed Amendment 4010, Exhibit C, pages 38 through 64. The entire industry is behind this bill with these changes.

ASSEMBLY BILL 501: Revises provisions governing mechanics' and materialmen's liens. (BDR 9-1159)

CHAIR CARE:
Mr. Peel, do you agree with that?

RICHARD PEEL (Subcontractors Legislative Coalition):
Yes.

CHAIR CARE:
What happens to A.B. 501 if this bill gets through the Senate?

MR. PEEL:
It will go away if this goes through the Senate.

CHAIR CARE:
I will entertain a motion.

SENATOR WIENER MOVED TO AMEND AND DO PASS AS AMENDED S.B. 352 WITH PROPOSED AMENDMENT 4010.

SENATOR PARKS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARE:
I will open the hearing on S.B. 338. This was a product of an interim study by the Real Property Law Section of the State Bar of Nevada.

SENATE BILL 338: Authorizes a landlord who leases or subleases any commercial premises to dispose of any abandoned personal property left on the commercial premises under certain circumstances. (BDR 10-1152)

CHRISTOPHER R. CHILDS (Real Property Law Section, State Bar of Nevada):
We support S.B. 338. I will read from my written testimony (Exhibit D).

CHAIR CARE:
When a tenant defaults and abandons or surrenders the property and leaves behind equipment or inventory, the landlord relies on existing statute applicable specifically to residential situations, but not commercial situations because, absent a bill like this, there are no statutes governing the commercial context. Is that correct?

MR. CHILDS:
That is correct. *Nevada Revised Statutes* (NRS) 118A.460 specifically applies to residential tenancies. Absent this bill, there is no process in NRS dealing with abandoned personal property in the commercial context.

CHAIR CARE:
Are the provisions in this bill applying specifically to commercial tenants and landlords the same as provisions in NRS regarding residential property?

MR. CHILDS:
That is correct, with the exception of a few minor language changes to make the statutory language more clear. The substance and processes are the same as in the residential statutes.

SENATOR WIENER:
When we have something similar to this, there is often a notice provision. Does the abandonment itself serve to start the 30-day process? Ordinarily, there would be a notice before destroying someone's property.

MR. CHILDS:
Most practitioners in this area would send a notice in the beginning and inform the tenant the property would be stored for 30 days. After that time period, an additional notice would be given. As it is drafted now, you could make an argument that the 30-day clock begins when the abandonment occurs. I am not sure how you would prove that without giving a notice. Once the 30-day period has lapsed, a landlord is required to give the tenant 14-days notice before he has the ability to do anything with the property. The mechanism is there for providing the notice. The smart practice would be to send a letter to the tenant establishing the fact that the 30-day clock has begun.

SENATOR WIENER:
It sounds like it is a practice to notify a tenant by letter. Should we include that in the statute so it is the same for everyone and not just a common practice?

MR. CHILDS:
We did not discuss that issue as a Committee when we were drafting this bill. The language should not be different for a commercial property than for residential property. I would not be opposed personally to adding that to this bill, but it would make the process different and more difficult for commercial landlords than residential landlords. It makes the language different. I do not know if it makes it different in practice, but it makes the language different.

SENATOR MCGINNESS:
Section 2, subsection 1 of the bill says, "... unless the owner of the personal property has expressed an intent in writing to return for the personal property." What does that do to the time period? Does he have 30 days from the time of the letter?

MR. CHILDS:
The property is not deemed abandoned if the tenant has provided that written notice. If the landlord gets a written notice, then he is not in an abandoned property situation and would have to deal with the tenant regarding the property outside this law. This only addresses situations where the property has been abandoned, and there is no intent expressed by the tenant to return for the property.

SENATOR MCGINNESS:
If a tenant sends the landlord a letter on the first of the month, can the tenant wait six months, or is the agreement outside of this? Could the landlord call and say he is going to put it in storage?

MR. CHILDS:
That is exactly what would happen. It is like so many other issues in the commercial landlord-tenant situation. There is no law to address that situation, and you would be left to work it out with the tenant outside of this bill.

SENATOR WIENER:
The economy has prompted a different kind of need you might not have anticipated a year ago. How does nonpayment of rent play into this? Could that start the clock ticking because letters have been sent and the tenant is in arrears? At what point when they are in arrears do you consider the relationship severed and the property abandoned?

MR. CHILDS:
The current economic circumstances have made this bill more relevant. The tenancy of a commercial tenant will terminate either through the eviction process or the parties have come to some other agreement. This bill would only address the situation where a landlord has lost a tenant, and the tenant has not communicated with the landlord a desire to come back and get the personal property. It applies after the tenant is out of the property and no longer has a right to possess the property after the nonpayment issues are clear. At that point, you are only dealing with the property left in the space.

CHAIR CARE:
Often, a tenant cannot make the payments any more and just leaves. Sometimes the landlord will contact the tenant, and the tenant might say they will come back to get their personal property but never does. If there is equipment or inventory left behind, there will almost always be a Uniform Commercial Code (UCC), Article 1 filing. The landlord cannot get that property anyway. It will go to someone who has a secured position. The landlord may be left with other personal property and is faced with what to do with it. Nevada Revised Statute 118A.460 contains the existing language for landlord and tenant dwellings and the same things we are talking about here. You are just trying to do the same thing for commercial, correct?

MR. CHILDS:
That is correct. It has a narrow scope to deal with the situation you just described.

SENATOR PARKS:
We often read and see on the news that confidential records have been tossed into a dumpster because the tenant has departed. Is there sufficient statute elsewhere that prohibits the landlord from dumping those records? There have been occasions where the landlord has dumped everything into a dumpster because the tenant has abandoned the property.

MR. CHILDS:
I do not know the answer in all situations. I had a situation where a title company left all its records and property behind. Some files were transferred to the purchaser of the title business, and others were left on the property. We advised the landlord to be very careful and communicate with the Insurance Division regarding what should be done with those records. A savvy landlord will do that on a case-by-case basis. I am not aware of a statute that addresses this specifically. This issue would require a landlord to maintain or store personal or sensitive records differently from other personal property left behind.

DAN MUSGROVE (National Association of Industrial and Office Properties):
One of our members, Harsh Properties, is one of the largest commercial landlords in southern Nevada, and they have expressed concerns. Mr. Childs has testified accurately that the law is silent. Perhaps to some degree, this gives the landlord some protections because it is based on how they handle it themselves, whether they are looking at the residential statutes or how they handle evictions.

Harsh inventories and photographs anything left behind. They send a certified letter saying they will hold the items for ten days before disposing of them. They do a search to see if there is any lender with a claim to the equipment left behind. If they do not receive a response, they will dispose of the property. They bring in an auction or liquidation company to sell the items and credit any tenant balance left behind. Many times, the property left behind can be considered junk—old desks, trash or lamps.

We are not the same creature as residential. We need to treat residents different than a business where someone has abandoned in the middle of the night. Many

times, they take their equipment with them because that is their livelihood. What they leave behind puts a burden on the landlord.

The intent is to lease the building as quickly as possible to recover what is lost when a tenant abandons the property. I am not sure we are there yet with this bill. I signed in as neutral because we had concerns with the application of this law regarding how we deal with tenants who have abandoned property.

CHAIR CARE:
Mr. Musgrove is with the firm in which I am a partner. I will be abstaining on the bill.

JOHN SANDE, IV (Jones Vargas):
I came here as an attorney with experience in this area. This is an area of the law where I get the most questions from clients. You look to the NRS for guidance. There is nothing in the NRS except a provision in the Residential Landlord and Tenant Act that deals with handling abandoned property. It does give some guidance.

Big issues have been brought up that require thought in applying this to a commercial setting. One issue is abandonment when commercial tenants who leave in the middle of the night neither talk to the landlord nor make payments.

It would be a problem for rent delinquency to be a triggering event. The law puts a lot of priority in property rights of tenants and owners. Many times, because someone falls behind in rent does not mean they have lost the rights to that property. If we make nonpayment a triggering event, you could have problems with a tenant coming back and saying they did not abandon their rights to that property. Under the lease, they may pay their back rent with interest and penalties.

Sometimes a tenant will say they are leaving. As an attorney, if you receive a letter that the tenant has manifested an intent to abandon the property, you can take some comfort. However, because the eviction process is somewhat streamlined, I usually advise my clients to get a judge to say it is okay to evict in this situation. Perhaps we could tie the triggering time to the service of the five-day notice to quit through the eviction proceedings. That way, the landlord has security knowing they have a date when they can start the clock—either

that or a written intention from the tenant telling the landlord they are relinquishing their rights to that property.

SENATOR WIENER:
In eviction, is there an opportunity for the tenant to catch up and pay the landlord what they owe them?

MR. SANDE:
Under NRS chapter 40, as soon as there is a breach of the lease agreement, the landlord can serve the five-day notice to quit or pay rent. The tenant receives that five-day notice, which explains their rights are under the law. The tenant has several options. They can go to court with a defense to this breach in an effort not to be kicked out, or they can remove their belongings and relinquish their rights to the property. They can contact the landlord and come current or work out an arrangement where they can come current. If they have not done any of those, after five days, the landlord can go to justice court and file a landlord's affidavit swearing to the facts of the situation and requesting the tenant be evicted. The judge will look at the affidavit to see if there are any defenses and if the tenant is going to provide a defense at the hearing. If not, he signs the order. You can take the order to the sheriff, who will change the locks. This can all be done in a matter of a week or two. For landlords, it is a good process and affords the tenants all the opportunities they need to come current on the rent.

SENATOR WIENER:
To make sure it is balanced, is the eviction notice a certified letter to ensure the tenant has received the notice?

MR. SANDE:
It can be done a couple different ways. It must be served similar to any documents you serve. You have to send it registered mail. If it is sent in the mail, the notice must be posted at the premises. There are three ways to do it, and each one tries to ensure the tenant gets the notice.

SENATOR WIENER:
I have concerns about mirroring a commercial process after residential because there is a different stake in the game. The standard should be higher with commercial property because the investment will typically be different. It will often be a greater investment and include leases on equipment where other

rights are involved. We need more in there to address the commercial environment, which is different than residential.

CHAIR CARE:
We do not want to confuse unlawful detainer with simple abandonment of property. If the Legislature does nothing, then counsel for the landlord will keep doing what they already do, which is contained in this bill.

MR. SANDE:
Exactly, and two other things came up. This law could potentially be a valuable tool for landlords in providing guidelines. If a landlord stumbles upon documents, they would have to give the tenant extra notice, or the tenant would have to take proactive steps after receiving notice that everything in the space can be discarded if the tenant does not take action and contact the landlord. If the landlord has given notice and inadvertently discards documents that later turn out to be sensitive, it is not right for the tenant to have a cause of action against the landlord for unknowingly discarding something of that nature. We want to establish a system that gives everyone the rules of the game. If you follow the procedures, you are protected. If you do not, you could be liable for that.

Commercial leases are different from residential leases because many times there is encumbered property. This law should include a procedure instructing the landlord to conduct a UCC 1 search to make sure there are no creditors.

CHAIR CARE:
If it is commercial property, there might be inventory and equipment. The landlord would be foolish not to do a UCC 1 search. I do not know if we need a provision in the law. When a tenant vacates, the landlord has a duty to mitigate his damages. Mr. Sande, please get together with Mr. Childs. This will go on a work session.

I will close the hearing on S.B. 338 and open the hearing on S.B. 348.

SENATE BILL 348: Revises certain provisions of the Uniform Principal and Income Act (1997). (BDR 13-1280)

FRANK W. DAYKIN (National Conference of Commissioners on Uniform State Laws):
This is something of an old friend. When I was first appointed to that Committee as an incident to taking over as Legislative Counsel in 1975, I went to this as an incident of my duties. I took an interest in it and have been with it ever since. A version of this bill was before us then.

The bill before you deals with handling trusts to which an election to qualify for the marital deduction under the Internal Revenue Service (IRS) Code may be made, or a trust which automatically qualifies. It provides that the provisions before and after this section do not apply except for the marital deduction. It provides the trustee shall determine the internal income of each separate fund, allocate a payment from the separate fund to income, and if you cannot determine the internal income, you proceed under section 7520 of the IRS month by month. We have been assured several times in hearings of the Conference of Commissioners on Uniform State Laws that this will be fair to the tax attorneys administering the Act.

CHAIR CARE:
The Uniform Principal and Income Act was introduced and adopted by this Legislature in the 2003 Session. Because of evolving tax code, it is necessary to make adjustments. This will go on work session.

I will close the hearing on S.B. 348 and open the hearing on S.B. 396.

SENATE BILL 396: Revises provisions governing an investigation of a peace officer by a law enforcement agency. (BDR 23-1098)

DAVID F. KALLAS (Director of Governmental Affairs, Las Vegas Police Protective Association):
Senate Bill 396 addresses revisions to NRS chapter 289, which is commonly referred to as the peace officers bill of rights. We have provided an amendment to S.B. 396 dated April 6 (Exhibit E). Because of the number of officers we have in the State covered under NRS chapter 289, we would like to set standards for how all those officers are dealt with during internal investigations and what protections they have that are consistent with the intent of NRS chapter 289.

Exhibit E, page 1, line 13 says, "'Peace officer' means any person upon whom some or all of the powers of a peace officer are conferred pursuant to

NRS 289.150 to 289.360, inclusive." Situations have arisen where a probationary officer—someone who has graduated from the academy—may be in field training or going through a 12-month or 18-month probation. For some reason they are terminated, either conduct-related or performance-related. Our concern is when they go to a nonconfirmation hearing, they do not receive the same discovery rights that a nonprobationary employee or a tenured employee would receive. That has to do with documents or evidence the agency may use to substantiate their desire to do a nonconfirmation on that particular employee.

The statute has never distinguished between probationary and nonprobationary employees for purposes of due process or discovery in a hearing setting. We have requested language be added so agencies understand that regardless of whether an employee is probationary or nonprobationary, if they are going through a nonconfirmation process with an agency, they are entitled to all the same documents and information any other employee would be entitled to in a similar process.

Regarding Exhibit E, page 2, section 2, situations have arisen where officers have decided to leave their employment, usually while being investigated by their agency for a violation of policy or a conduct issue. After leaving, they find out information has been placed in their file regarding the investigation that was taking place prior to their termination of employment or retirement.

CHAIR CARE:
If they are no longer an active peace officer, why does it matter what is in their file?

MR. KALLAS:
Because if they choose to seek employment after they leave employment with their current agency and negative information has been placed in their file, the statute provides the employee with an opportunity to respond to any negative comment in their file within 30 days after receiving notice. This is a concern because if that employee intends to seek other employment, and they were not aware of negative comments in their file, they would not be given that same opportunity.

CHAIR CARE:
If I retire or quit one law enforcement agency and decide to go to work for another, is my entire personnel file subject to inspection by the potential law enforcement agency I want to work for?

MR. KALLAS:
I do not know the procedure. If a potential employee authorizes review, it would be between the prospective employer and the former employee what information would be reviewed. I do not know if you may view the entire file or receive copies of specific information. The opponents of the bill would be better suited to answer those questions regarding the interagency actions.

CHAIR CARE:
There are laws in the private sector to protect a former employer. If a potential employer calls a former employer, the employer is protected by saying, "You need to know this employee did this. We have a record of this and a complaint of that." The potential employer makes up his mind. Your point is that if you are looking for employment and unaware of a complaint in your file, you could make the mistake of telling a prospective employer to call your former employer and that there are no complaints in your file.

MR. KALLAS:
More importantly, if there is something in your file, you would want your new employer to know that. If they review that file, they should be given the opportunity to see both sides of the issue. That is why the law allows current employees to place a rebuttal in their file regarding any negative comment.

On page 3 of Exhibit E, line 39, regarding NRS 289.057, we are clarifying the language regarding an investigation of a peace officer—what sustain means and what it means to consider the imposition of punitive action against the officer. Mr. Dreher and I met with representatives of agencies, and we went over the original bill. We received input regarding their concerns. I attempted to address those concerns and amendments, some of which were agreed to and some were not. There was no disagreement on this particular section. As I go through the bill, I will make those representations in areas where there was no issue.

There is opposition to language regarding probationary police officers being included in the bill.

On page 3 of Exhibit E, beginning on line 24, we add that when an investigation is completed, and I am referring to the LVMPD, representatives and/or the employee have a right to review their file in consideration of filing a grievance or an appeal if punitive action has been implemented against that employee. If an employee is going to file a grievance or an appeal, we should be able to copy the information the agency used to determine the punitive action taken against the employee. That would be helpful in putting on our defense properly or to make the determination after reviewing the information whether to move forward with an appeal. We have asked to include the words "and copy" the file on line 24, page 2 of Exhibit E.

CHAIR CARE:
The statute says you may review. You have added "and copy." You could write down what you see in the file.

MR. KALLAS:
That is what occurs at LVMPD. There is issue with the two words "and copy." I am not aware of any issues with the language on page 2, line 26 of Exhibit E, which says, "... after the peace officer or the authorized representative make a written request to the agency."

On page 4 of Exhibit E, beginning with line 40, we clarify what must be included in a notice and the obligations of the agency when it issues the notice. If there is an allegation of misconduct, the statement of complaint is written. *Nevada Revised Statutes* chapter 289 gives specific information that must be contained in the notice given to the employee and, in some cases, the employee association.

On page 3 of Exhibit E, lines 24 through 29, we include language to specify when and who we are talking about. There will be objection to Exhibit E on page 4, lines 33 through 37, which state,

> If the law enforcement agency has any audio or video evidence or any written evidence prepared by the peace officer and the evidence is compiled [*sic*] during the investigation, the law enforcement agency shall allow the peace officer a reasonable period to review the evidence prior to the time the interrogation or hearing begins. ...

For example, an incident may have occurred at a hotel, a casino, bar or apartment complex where an allegation of misconduct is made against an officer. At the interview and during the questioning, a copy of a video may be shown or an audio may be played. In order to have a fair and balanced interview, the agency should make that evidence available before the interview.

CHAIR CARE:
What happens if the agency has an audio recording, and they do not intend to use it as evidence in the underlying case, but they would like to have it around to use for impeachment purposes?

MR. KALLAS:
The purpose of the interview is to get to the truth, and if that audio or video can assist in getting to the truth, it is important. Generally, there is more than that person saying the officer was untruthful during the interview. That is the only reason I can see them using that recording. If the officer is untruthful, that is a terminable offense. If we have information to help get to the truth, it is important to have that information before the hearing starts so we can ask questions based on the information they have.

Lines 38 through 45 on page 4 of Exhibit E read:

> If a law enforcement agency has any knowledge of or a belief that a peace officer may be subject to punitive action, the law enforcement agency shall not, without complying with the provisions of NRS 289.010 to 289.120, inclusive, order or otherwise require the peace officer to provide a written statement or memorandum concerning any involvement or activities of the peace officer in the alleged misconduct of the peace officer who is the subject of the investigation.

For example, a supervisor may contact an officer and tell him he received a citizen complaint that the officer had been discourteous during a traffic stop. The officer would explain what happened, and the supervisor would ask the officer to memorialize that in a report. The supervisor would recontact the complainant to remedy the situation at the supervisory level. Sometimes that works, and sometimes it does not. If the complainant is not happy with the response from the supervisor, he will go to internal affairs and file a statement. There would then be a complete investigation without the officer having

received the rights afforded under NRS chapter 289 to have a representative present during the interview.

We are not trying to impede the agency's ability to resolve issues at the supervisory level. The concern is that when an officer is requested to memorialize something in an officer's report, it could lead to punitive action. There is a process in place for that, which includes giving notice, date, time and location of the hearing and the alleged misconduct. Our concern is if you prepare a statement, it should be part of the investigative process, not something done informally that eventually becomes part of the investigative process.

Page 4, lines 1 and 2 of Exhibit E say, "If a peace officer provides a statement or answers a question relating to the alleged misconduct of the peace officer ... ." *Garrity v. New Jersey,* 385 U.S. 493 (1967) afforded certain rights to peace officers. It says if an officer is compelled to answer questions during an interview or interrogation hearing with his employer under the threat of termination, he is afforded certain rights. The information he provides based on that compelled testimony will not be used against him in any criminal proceedings. We have included the intent of *Garrity* in this part of the amendment and included the terms "any criminal or civil investigation" on page 4, line 7 of Exhibit E.

The term "insubordination" on page 4, line 5 of Exhibit E would more properly be "termination" if you are charged or threatened to be charged with termination because that was the intent of the court in *Garrity*.

The top of page 5 of Exhibit E, subsection 6 reads, "... copy the entire administrative or investigative file maintained by the law enforcement agency relating to the investigation, ..." Sometimes agencies, depending on their own policies and procedures, have more than one file. The intent of the statute is to allow any employee or an officer to review and copy any information available regarding that investigation, regardless of what file it is in. Files may be investigative, administrative or personal. If there is any information regarding that investigation in any file anywhere, the employee or officer should be able to review and copy that information in preparation for an appeal.

In section 6 on page 5 of Exhibit E, line 9, we have added "hearing officer." Not all agencies have the opportunity to participate in the collective bargaining

process. In our agency, if there is a dispute, we go to an arbitrator. Some can go to court, but other agencies are mandated to have their appeal heard in front of a hearing officer.

On page 5 of Exhibit E, lines 17 through 24, the purpose of adding punitive action against the agency is to hold the agency accountable for the actions of its employees if the agency or an employee violates the provisions of this statute. When our officers are participating in the investigative process and being interviewed, they are there to be accountable for their actions. On more than one occasion when I have been in an interview, I have had to tell a lieutenant, sergeant or detective the questions they are asking the officer violate the provisions of NRS chapter 289. It is problematic for supervisors to be violating the statute when they are investigating an officer for a policy violation. Initially, we put in a fine. We have added the provision permitting an arbitrator, hearing officer or court to choose between fining the agency or dismissing the investigation if they believe the agency knowingly violated the statute.

SENATOR WIENER:
By adding "hearing officer" and a "knowingly" standard, will hearing officers receive training so they will know the parameters of the interview process?

MR. KALLAS:
If I am in an interview and say I believe the hearing officer is violating NRS chapter 289, and the hearing officer acknowledges he understands the objection, since the testimony is compelled, he may order the individual to answer the questions. If he is a trained law enforcement officer and conducting interviews on behalf of his agency, he should know the law as well as the officers know the policy manuals and the laws they are required to know. If he is told that and chooses to ignore it because his goal is to try to get the question answered, that is knowingly.

A state hearing officer would have enough training and experience. Anyone hearing employees' issues would have the training and experience needed to make an educated decision on whatever comes before them.

CHAIR CARE:
Nevada Revised Statute 289.120 says:

> Any peace officer aggrieved by an action of his employer in violation of this chapter may, after exhausting any applicable internal grievance procedures, grievance procedures negotiated pursuant to chapter 288 of NRS and other administrative remedies, apply to the district court for judicial relief. If the court determines that the employer has violated a provision of this chapter, the court shall order appropriate injunctive or other extraordinary relief to prevent the further occurrence of the violation and the taking of any reprisal or retaliatory action by the employer against the peace officer.

It appears that other than injunctive relief, there is no judicial remedy available for the peace officer. Nothing addresses the peace officer's fees and costs if he prevails and obtains injunctive relief. Please make a comment about what the laws says now as opposed to what you want to do with respect to judicial review.

MR. KALLAS:
We are trying to make the process as streamlined as possible, even though this process is not streamlined. We are trying to set a standard. We understand judicial relief, but it does not have enough teeth. That is the purpose of this. I hate to take punitive action against our agencies. Unfortunately, as individuals participate in the process, they make decisions that negatively impact our officers. By providing the amended version including the fine or removal of punitive action based on the investigation, the protections of officers are strengthened, and a standard is set to ensure all the agencies make sure people participating in the process know what they can and cannot do. This language sets a standard everyone can follow and understand.

We have included some clarifying language on page 6, line 19 of Exhibit E. This would become effective on July 1, Exhibit E, page 7, line 4.

CHAIR CARE:
Depending on the section of the bill, there are three effective dates. For example, if you are in the midst of an arbitration and this law takes effect, do

you mean the effective date would only apply to those matters that commence after the effective date?

MR. KALLAS:
That is correct. Section 8 on page 6 of Exhibit E refers to NRS 41.035 and addresses public duties and actions not to exceed certain sums. Because there have been so many amendments over the last several days, we have different dates to coincide with the provisions of NRS chapter 41.

RONALD P. DREHER (Government Affairs Director, Peace Officers Research Association):
We support S.B. 396. Stan Olsen asked to me state the Las Vegas Police Management and Supervisors Association also supports S.B. 396 and the amendments we will be speaking about. I have provided you with a handout (Exhibit F).

I have represented law enforcement officers in Nevada for the last 25 years. *Nevada Revised Statutes* chapter 289 rights apply to every peace officer in the State. All the chiefs have the same rights as the category III peace officer. These are due process rights. There are misunderstandings, misstatements or misapplications of our rights. In 2005, we thought we had a cohesive bill understood by the representatives, the internal affairs people, the chiefs, sheriffs, hearing officers, cities, counties, county managers and all State law enforcement people.

We have come back because of misapplications and misunderstandings. For example, NRS 289.057 deals with the right to review a file. It is complicated to go into an administrative investigative file to prepare for a disciplinary hearing. It requires sitting in a room for 8 to 12 hours and copying a file that could be several folders thick. We are trying to represent the officers appropriately and make sure their rights are followed. Why can you not have a copy of the file at that point? You cannot even get a copy of the investigative conclusion, which may be three or four pages. Nevada Revised Statute 289.057 says you have the right to review the file, but you do not get the right to a copy of that file until you get to NRS 289.080. This means if that person goes to the predisciplinary hearing and discipline is recommended, only then do we have the right to copy the file. That means we will have done a disservice to those we are representing. We have a duty to fairly represent our peace officers. We are bound by that duty and could be sued for that.

We provide training and invite management to come because management people are peace officers too. We want them to understand the rules as we see them. We welcome their input. That is what we are trying to accomplish with this bill.

Referencing someone who resigns prior to an investigation: When officers apply for another department, under NRS 289.040, they sign a waiver, which means they have no recourse with whatever files are given to the prospective agency. Because of that, if there is a sustained finding, they should have a right to rebut that and include their side of the story in their file. That way, the new employer can look at both sides.

The crucial part of the bill is section 3 dealing with NRS 289.060. Some departments give officers notice, some do not. Some departments give a *Garrity* notice if you are the principal in an investigation. Other witnesses may not get the notice. Some agencies give every officer the notice. It is confusing to know when you will get a notice and when you will not. This section of the bill clarifies that all officers will be noticed because you could go immediately from a principal to a witness or a witness to a principal in an internal affairs investigation. It provides them basic due process rights.

The same applies to the audio and video recordings. If an officer provides a written statement and someone complains about that, most agencies provide the officers with the statements they made in the past so they can prepare for a hearing. There may not be an internal affairs hearing until six months after the incident. They should have a right to look at that information if the department has it. We do not want complainants' statements because investigators have to do their jobs, and we do not want to bias the investigation one way or another.

CHAIR CARE:
Regarding section 3 of the bill, what if the subject peace officer believes another peace officer may have knowledge, but the law enforcement agency does not think so. Does that happen?

MR. DREHER:
Yes, it does. We ask the internal affairs investigator to provide that information, to notice them and bring them in. We want them to do a thorough investigation.

Regarding NRS 289.080, we added two terms in the statute—"administrative file" and "investigative file." This has become so misunderstood when internal affairs investigations are done. Some agencies give you everything. Some will only give you an administrative file. Some will give you only an investigative file. Some relate back to NRS 289.057, which says you are entitled to any file relating to the investigation. We are asking for clarification in NRS chapter 289 to say any related file means anything related to the investigation. The administrative or investigative file or anything relating to that should be included in NRS 289.080.

With respect to NRS 289.085, the state hearing officers are well-trained. Most of them are attorneys. We need hearing officers in the law. We do not want someone coming back later to say, "You are not an arbitrator, you are a hearing officer," or "You are not a court, you are a hearing officer."

Nevada Revised Statute 289.120 provides a process for the judicial level, but you must exhaust administrative remedies first. That is what we want. We want to resolve an issue before going to the judicial level.

We modeled section 4, subsection 2 of the bill after the California Peace Officers Bill of Rights, looking for a $25,000 fine if an agency intentionally and knowingly violates the NRS chapter 289 rights. We would permit the arbitrator the discretion to say if an officer's rights were knowingly violated; if it is prejudicial to the officer, that information is inadmissible. We have had two cases recently where we have had this situation. In one case, the department went outside the notice and sustained discipline completely outside the notice provided under the statute.

We are asking an arbitrator, hearing officer or court to determine when a violation can be knowingly made and what kind of sanctions are taken on the violator. They could throw out that portion of the interview, throw out the entire interview or impose a fine not exceeding $5,000. We need something to stop these violations. We provide training, and we expect the people doing the internal affairs investigations to be well-educated and trained. We are accountable for everything we do. We have to justify our actions repeatedly, whether it is an officer-involved shooting, a critical incident or because someone makes a complaint against an officer. We ask you to support S.B. 396 and the amendments proposed.

RON CUZZE (President, Nevada State Law Enforcement Officers' Association):
We support S.B. 396. There is one section that should be brought to the Committee's attention regarding the hearing officers. I live in a noncollective bargaining world, and everything we do usually ends up with a hearing officer. On more than one occasion, hearing officers have told us NRS chapter 289 does not apply. The most recent case was at the University of Nevada, Las Vegas (UNLV). From the start, the hearing officer violated NRS chapter 289 by telling us we could not have two representatives present. This affects us in a different way than it does people with collective bargaining rights.

There was a big case at the Investigation Division involving missing guns and drugs. It had to do with the *Garrity* warning and an administrative hearing versus a criminal hearing. We said it should be criminal. They decided to do an administrative hearing. Once they got into it and after all the officers were admonished and forced to give their testimony, they made it a criminal matter. *Nevada Revised Statutes* 289 is not only misunderstood, it is written in a manner that some police administrators willfully violate. I encourage you to pass S.B. 396 as amended.

I would ask you to include the word "working" as reflected in my e-mail to you (Exhibit G).

CHAIR CARE:
I have your e-mail, Exhibit G. If the statute is misunderstood, how can it be willfully violated?

MR. CUZZE:
It is both misunderstood and willfully violated. It is not done through malice the majority of the time. We live under two sets of rules—NRS chapter 284, which is the state personnel system, and NRS chapter 289, which pertains to law enforcement. The bill will make administrators less likely to revert to NRS chapter 284.

TERRENCE MCALLISTER (President, North Las Vegas Police Officers Association):
Section 1 of the bill clarifies who qualifies as a peace officer. The statute does not exclude probationary employees. The bill in section 1 also clarifies that punitive action means any action that may lead to dismissal, demotion or suspension. It is egregious when administration takes definitions or terms and changes those terms to benefit their particular situation. This is a misapplication

of statutes. In North Las Vegas, we have had many discussions on these issues, and we have fallen victim to several of these issues because of misapplication.

As law enforcement, we must keep up to date with statutes and laws, not only policies and procedures of our organization but state laws that give protection to officers. Those rights are granted and need to be followed.

It is right and fair that a witness be afforded representation. The witness was with the officer when the allegation of misconduct occurred. By the mere fact of his presence, he could be subject to disciplinary action.

I still fight administration to get a copy of a file, even after an appeal has been made, because they add stipulations to prevent the officer from getting that file for an appeal.

Internal affairs personnel are fact finders. They are there to prove the allegations, and they have an obligation to refute the allegations and present both sides. When an officer comes before that investigation, they are subject to interviews and interrogation. That employee already has the right to throw out any additional information they have. Because they do not get to see the file prior to that interrogation, they do not know of additional information before that point. Their union representative or attorney has the right to ask questions or bring up additional information. After that interview and interrogation, if the officer has sustained charges against him, he goes to a predisciplinary hearing. We do not have the right to review those files. However, administration wants you to come and explain your side of the story.

We had a recent arbitration case where an off-duty officer was involved in an incident, and they compelled him to come and give a statement. We had filed a motion in limine at that arbitration hearing. The arbitrator did not address the issue. Injunctive relief is available through district court. We are here today to afford officers due process and to give transparency. We ask that officer be held accountable. Safeguards and protections are in place. I support S.B. 396.

MR. CUZZE:
I would like to clarify for the Committee that our predisciplinary hearing happens after the internal investigation and just before the execution of the punishment.

JUTTA CHAMBERS (Police Chief, City of Henderson):
I oppose S.B. 396. We are concerned about a probationary police officer having the same protections as an officer who has completed his probation. All other employees in our department have a probationary period. During that probationary period, employees are not afforded the same level of protections as a nonprobationary employee. We assumed that would also apply for a police officer. A brand-new police officer just out of field training or still in field training does need to have a different set of standards and processes in place to correct unacceptable behavior.

Many other areas they talked about are specific to events that may have occurred at specific jurisdictions. I am concerned about section 3, subsection 5 of the bill because we are a paramilitary organization, and our first-line supervisors have a lot of responsibility to help officers deal with challenges they may have. One of the examples given was a supervisor getting a complaint from a citizen on rude conduct during a traffic stop. We want our sergeants to interact with our officers and help them understand how their conduct is perceived by the citizens. If we do not allow a first-line supervisor to do any coaching or counseling with an employee, these incidents will go into an internal affairs formal process. We would not be able to teach our officers that there might have been a different approach on minor infractions. We call them inquiries and not internal investigations. They are called a service complaint, and they are categorized differently. If this language stands in this bill, the first-line supervisor would relinquish all teaching capabilities to internal affairs, and we would act from a punishment perspective. That is not the best way to manage and supervise the people who work for us.

Those are some of the main challenges I see with this. In talking about fining an agency, there will always be horror stories, but those get corrected through the process we have in place. Having a fine in this statute is detrimental to the process and the agency's ability to supervise and manage their employees.

CHAIR CARE:
In Henderson, what is the probationary period of a new officer?

MS. CHAMBERS:
It is 18 months.

CHAIR CARE:
Two weeks into basic training in the Army, we had a young man in my platoon who received an Article 15 court martial for leaving his locker open in spite of repeated orders not to do so. I bring that up because the Army does not wait until basic training is over before they apply the Uniform Code of Military Justice. Using that as an analogy, why would a probationary officer be treated differently than the peace officer as defined in statute?

MS. CHAMBERS:
There are a lot of issues where a probationary officer is treated the same as a nonprobationary officer. The treatment is different when an officer has more performance challenges than his training officer or first-line supervisor can correct. The probationary period is there to have conversations with those people when this is not the job for them. Most of the time, those actions are not so much disciplinary, but the person is not up to the standards we have from a performance perspective. That is why they are treated differently. When they are just learning the job, going to an internal affairs process to remove them for performance considerations puts a significant burden on the agency.

PAUL T. HOWELL (Undersheriff, Douglas County Sheriff's Department):
I have conducted numerous internal affairs investigations. I teach peace officer rights, NRS chapter 289, to the basic recruits and new sergeants. There is no pattern in practice of abuses of NRS chapter 289 by police administrators in this State. *Nevada Revised Statutes* chapter 289 is a good law. It affords officers a lot of necessary protection. But this bill erodes our ability to effectively investigate and punish police misconduct. It tries to clarify things to give officers special privileged treatment in inappropriate areas.

In fairness to the authors of the bill, there are two areas that we do not see as a concern. When talking about a former officer receiving notice regarding negative comments being placed in his file, that is fair and will impact their ability to seek employment elsewhere. If they do not respond or refuse to respond to notices by certified mail, we could still include comments in the file.

CHAIR CARE:
That is section 2 in Exhibit E on page 2. Do you have copies of the April 6 amendment?

MR. HOWELL:
I reviewed it briefly with Mr. Adams this morning.

CHAIR CARE:
That is the document Mr. Kallas is working off of.

MR. HOWELL:
Most of our concerns stay the same, even with the April 6 amendment. I have heard discussion about the reviewing and copying of files. At the time of a proposed discipline, *Nevada Revised Statutes* chapter 289 gives the officer the right to review the files related to the matter. At our agency, we allow them to review and make copies. If not done across the State, that might be something fair to include because they should be able to make copies at the time discipline is proposed, not before. Many agencies do allow copies.

CHAIR CARE:
Is there any difficulty with the language the proponents want to add on copying after the peace officer or authorized representative makes a written request to the agency? That would be after notice of the hearing.

MR. HOWELL:
I support it if it is at the time when the agency notices the officer that they are proposing discipline. At that time, they should be given access to those files so they can prepare for their appeal or grievance hearing.

We are concerned about probationary officers. Probation is part of the hiring process, and we spend a lot of money on police recruits. We are not going to throw them to the curb for minor policy violations. If we start seeing some red flags, we need to get them out of employment as a police officer as quickly as possible. We handle that like any other probationary employee throughout any business, particularly government. If they have not met the terms and conditions of probation, they are excused. We should not have to go into a full-blown NRS chapter 289 rights like you would with a tenured officer.

CHAIR CARE:
What is the probationary period for your office?

MR. HOWELL:
It is 12 months. It varies between departments. Section 2 of the bill talks about imposed punitive action following an internal investigation. The officer has a right to provide a response upon receipt of that proposal. If discipline is imposed, they have ample appeal rights via department policy or labor contract and relief through the civil courts. The law should not step on management's toes. We often have a meeting before imposition of discipline where the administrator imposing the discipline can get input from the internal affairs investigator and the employee's captain on what discipline will be imposed. That meeting should be closed to everyone but management because they have a right to provide their response upon receipt of the proposal. Adding hearings to the law will make the process more costly and time-consuming. There is ample time for hearings once the discipline is proposed. We oppose hearings where the officer would attend as we prepare to propose the discipline.

Section 3 of the bill talks about extending the *Garrity* warning to witness officers. The decision focuses on the accused officer. To extend a *Garrity* notice to a witness officer goes beyond the scope of the court's intention. In the notice of internal investigation, you provide the accused officer basics about the complaint—who is complaining, what the incident involved and the allegations of misconduct. At that time, you may not want to provide that to witness officers because a witness statement is supposed to be biased. It may compromise the integrity of an investigation if you provide eight witness officers with a notice that includes the details of that investigation. A witness officer is not subject to any disciplinary process. They are a witness, and there are times when that can flop back and forth, but NRS chapter 289 is clear. If that witness becomes a suspect in any wrongdoing in the focus of the investigation, he is provided a *Garrity* warning and notice of internal investigation that complies with NRS chapter 289. Their role would change.

CHAIR CARE:
Section 3, subsection 1 of the bill says, "… provide a written notice to the peace officer … " and the additional language includes any other officers. But it goes on to say, "Each of those peace officers may waive the notice required pursuant to this section." How would that work?

MR. HOWELL:
That is what happens. There are officers who say they neither need their *Garrity* warning nor their labor representative and attorney there.

CHAIR CARE:
They would not do that until they have already learned a hearing is coming up?

MR. HOWELL:
That is correct; that happens when they are called in and given their *Garrity* notice. Most officers know something is happening. It will rarely be a surprise. But some officers do waive the notice.

It is not appropriate to extend a *Garrity* warning. The U.S. Supreme Court developed that to protect an accused officer. He is compelled to make a statement. He will be fired if he does not. It is a coerced statement. Therefore, it should not be used against him in a criminal proceeding. Why would we extend that to a witness officer? The April 6 amendment, Exhibit E, still takes the ability for an officer who is under a criminal charge to exclude that witness testimony.

I have a problem with a law that would prevent witness officers from testifying against an officer who has committed a criminal act. There is more to it besides noticing them and possibly compromising the integrity of the investigation because of the rumor mill. It also speaks of the accused officer being able to say it was a compelled statement, so they want to exclude that from testimony against me.

CHAIR CARE:
The bill talks about a hearing, an investigation and the issue with the probationary officer where things are handled in a less formal manner. In the case of a hearing, do the parties exchange a list of witnesses?

MR. HOWELL:
At a hearing with an external hearing officer, there will be that process. There has been some confusion in today's testimony regarding hearing versus interview. *Garrity* applies to the interview of an accused officer during the investigation. Section 3 of the bill also deals with expanding the notice of internal investigation to include the officer having all the evidence and statements so he or she can prepare before the interrogation. That is scandalous. You have an officer accused of misconduct. No one in society is given the right to have all the evidence against them to prepare for the procedure. That compromises the investigation. No one deserves that kind of privileged treatment. There may be times when two or three officers are

accused of misconduct and someone is not telling the truth. Then the department should have the ability to withhold some of that to see who is telling the truth and who is not.

CHAIR CARE:
Making a distinction between the hearing and the interview—is there any difficulty with the officer having access to the complete file prior to the hearing as opposed to the interview?

MR. HOWELL:
Prior to the interview, there is a problem. Prior to the hearing, there is no problem. Once an investigation is concluded and there is a proposal for discipline, the officer should have access to all the materials and witnesses against him so he can adequately prepare. *Nevada Revised Statutes* chapter 289 says when there is to be an imposition of discipline, the officer has the right to review that information. Some of the problems are coming from being allowed to read the testimony of others but not make copies. In Douglas County, we make copies of the interview tapes, the transcripts and everything. At the hearing, they should have it to adequately prepare for their defense, and NRS chapter 289 gives them the right to respond to any negative information. But they should not have it during the investigation, not at the time of *Garrity*.

It is inappropriate for us to provide the evidence and statements prior to an interview. An officer on trial should not be able to block the testimony of fellow officers who gave information against him.

Section 4 of the bill talks about being in violation of NRS chapter 289. *Nevada Revised Statutes* chapter 289 provides that a court or arbitrator can make evidence obtained in violation of an officer's rights inadmissible and excluded. That is fair and appropriate. Exhibit E adds what would prohibit the disposition of discipline. If we are to impose discipline, the officer has done something wrong. If evidence has been removed, and there is still enough to prove wrongdoing, that officer should be held accountable. The law is fair. It excludes that evidence. Why would we mandate a payment? An arbitrator, court or external hearing officer will make a determination on a knowing violation. That can be subjective and will result in more litigation. To guarantee a payment because of a civil wrong is not appropriate. They could address that through the court like anyone else.

CHAIR CARE:
Nevada Revised Statute 289.120 includes the remedies in the chapter available to a peace officer. Is it limited to injunctive relief? There is nothing about attorney fees and costs.

MR. HOWELL:
There is nothing about attorney fees and costs. It only provides two protections—the exclusion of evidence obtained in violation of NRS chapter 289 and the injunctive relief to prevent it from happening again.

CHAIR CARE:
What happens to the peace officer who goes to the trouble of retaining counsel and files a petition with the court? The remedies seem limited to me.

MR. HOWELL:
These proposed changes to NRS chapter 289 do not serve the best interests of the public, and it would hamper our ability to conduct investigations into police misconduct.

FRANK ADAMS (Executive Director, Nevada Sheriffs' and Chiefs' Association):
This is an important issue. These issues affect all our law enforcement agencies throughout the State.

JAMES MILLER (Sheriff, Storey County; President, Nevada Sheriffs' and Chiefs' Association):
I am the Sheriff of Storey County. We oppose S.B. 396 and the amendments. This is not an easy bill. This is a serious and complicated bill. It comes down to interpretation, which we do every day in our jobs to follow the NRS.

All files are open to inspection by the officers. If they feel they are getting a bad evaluation or a disciplinary action, they can have their letter submitted into the file. It is not open to just anyone. We do have NRS chapter 289, the peace officers bill of rights. It is a good guideline for everyone to follow.

When an officer goes to another agency, it is the right of the agency that is looking to hire the individual to know his background. For the most part, we get waivers. We do review files with other agencies. If the file contains letters, we try to get the other side of the story from the person applying.

The fines would create problems for everyone, not just for law enforcement but for our courts. We have a fair system in place with the officer bill of rights. We need more time to review this bill. There may be things we can do to clear up the language, but we need more time.

PAT DOLAN (Washoe County Sheriff's Office):
I have prepared a submission showing our comments on S.B. 396 (Exhibit H). We are opposed to including probationary employees in this bill because it creates a distinction without a difference. The whole idea of probationary employment is a test period in which you can dismiss an employee without cause. Without cause does not mean for just any cause. You have equal rights legislation and whistle-blowing statutes to protect an employee. We spend a lot of money to recruit our employees. It usually applies to an individual who persists in an inability to perform or an attitude that will not perform. We release those employees reluctantly. It is like following progressive discipline. In progressive discipline, we try to salvage every employee because we spend a lot of money on them.

Justice is the same whether it comes from the public and our agency to the officer or the officer to the public and the agency. When we look at this legislation, we think it goes too far in a number of areas.

We want a speedy and fair investigation. It proposes at the outset that the charges do not always allege the potential witness. On page 3 of Exhibit H, line 26, we say "after the peace officer." It is not necessary to protect the legitimate rights of the officer and to enhance the public's legitimate rights. We would strike, "or the authorized representative makes a written request to the agency." We would say the access is:

> ... at the completion of the investigation of the peace officer by the law enforcement agency and which accord the peace officer to prepare for participation at any hearing to consider the nature and extent of any discipline to be imposed on the peace officer based on any recommended discipline as a result of that investigation.

We are trying to be fair. But it is basic investigative technique not to disclose the evidence until you have the officer testify regarding the general allegations because the investigation could be tainted by presenting the evidence and allowing time to prepare responses. You want responses to be spontaneous and honest.

In section 3 on page 4 of Exhibit H, at line 40, we want to clarify the notice to the witness by saying, "... and provide a similar advanced notice at any time during the investigation process before any interrogation of any peace officer believed ... to have knowledge ... " of that investigation.

On page 4 of Exhibit H, line 15, they said they wanted to clarify that the interrogation of the peace officer applies to any time he is required to report while off duty. Most agencies try to schedule that during regular work hours.

In line 25, on page 4 of Exhibit H, it says, "He is entitled to review any evidence pursuant to subsection 4 ... ." We would add, "at the conclusion of the investigation and before the imposition of any discipline based on that investigation." Before the predisciplinary hearing, a hearing with the sheriff or arbitration, you are presented all the evidence, and you can use that along with the recommendations and findings. We instruct our internal affairs investigators they have no stake in whether the officer did it or not. Just get the facts. Many times during an investigation, you may find the original allegations are unfounded or not sustained, but evidence discovered during the investigation leads to notice of a new or additional charge. You need that flexibility to protect the public.

Page 4 of Exhibit H, line 27 says, "Limit the scope of the questions during the interrogation or hearing to the alleged misconduct of the peace officer who is the subject of the investigation ... ." We would add the language in line 29, Exhibit H, page 5.

Otherwise, you have a chilling effect. If an incident occurs in the street with two or three officers, that seems to limit your ability to follow out the investigation and find out who was there with knowledge pertinent and material to the investigation of the charge on a fair and timely basis.

MR. DOLAN:
In line 37 on page 5 of Exhibit H, we would strike "prior to the time the interrogation or hearing begins," and add the language beginning on line 37. You get the honest and timely response to the charges by the officer. Once the investigation is completed and the recommendations are made, you allow them to respond and challenge any factual findings or conclusions made.

In line 39 on page 5 of Exhibit H, we add the word "reasonable." On pages 5 and 6 of Exhibit H, we would strike the language contained in lines 17 through 33 regarding damages for knowing violations. We have adequate provisions under the law. If you have a systematic abusing of those rights, you go to a Title 42 USC section 1983 or other action to seek damages for a pattern by an agency. It is historic in public labor law that you do not normally award damages to either party. This is a program designed to get a timely, expedient and fair determination of the charges.

There was a provision about not being able to use a report if it is punitive. We are concerned that one of the best protections you can have in law enforcement is to write incident reports and reports of the actions that you discharge. We provide our officers with a cassette recorder and say to turn it on because it is their best protection. Sometimes those reports establish the baseline for how we examine the alleged charges. We do not know whether that report is of value until charges are brought. You look at the arrest reports or the particular incident reports and go from there. We want to ensure that is maintained in the interest of the public.

We have a concern where the bill addresses a former police officer. It says "read and initialed." I have a problem if it does not say, "has read and had the opportunity to initial or challenge" that particular document. If you have a misconduct allegation and an internal affairs notification, and the officer resigns or retires before you complete that internal affairs investigation, what do you do with that report? In the interest of justice, we will go forward with those reports. We must have a mechanism to show where they have a right to challenge. We want a standardized and documented procedure. We require an authorization to release that document, and we do not allow anyone to make comments regarding the character of the person through their fact analysis. We send the reports where the employee has signed off, and we say, here is the best mark of what kind of employee they were. We say, here is the discipline either accepted or imposed after challenge. We do not get into character shadings that occur in some agencies. My only concern is to have a mechanism to resolve the issue when an employee does not initial the document.

CHAIR CARE:
Ms. Eissmann and Mr. Wilkinson, please take Mr. Dolan's amendments and include them for our work session tomorrow.

MIKE SNYDER (Director of Labor Relations, Human Resources Division, Las Vegas Metropolitan Police Department):
We deal with these issues daily. We have concerns about S.B. 396. *Nevada Revised Statutes* chapter 289 works. It does not need to be changed. There are some clarifications acceptable to all parties.

Nevada Revised Statute 289.085 and 289.120 provide remedies. It says, "appropriate injunctive or other extraordinary relief to prevent the further occurrence of violations." It gives the district court flexibility if it gets to that point.

The probationary period raises more questions than it answers for us because it suggests a property interest in the job. If we give a property interest in the job by way of statute, do we have the appeal process? If we want to terminate someone or if there is a mistake or violation of the statute, will the employer be required to put someone back to work who should not be back to work—an employee who was on probation and should have been let go? Our agency, like Washoe County and all other agencies, puts a tremendous amount of time and resources into recruiting and retaining people and correcting behavior. The current statute takes care of that.

In section 3 of the bill, I am concerned not only about the probationary officers but the suggestion for a hearing. In some circumstances, hearings do not occur. Does this suggest that we must have a hearing in those situations? We are mixing the line between investigations and engaging in a hearing and an appeal process, which is different from a prediscipline hearing process. The statute does not require us to make copies. When discipline has been imposed and someone wants to look at the file, we allow them to do that. The unions and associations have the necessity and the opportunity to fairly represent their employees. They have to look at that information to make a determination whether to file an appeal. Once that appeal is filed, they get complete access.
We also have a pretermination process where we give full access to the file. We do have a hearing. We have a discipline board for our police, managers and supervisors, and they get copies of that material.

If we have to give copies for everything, it is burdensome for the agency, and it impacts confidentiality. In working through this process for a long time, the more open you make those files, the less confidential they become when they are requested from outside the agency. The protections for the employees are

diminished. In our agency, like Washoe County, all requests come through us. We adhere to the statute closely so we can protect the rights and privacy of the officers. That is a consideration for you as well.

All we want is the truth in the investigative process. The more we put regulation in place of that and the more you put discovery information out there before you get into the investigation, the less likely you will get to the truth. We have to maintain the integrity of our law enforcement agencies in order to properly prosecute and achieve our day-to-day mission of protecting our citizens.

MR. ADAMS:
This dialogue needs to be ongoing, and there has not been enough time to work through the problems in this bill. The Sheriffs' and Chiefs' Association represents all law enforcement in the State of Nevada, and we are open at any time to sit down with labor representatives and work through these things.

I have a copy of my testimony for the record (Exhibit I). I am told a recommendation that would include a criminal violation is inappropriate for labor management, so I would like to withdraw that. This is too important to try to do something like this with a week's notice.

CHAIR CARE:
I will close the hearing on S.B. 396. There being nothing further to come before the Committee, I will adjourn the meeting at 11:28 a.m.

RESPECTFULLY SUBMITTED:

Kathleen Swain,
Committee Secretary

APPROVED BY:

Senator Terry Care, Chair

DATE: