MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Sixth Session
February 23, 2011

The Committee on Judiciary was called to order by Chairman William C. Horne at 8:10 a.m. on Wednesday, February 23, 2011, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/76th2011/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman William C. Horne, Chairman
Assemblyman Steven Brooks
Assemblyman Richard Carrillo
Assemblyman Richard (Skip) Daly
Assemblywoman Marilyn Dondero Loop
Assemblyman Jason Frierson
Assemblyman Scott Hammond
Assemblyman Ira Hansen
Assemblyman Kelly Kite
Assemblyman Richard McArthur
Assemblyman Tick Segerblom
Assemblyman Mark Sherwood

COMMITTEE MEMBERS ABSENT:

Assemblyman James Ohrenschall, Vice Chairman (excused)
Assemblywoman Olivia Diaz (excused)

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Nick Anthony, Committee Counsel
Karyn Werner, Committee Secretary
Michael Smith, Committee Assistant

OTHERS PRESENT:

Scott Anderson, Deputy for Commercial Recordings, Office of the Secretary of State
Kevin Benson, Deputy Attorney General, Office of the Attorney General
John W. Griffin, representing the Independent Gaming Operators Coalition
Alfredo Alonso, representing Lewis & Roca LLP
Scott Scherer, representing Nevada Registered Agent Association
Chris Ferrari, representing Nevada Registered Agent Association
Matthew A. Taylor, President, Nevada Registered Agent Association
Trevor Rowley, Executive Vice President, Nevada Corporate Headquarters, Inc., Las Vegas; and Corporate Service Center, Inc., Reno
Janine Hansen, President, Nevada Eagle Forum
John Wagner, representing the Independent American Party
Tray Abney, Director, Government Relations, Reno/Sparks Chamber of Commerce
Doug Ansell, representing Inenvi, Inc.
Andrew B. Platt, representing Woods Erickson Whitaker & Maurice LLP
Jed Block, President, State Agent and Transfer Syndicate, Inc.
Bryan Wachter, Director of Government Affairs, Retail Association of Nevada
Keith G. Munro, First Assistant Attorney General and Legislative Liaison, Office of the Attorney General
Brett Kandt, Special Deputy Attorney General, Office of the Attorney General
Samuel G. Bateman, Deputy District Attorney, Office of the District Attorney, Clark County; and representing the Nevada District Attorneys Association
James Sweetin, Deputy District Attorney, Office of the District Attorney, Clark County
Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office
Rebecca Gasca, Legislative and Policy Director, American Civil Liberties Union of Nevada
Amy Coffee, representing Nevada Attorneys for Criminal Justice

Lisa Rasmussen, representing Nevada Attorneys for Criminal Justice

Chairman Horne:
We have three bills on the agenda today, which I will take out of order. We will hear Assembly Bill 78 first.

I am going to start out with an admonishment. At the beginning of session, we told everyone, and particularly those who are familiar with appearing before any committee, that we need exhibits and documents to our Committee 24 hours in advance. The Committee started today at 8:00 a.m., so they should have been in my committee manager's hands at 8:00 a.m. yesterday. Two parties on both sides of this particular bill sent documents in last night. That means I spent the morning in my office reading them before coming out here, so now we are starting late. We have to get things in on time so we can move this session along.

Let us open the hearing on Assembly Bill 78.

Assembly Bill 78: Makes various changes relating to business. (BDR 7-403)

Scott Anderson, Deputy for Commercial Recordings, Office of the Secretary of State:
It is my pleasure this morning to present testimony on A.B. 78 on behalf of Secretary of State Ross Miller. [Reads from written testimony (Exhibit C).]

Assembly Bill 78 proposes several changes to Title 7, Chapter 225 of the *Nevada Revised Statutes* (NRS) that will further standardize and refine the filing processes of the Secretary of State's Commercial Recordings Division. We are also clarifying statutory provisions for exemptions relating to the state business license, as well as adding compliance language for sole proprietors and partnerships similar to what was added in the 2009 Session for Title 7 entities.

I will touch on the major provisions of this bill and will be happy to answer any questions as we go, or we can wait until the end.

Starting with section 1 of the bill, when the state business license was transferred from Chapter 360 of the NRS under the Department of Taxation (Taxation) to the Office of the Secretary of State, the statute was transferred word-for-word from the previous statute. Nevada Tax Commission determinations and certain rules were not sufficiently codified.

To give you some background, in 2009, the authority for the state business license transferred to the Secretary of State because of the estimated

155,000 entities that were subject to the state business license requirement that were not captured through the Department of Taxation processes. At this time, the gap amounted to a potential $15.5 million in revenue that was going uncollected. While we have breached much of that gap by including the state business license filing with the annual list filing for Title 7 entities, there is still a significant gap that is the unintended result of the transfer of the state business license authority to the Secretary of State.

Currently, there are approximately 315,000 business entities registered with my office as Title 7 entities, sole proprietors, and partnerships. Of these, 20.7 percent, over 65,000, are claiming an exemption of one type or another. Our main concern is the home-based business exemption that applies to a sole proprietor with no employees, working exclusively from their home, and making less than 66-2/3 percent of the Nevada average annual wage for 2011, or $27,000. There are 60,467 business entities claiming the home-based business exemption, of which 55,000 of those Title 7 entities were previously not allowed the deduction. At the current $200 annual fee for the business license, that is an annual revenue loss of $11 million. This is revenue that, if left on the table, will have to come from somewhere else. We feel this is revenue that has fallen through the loophole and is left out there collectible on an annual basis. Additionally, Taxation never allowed corporations and other entities under Title 7 to take this exemption.

Section 1 of the bill adds the word "natural," clarifying that a "natural person," as opposed to a "person"—that may include a corporation, limited liability company (LLC), or other artificial person—may claim the home-based business exemption from the state business license requirements. Currently, as worded, the statute has been construed to apply to the broad definition of "person" and, therefore, our system was designed to allow corporations and other artificial persons a home-based business exemption, provided they meet the other statutory requirements. We feel this is a misapplication of statute that will be corrected by this language change. Testimony from 2003 and 2009 showed intent that this exemption apply only to sole proprietors. A previous Tax Commission ruling also stated that the home-based business exemption was available only to a sole proprietor. Testimony from the registered agents in 2003 showed that they understood this and even supported the concept of Title 7 entities being required to maintain a state business license. In 2009, this unintended consequence, or loophole, was not anticipated, and neither was the extent to which this exemption would be claimed. I do not recall discussions in hearings that this exemption was intended for anyone other than the sole proprietorship, and more specifically, the sole proprietor multilevel market such as Avon, Mary Kay, and Pampered Chef representatives.

This is pro-business legislation that, in its current structure, is ambiguous. This change will ensure that those paying the proper fees are not put at a competitive disadvantage with those who have not. Many businesses have received a reprieve from the state business license requirements because of the home-based business exemption that was not previously available to them. Basically, many of them may have received a bonus by paying $100 instead of the $200 they should have paid.

At a time when the state is looking at raising taxes, reducing services, and closing prisons and campuses, Secretary of State Miller has stated that our first attention should be on collecting uncaptured revenue. We should not be looking to increase or impose new fees and taxes on businesses as a revenue source, but to impose and collect those that are already in place. We feel that our core fees cannot be raised without putting Nevada at a competitive disadvantage. In order to meet our revenue obligations, we must collect those fees that are already on the books. We believe that this is already in place but needs clarification and proper application.

Section 1 also adds nonprofit entities formed under Chapter 81 of the NRS and having the same characteristics as those formed under NRS Chapter 82, to the list of nonprofit organizations, specifically, those exempt from the state business license.

Sections 2 and 3 provide a penalty on sole proprietors and partnerships similar to that passed in Senate Bill No. 350 of the 75th Session. This language would have been added in 2009 had the business license authority resided at that time with the Secretary of State. As with the legislation passed in 2009, this section provides a remedy to the state for sole proprietors and partnerships doing business in contravention of the licensing requirements of Chapter 76 of the NRS. It also allows the Secretary of State to pursue action against those businesses through the Attorney General's Office or the district attorney.

The intent of these sections is not to inordinately penalize the unsophisticated business, but to penalize those who, after notification, intentionally refuse to comply with the statutory requirements for doing business in Nevada, and to level the playing field with those who are compliant. These sections also provide the Secretary of State with regulatory authority for the administration of these provisions, allowing us the ability to further refine the process.

Senate Bill No. 350 of the 75th Session gave us this authority for corporations, LLCs, and other entities filed with the Secretary of State. These sections also have the same authority over sole proprietors and partnerships that are now required to register with us pursuant to Chapter 76 of the NRS through the

state business license process. We have proposed the amendatory language (Exhibit D) that adds the word "willfully" to NRS Chapter 76 language and keeps the S.B. No. 350 of the 75th Session provisions that create the higher "willfully fails to file" standard.

Sections 4, 6, 8, 9, and 11 through 24 relate to the same "willful" standard. We had put in "willfully fails or neglects," then initially proposed to take the "willfully" out of those sections. However, we are amending the amendment to strike that change and to put the "willfully" back into the statute to maintain that higher standard for "willfully fails to file."

Chairman Horne:
I do not understand that part. If I do not register my car timely, the Department of Motor Vehicles (DMV) does not say, "Did you willfully miss the deadline to register?" If you miss the deadline, there is a penalty for registering late. Why would you add "willfully fails?"

Scott Anderson:
We understood that and it was our original point when we asked to strike that language. However, in discussions with the business community, they felt that would be hard on small businesses. Instead, we may simply be able to go after them for failing to file their annual list, which already has penalties. This is intended for those who have not filed with us. We give them the opportunity to obtain their state business license, file their incorporation documents if they are a corporation, and to come into compliance. After proper notification, if they still do not comply, we can go after them for the $1,000 to $10,000 fine. This gives businesses the opportunity to become compliant and to file with us. After discussions with the business community, we agreed to take that out to make it the higher standard. Granted, if we were to go after every business that went into default or revocation because they failed to file with us, we would need to add an entire other division for compliance. We feel this allows businesses to become compliant with our office, but if they intentionally refuse to do so, it gives us the hammer to go after them and collect the additional penalties.

Sections 5 and 7 remove the requirement that a foreign corporation submit a certificate of good standing from its jurisdiction of incorporation when it files to qualify to do business in Nevada. This causes processing delays and rejections of the initial qualification filings. The filer may not be able to obtain the certificate, or the date of issuance of the certificate is over 90 days, even though they actually are incorporated in that state. Many states only require an affidavit or declaration that the corporation exists in its home jurisdiction. This provision removes that barrier and will allow us to file these qualifications without significant delay.

Section 10 adds the same declaration language for the foreign LLC qualifications that we are proposing in sections 5 and 7. Currently, there is no provision that a foreign LLC provide a certificate of existence from its home state. That was left out intentionally because of this barrier; however, we felt that it was necessary to add the declaration language to ensure they have filed the proper documents in their home state.

Sections 25 and 26 change the name of the International Association of Commercial Administrators to reflect the Association's name change as referred to in NRS 104.9526 and NRS 104.9527. We are asking that section 27 be amended out. This was the fee portion of the bill that is not necessary. It would standardize some of our fees, but we felt it might be better for another day.

Chairman Horne:
Can you quickly highlight which areas you agreed to make changes to?

Scott Anderson:
We have agreed to make changes to sections 2 and 3 regarding the penalty for sole proprietors and partnerships that are similar to those in Title 7. That puts back the "willfully" language to make it a higher standard. I know there may still be concerns, but we hope that this testimony and our intent will eliminate those concerns. When it comes to our attention that a business is noncompliant and has not filed the proper origination documents, we have significant work to do.

Chairman Horne:
Are there any questions for Mr. Anderson?

Assemblyman Hansen:
What is 66-2/3 percent of the average annual wage? What is that dollar wise?

Scott Anderson:
That amount is $27,000. That figure is determined through the Department of Employment, Training, and Rehabilitation and is in the statute. That amount is what we go by. Every year the amount is determined and the change is posted. A person who is applying for a home-based business exemption, but makes more than $27,000, would not be entitled to this exemption.

Assemblyman McArthur:
I am trying to figure out section 1, subsection 2, paragraph (c), on line 23 where you have the average annual wage. Before the bill came up, anyone

having a home business making less than $27,000, whether they are an LLC or a sole proprietor, got an exemption. Is that correct?

Scott Anderson:
Since October 2009, that is correct. When we put our systems together, there was a misconception that this was available. Plus, we did not realize to what extent there would be home-based business exemptions. It was not until months later when comparing the number of exemptions claimed to the number of applications that were submitted that we saw there was a problem—a loophole—and that we needed a way to rectify it.

Assemblyman McArthur:
The way the bill reads currently, if you are a home-based LLC that makes under $27,000, you will no longer get the exemption. It now says a "natural person," so it must be a real person, and corporations do not qualify for the exemption.

Scott Anderson:
We do not believe that it was really ever there. It was a misapplication on our part because of the timing we were under to get the state business license in place and the amount of work it took. This clarifies what we feel is already in statute. If you look at section 1, subsection 1, paragraph (c), and subsequent sections, there are provisions that entities filed with our office pursuant to Title 7, and that have a registered agent, are subject to the state business license. While we feel that current statutes allow us to apply it this way, the addition of the "natural person" clarifies the language and makes the statute unambiguous.

Assemblyman Sherwood:
You are claiming $11 million lost, so could we just double the fee? The presentation that you made last week showed that you made more money in registrations. How much money have we made already by doubling this fee from the last session?

Scott Anderson:
Yes, this body did increase the fee from $100 to $200 effective July 1, 2009, when we took over the program in October 2009. This past fiscal year, we increased the amount of business license revenue over what Taxation did. In 2009, Taxation collected $22 million in business license fees. In fiscal year 2010 (FY10), we collected $37 million for the nine-month period. Yes, we have bridged part of that gap. However, had these 55,000 entities also paid the fees, there would have been an additional $11 million. We had projected that the revenue generated by the state business license would be between $55 million and $60 million. We are not even close to that. We are

pushing $45 million to $50 million a year. There is still a gap of uncaptured revenue that should be collected, but is not, and is leaving a hole.

Assemblyman Sherwood:
As far as the number of entities filing, you have $17 million more than you had, but the numbers that I saw indicated fewer entities filing. If we increased the rate, would it not figure that, of the 60,000 entities, we would have fewer filing? We think we are going to get $200 from them, or $500 if they are late, and there is a late fee already. Are we going to capture 100 percent of that 60,000?

Scott Anderson:
We may not capture 100 percent, but we should be able to capture a significant portion because we are looking at 55,000 Title 7 entities that are claiming the home-based business exemption at $200 each, or $11 million. If they are collected with the annual list as they are with other Title 7 entities, we should see a significant increase in the amount of revenue collected.

Assemblywoman Dondero Loop:
I am looking at the loophole that you are referring to that people are taking advantage of. I want to know what percentage of people are taking advantage of that loophole.

Scott Anderson:
There is a loophole that was created in 2009. This statute has been on the books through Taxation since 2003. Taxation did not allow this exemption for corporations and LLCs. We feel that this closes the loophole. It also levels the playing field with those who are compliant, since there are those who are definitely not following the rules. When you have a bowling alley or mining company that claims the home-based business deduction, there is a problem. For those types of businesses, we do have the authority to go after them under the false filing provisions.

Assemblywoman Dondero Loop:
To me, the $200 license is just a function of doing business in this state. My concern is that we have people from out of state that are taking advantage of this by not filing. Is that correct?

Scott Anderson:
That is correct. This is an exemption that is taken by both domestic and foreign corporations, those in and out of the state. Those that are not in this state, that are not contributing to our tax base through employment taxes or any other presence in the state, are taking advantage of this as well.

Assemblyman McArthur:
It does not look to me as if there was a loophole; we just did not go after those who were falsifying their papers. It seems we are trying to solve the problem of not going after those people by cutting out the small businesses. Do we really need to hurt the under-$27,000 small businesses, or just go after those who are falsifying their paperwork?

Scott Anderson:
In 2003, when this was originally put forward, it was understood that all Title 7 entities would be subject to the state business license. That would be the first step in doing business in Nevada. The business license program was transferred to the Secretary of State's Office because of noncompliance and lack of enforcement. In NRS 76.020, section 1, subsection 1, paragraph (c), it states, "Any entity organized pursuant to this title, including, without limitation, those entities required to file with the Secretary of State, whether or not the entity performs a service or engages in a business for profit." The business license also applies to them, so this was part our creation, part a misunderstanding, and part our systems. This has been a two-year loophole in the current statute that needs to be closed. We need to level the playing field, so those who are in compliance are not in a competitive disadvantage with those who are unjustly claiming the exemption.

Chairman Horne:
To break this down in laymen's terms, in 2003, businesses were required to pay these fees; then, businesses began to take the exemption. By oversight or mistake, the Secretary of State allowed the exemption. Now you say it is an error, they should not have had the exemption, and we are now trying to change it back the way it was initially.

Scott Anderson:
That is correct, Mr. Chairman.

Assemblyman Sherwood:
We understand the loophole exemption that you are trying to change. However, the other half of the bill concerns collecting fees on top of the late fee that is already there. The Secretary of State can also invoke procedures to collect the fees as they see fit, including collecting up to a $10,000 late fee and attorney fees. What I am concerned with is section 27, subsection 2, paragraph (e), subparagraph (2), sub-subparagraph (II), which states, "The Secretary of State shall, by regulation, establish procedures for the imposition of the fees authorized by this paragraph and the manner in which a fee authorized by subparagraph (2) will be calculated." You are saying that you would need a whole other office to collect these fees is something I would like to avoid. You

could, in theory, hand it off to a collection agency that could put a collection fee on top of the other fees. Then a $100 fee turns into a $10,000 fine, plus attorney's fees, plus collection agency fees. This could become a $20,000 lien on this man's house from a $100 fee. How do we mitigate something like that from happening?

Scott Anderson:
Section 27 applies specifically to fees from Chapter 225 of the NRS, and not necessarily to fees under Title 7. However, to answer your question regarding this, the "willful" standard allows us to take action against a business that intentionally refuses to register to properly do business in this state. It is intended for businesses that do not become compliant after our attempts to bring them into compliance as all other businesses in this state must be. The intent is to go after those companies that have not filed their origination documents. There is a possibility that the fees can still be collected for companies in permanent revocation if they are still doing business in this state. We will give ample opportunity for compliance before we take action through the Attorney General or District Attorney to enforce the fees and provisions. This is not something we will take lightly, but I will not feel bad about assessing additional fines or penalties after affording ample opportunity to correct the situation.

Chairman Horne:
Is there anyone else present who wishes to testify in favor of A.B. 78?

Kevin Benson, Deputy Attorney General, Office of the Attorney General:
I represent the Secretary of State, and I think Mr. Anderson adequately covered everything I wanted to cover.

Chairman Horne:
Are there any questions for the Secretary of State's attorney? I see none.

John W. Griffin, representing the Independent Gaming Operators Coalition:
The Independent Gaming Operators is an association made up of small gamers across the state. We have been paying close attention to the budget and the fiscal situation in the state. As a bit of background, most of the small gaming companies in the state are struggling. Many of them are on the verge of bankruptcy and collapse. Most of them are located in the small towns across Nevada, are primary employers in those towns, and are just trying to stay afloat to keep people employed in those small towns.

The reason we are here is, as everyone knows, there is discussion on increasing gaming fees to pay for the operations of the State Gaming Control Board. It is

our opinion that we ought to close loopholes that are being taken advantage of wherever and whenever possible before we look at new revenues. Small gamers pay gross gaming tax, property tax, sales tax, slot tax, modified business tax, liquor tax, live entertainment tax, minimum wage for tip employees, private audits, and gaming control audits. In comparison, it just does not seem right or fair not to close loopholes being taken advantage of by home-based LLCs making $27,000 a year and not having to pay a mere $200.

Alfredo Alonso, representing Lewis & Roca LLP:
Just to add a bit of historical perspective that Scott did not touch upon, the Secretary of State just recently got these duties. Definitionally, there may have been some mistakes made. With respect to "natural person," if you look at section 1, subsection 2, paragraph (d), you already have "natural person" so it is clear that this was a mistake. It is clear that you have a "person" and a "natural person" below it, so it is a loophole. From my firm's perspective, we look at this as it has always been a "natural person" and we treat it as such. We are registered agents for thousands of clients and we have never looked at it any differently. We have looked at it and treated it in the same manner that the Secretary of State is now treating it. All you are doing is closing the loophole, and we should collect all fees currently assessed. There are going to be significant issues this session, and this should not be one of them.

Chairman Horne:
Is there anyone else wishing to testify in favor of A.B. 78? I see none, so we will move to the opposition.

Scott Scherer, representing Nevada Registered Agent Association:
Mr. Alonso referenced the fact that the statute refers to a "natural person" in a number of different sections. In NRS 76.020, section 1, subsection 1, paragraph (a), it specifically says, "Any person, except a natural person . . ." so the language in the statute itself draws a distinction between a "person" and a "natural person." They are two different things; otherwise, paragraph (a) would be meaningless. The Nevada Supreme Court has said on many occasions that we should not interpret statutes in a way that would render any language meaningless. Section 1, subsection 1, paragraph (b), refers again to a "natural person" who files certain individual income tax forms. Mr. Anderson referred to paragraph (c) that talks about an entity. Subsection 1 talks about all of the people who constitute a business, whether they are entities or a natural person, and when they constitute a business.

Section 1, subsection 2, which is the subsection they are attempting to change with A.B. 78, provides exemptions to subsection 1. The fact that subsection 1(c) refers to entities does not mean that all entities are subject to

the business license because subsection 2 creates the exceptions. Subsection 2 (c) is the home-based business exemption and it refers only to a person in the broader context. As Mr. Anderson said in his prepared testimony, currently, the statute has been construed to apply to the broad definition of "person" and, therefore, our systems were designed to allow corporations and other artificial persons the home-based business exemption, provided they meet the other statutory requirements for the exemption. As he has admitted in his testimony, the current language in the statute allows home-based limited liability companies and corporations to take advantage of the home-based business exemption.

Chairman Horne:
Why were they paying it prior to the previous two years? The testimony was that they were paying it before with the language there, then they stopped paying it, and now they are testifying to close the loophole.

Scott Scherer:
I have not looked at the prior language in Chapter 360 of the NRS. I did not know that it would be their argument. It is my understanding that Taxation, while there were several interpretations, had said that the home-based business exemption did not apply. That language was not enforced and it was not regularly collected. There were no enforcement actions taken against home-based businesses, and people claimed the home-based business exemption even if they were entities.

Chairman Horne:
That was before it was under the umbrella of the Secretary of State's Office.

Scott Scherer:
Correct. And then in 2009, it was moved under the Secretary of State's Office with this language in the statute, which was Assembly Bill No. 146 of the 75th Session. As I pointed out in my memorandum (Exhibit E), that bill specifically distinguished between the "person" and the "natural person." In the transitory language, section 46 talked about someone who had a previous business license under Taxation, but since it is transitory language, it was not codified in the NRS. It states that a person who holds a valid state business license under NRS Chapter 360 before October 1, 2009, is an entity that is required to file an annual list with the Secretary of State. So, the transitory language itself in the bill that created this exemption under the Secretary of State's umbrella specifically considered the fact that an entity could, in fact, be a "person", so a "person" is construed in the broader sense to be an entity. Chapter 0, which is the preliminary chapter of the NRS, contains a definition of "person." That definition of "person" specifically includes business entities,

corporations, limited liability companies, partnerships, and others. In the absence of a specific definition of the word "person" in Chapter 76 of the NRS, the word "person" does include business entities.

Our position is that, under the current language in statute, it is clear that business entities are entitled to the home-based business exemption. I am not here to address the specifics, but under the current statute, it is clear that the home-based business exemption does apply to the small "mom and pop" limited liability company that is operating out of the home, trying to get a business started, and is making less than $27,000 per year.

Chairman Horne:
Are there any questions for Mr. Sherer? I see none.

Chris Ferrari, representing Nevada Registered Agent Association:
For those who are not familiar with what a registered agent does, the agent is a person or entity designed to receive tax and legal documents on behalf of a corporation. For example, you could have a business in another state, but choose to incorporate in Nevada because of the favorable business climate and tax structure. For that reason, you would need a registered agent to receive legal documents, information, et cetera, on your behalf for your corporation.

Our members spend millions of dollars every year promoting Nevada as a business-friendly state. We tell others specifically that we are a business-friendly, no-tax state. That is our absolute number one pitch across the country. In doing so, we generate more than $34 million a year in revenue for the state, employ more than 1,000 people across the state, and generate more than 100,000 visits by those incorporating in Nevada from out of state. We also attract capital to Nevada's banks from those corporations filed in our state. Since most of our clients are filing corporations from out of state, they spend their money registering here, fund our tax base, and use our services. They are not using our schools or roads, and they are not creating traffic; they are just generating dollars. Even the Office of the Secretary of State boasts on their "Why Nevada?" website that we are number 2 in the nation for corporate filings.

While we strongly support the Secretary of State's efforts to crack down on corporations illegally claiming the home-based business exemption, we do oppose A.B. 78 as written. There is a fundamental question that I would ask you to consider as policymakers. Is it good policy to punish the smallest business people earning less than $27,000 a year and filing legally for the home-based business exemption in order to catch larger corporations that are illegally filing for this same exemption? In our eyes, these are two different

issues, and to punish the smallest business to catch the biggest is not the answer.

Per A.B. 78, the Secretary of State's Office is removing the home-based business exemption for all corporations, even the little guys complying with all aspects of the law. The exemption, which is $200 in this case, may not seem like much to some, but it is intended to help out small business people who want the legal protection of the corporate entity. For example purposes, we will say that Assemblyman Hammond's wife has an active real estate license, but also has a full-time job in another profession. Maybe she sells a couple of homes a year to friends just to make a little extra money for the family. For this purpose, they are savvy folks. They are going to set up a corporation to ensure the rest of their family assets are protected. She will pay $125 a year to the state to file her annual list of officers. She qualifies for the home-based business exemption since she makes under the threshold, which saves her $200 a year. The same exemption is afforded to any small business in the state, or anyone who just files a corporation in anticipation of one day fulfilling their entrepreneurial dreams. Two hundred dollars may not be a lot to some of us, but again, I ask you, the Committee, in the worst economy that we have seen in most of our lifetimes, do you want to make a policy decision that places an additional burden on these small business people? It is enough to buy groceries, pay for a few tanks of gas, buy school clothes, and whatever else. I venture to say that $200 matters now more than it has in a very, very long time.

The Secretary of State's Office believes that the larger corporations are taking advantage of the home-based business license in order to avoid paying the $200 fee. If that is the case, and it is proven, we absolutely support their efforts to go after these folks with everything they have. It is not our business to advertise the home-based business exemption, and if there are folks violating that law, they are guilty already of a class E felony. If they need some increased fining capacity to go after these folks, we support that fully. Our research shows that Nevada is the only state in the country with a state business license fee. Typically, this is done at the city or county level, but in Nevada, we have both. Again, our members spend money recruiting businesses to incorporate in Nevada, and we see removal of this exemption for small businesses a step toward making Nevada less business friendly and pushing businesses to incorporate in other states. To incorporate in Nevada the first year, it costs a business $400, or $200 with the exemption of the home-based business license fee. In Wyoming, it costs $100; in Delaware, $90. Even with the exemption, we are 100 percent more expensive than those states. We do not believe this is a policy decision that makes sense.

Assembly Bill 78 is also a fee increase. The removal of an exemption allowed under current statute, per Mr. Scherer, is a new $200 tax each year on all small businesses. That is why the bill requires a two-thirds majority vote. We believe that passage of the bill could have a negative long-term impact on our state. The Secretary of State has identified several millions of dollars in uncaptured revenue as indicated earlier based on bigger businesses claiming that exemption. If the wholesale removal of the exemption passes, even for that little guy who is abiding by the law, how many businesses will not refile their corporations in Nevada? How many will register elsewhere? Can Nevada afford to drop on the annual lists of business-friendly states? What does that mean to the macro picture of our economy? Will the Secretary of State's Office still be able to boast about Nevada being number two in corporate filings? Do we want to be known as the state that is business friendly, but do not want companies to register here because they are too small? I cannot answer all of these questions, but I pose them to you as the policymakers for consideration during your deliberations.

Assemblywoman Dondero Loop:
Am I misunderstanding that, when it says "whose net earnings from that business are not more than 66-2/3 percent . . . ," the small businesses are exempt from this?

Chris Ferrari:
Under the Secretary's bill, not if you are a corporate entity or a Title 7 entity; only if you are a sole proprietorship.

Matthew A. Taylor, President, Nevada Registered Agent Association:
We are a trade association of incorporators in Nevada. Our membership is roughly 42 to 44, depending on the year. Our members represent over 125,000 corporations and LLCs that are on file with the Secretary of State. As you have heard, we have a number of concerns on this bill. First, this has been expressed as a loophole regarding the section 1 language, that somehow corporations and LLCs are unfairly taking advantage of the language choice. We do not believe that is the case. We believe this is a specifically worded exemption that was really designed to be offered to home-based businesses. They have to earn less than $27,000 a year and be based solely out of their home. This was the intent of the exemption.

When we refer to multilevel companies—the Avon ladies, the Pampered Chefs—these are companies that could take any form as far as what business structure they choose. We have a history, both with our industry and with the Secretary of State's Office, prompting these small business owners that they should avail themselves to the protections of corporations and LLCs. When we explain to

individuals that a corporation is a legal person, that it has its own rights and responsibilities, people choose to spend this revenue with the Secretary of State's Office forming corporations and LLCs for a number of reasons. They are trying to protect themselves when they are just starting out and more likely to make mistakes even before they have made a dime of income. Quite frankly, they may never make a dime of income, but they are still looking to protect their homes, their wages, and the wages of their spouse, while trying to get a hand up in this economy. We have seen a lot of individuals trying to start a business of their own after being laid off or displaced out of the employment field. Obviously, that usually takes the form of a home-based business. It may be years before they make a profit or pass $27,000 in income, which we can agree is not that much for someone starting out in a business. They are trying to protect their assets and themselves from predatory trade practices and partnership disputes. As an industry, we have the responsibility to help them protect themselves. For the state, the Secretary of State's Office markets the exemption to both large and small companies that are just starting out. We hope, with our economic system, they will eventually all grow. One of four may get to the point where they grow, hire employees, and survive. If we discourage those home-based businesses by changing the exemption, we will never see even one out of four make it.

In addition, we have heard concerns regarding the number, or the percentage of, companies that are filing for this home-based business exemption. By Deputy Anderson's testimony, roughly 20 percent of companies on file with the Secretary of State file some type of exemption. Obviously, less than that are filing a home-based business exemption. I do not know, and have not heard, what the ratio of home-based businesses is. After 14 years in business, I would not doubt that one out of five or six companies start out as single-person, home-based businesses. They are pursuing their hopes and dreams while availing themselves to the protections that we afford in our statutes for forming corporations or LLCs.

We have spoken to the concerns that there might be larger companies that are trying to abuse this. I do not believe that a larger company is going to escape scrutiny very long, and there are mechanisms in place to address those issues. We support the Secretary's efforts in trying to enforce the statutes as they are written.

To sum it up, we are not looking for a change in the current statutes. We are not looking for additional relief for small businesses, or an expansion of small business exemptions. I could make an argument to look at that policy decision, but that is not why we are here today. All we are asking is that the members of this Committee not allow this fee increase to be applied to the business

demographics least able to afford it. The Nevada Registered Agent Association cannot support A.B. 78 as it is written. We respectfully ask that you do not let this bill proceed out of committee.

One other comment regarding sections 2 and 3. We have concerns, and we have addressed these with the Secretary of State's Office, that there is a duplication of penalties in this bill as it applies to corporations and LLCs. The language was borrowed from Senate Bill No. 350 of the 75th Session. It applies the same penalties and process for corporations and LLCs that fail to register with the Secretary of State's Office as those that fail to maintain their status with them. A corporation cannot maintain its status without applying for its business license, so the language, as it reads, allows the Secretary of State to potentially go after a company twice for the same infraction when it has not filed its corporation documents and it has not filed for its business license. It is essentially the same penalty being applied twice for the same issue. The Secretary of State's Office has gone on record that this is not their intention, and we believe them, but we still want to express concern that what it means today, and what the intentions are, can be misconstrued five or ten years from now.

Chairman Horne:
What do you say to the question I posed earlier about the very same businesses paying the fee prior to it going to the Secretary of State's Office? I do not define that as punishment for the small business owner as it has been suggested a couple of times. If I go to the movies every weekend and pay $5 every time, then I go up to get a ticket with my $5 and am told that the movie price is $7.50. Although previous weeks I paid $5, from now on I have to pay $7.50 because that is what I was supposed to have been paying all along. I do not see that as a punishment. First you were paying, then you were not paying, and now they are asking you to pay again.

Matthew Taylor:
With respect to Taxation, one of the reasons that the Secretary of State took over the collection of the business license filings is that Taxation was not effectively or consistently enforcing it. Taxation had a collection rate of about 30 percent of the businesses that were on file with the Secretary of State's Office. The collection rate has gone up to 80 percent.

Chairman Horne:
Is that not the purpose of it going over to the Secretary of State to begin with?

Matthew Taylor:
Enforcement was the reason we supported the Secretary of State's efforts and why we worked with them to make the transition. That said, this is when the exemptions were reviewed by the Secretary of State's Office, our industry, and attorneys, and it was determined that the way the language read it did apply to corporations and LLCs. That is why we were able to get behind that effort and support it. We looked at different exemptions and at tying the business license to the list of officers. Some exemptions were removed, some were clarified, and it was decided that this one did apply to corporations and LLCs. We do not believe that this is something that was mistakenly added in. We believe it was the intent when it was drafted that the exemption included corporations and LLCs.

Assemblyman Segerblom:
Did one of you say that these corporations do not use the schools or public services?

Matthew Taylor:
That is correct. There have been concerns that these companies are not contributing to the other tax bases in the State of Nevada. I would encourage you to remember that the only companies that we are talking about here are small home-based businesses that earn less than $27,000 a year. If they are coming from outside of the state, they still have to be home-based and be earning less than $27,000 a year. If they are coming from out of the state, that is correct. They are not driving on our roads, they are not creating a burden on our systems, or anything else. Essentially, this is found money for the state for the General Fund through the Secretary of State's Office. We have one of the highest filing rates per capita of corporations and LLCs for specifically that reason. We have tried to make this a business-friendly climate. We have tried to attract these companies regardless of their size.

Assemblyman Segerblom:
So you are saying that these are not my neighbors who are "mom and pop" real estate agents in Las Vegas. Are these companies that are using Nevada as a corporate haven in Los Angeles or San Francisco?

Matthew Taylor:
No. What I am stating is that it is both. It is your neighbor or your cousin's neighbor in Los Angeles. These are small companies coming from anywhere in the country. There is a large local population of corporations and LLCs, and we also have a large demographic of small companies that are coming in from outside of the state.

Assemblyman Segerblom:
The $27,000 profit, is that after taxes? Is it the net profit? They could be grossing $100,000, then write off their car, part of the house, their utilities, et cetera, to get down to that $27,000 threshold.

Matthew Taylor:
That is correct. It is based on the net profit, just as it is for sole proprietors.

Assemblyman Sherwood:
For the record, there may be a perception that they are not paying any money, and not contributing anything. Mr. Ferrari mentioned that when you start up, it is not going to be $400, but $200 instead. As I read the current statute, it is $125 for an annual filing fee for everyone regardless of exemption. It looks like, based on 60,000 folks who are claiming this exemption, it generates between $7.5 million and $12 million if you take the $125 or $200 for the first time. Is that true?

Matthew Taylor:
That is absolutely correct. No one is looking for an exemption of the state filing fees for maintaining a list of officers, or a reduction of fees for forming a corporation. These are fees that have always been paid by these companies for as long as there have been corporations and LLCs. These are fees that are paid above and beyond what the same company would pay if it chose not to incorporate. This is an issue where the same size companies are placing themselves in a competitive disadvantage by choosing to pay these fees and availing themselves to corporations. We are not claiming that it is not without benefit. This is a separate issue where the business license exemption was intended to provide relief for those small businesses that are home based and just starting out.

Chairman Horne:
We still have others in opposition to this bill, so I would like to move on to them. I am looking for different testimony. I am not trying to stifle anyone's testimony, but "me too" would be really good right now.

Trevor Rowley, Executive Vice President, Nevada Corporate Headquarters, Inc., Las Vegas; and Corporate Service Center, Inc., Reno:
Our firms are listed as commercial registered agents with the Office of the Secretary of State. Combined, we represent more than 9,000 active business entities. Our firms promote the State of Nevada. In fact, we spend over $125,000 every month in advertising to promote the advantages of utilizing Nevada entities. This kind of expenditure is necessary as we compete with other states for business filings, specifically Delaware and Wyoming. Our

efforts have produced on average of about 363 new entity filings in the State of Nevada per month over the last six months.

In our 20-plus years of serving entrepreneurs across the United States, we have learned a few things about their behavior. First, they look long and hard to identify the most favorable jurisdiction for the filing of their new entity. Key factors in making this decision are strong statutory protection of the corporate veil, statutory indemnification, overall low cost of filing, and taxes. Fortunately for Nevada, lawmakers over the years have consistently taken steps to lock in a Nevada advantage in these key decision making areas. As a result, we see as many as 90 percent-plus of our entrepreneurial clients coming to Nevada from other states. The revenue produced by these filings from out of state comes with no need for additional state services.

One of our 100-plus employees will personally take time with each of our clients to ensure they are in full compliance with all state filings, business licenses included. We use information published by the state regarding state business license requirements so that our clients can make an educated decision whether they are required to secure a license or whether they may be exempt. Because we take so much time with each client, we learned a lot about the reasons they have for creating an entity as opposed to large national based commercial registered agents whose clientele consists of very large corporate businesses. We have found that our client base consists largely of smaller "mom and pop" businesses and entrepreneurial-minded individuals who have hopes of achieving the American dream and owning their own business. An extremely high percentage of these individuals start their businesses out of their homes and on a shoestring budget. As they read the state business license requirements, they believe they qualify for the home-based business exemption. If it were not for this exemption, they have expressed to us that they would probably choose to incorporate somewhere else where the overall cost would be lower, or they would choose not to incorporate at all and risk the possibility of never achieving their dream. Neither one of these possibilities would be good for our business or the State of Nevada as they would represent lost revenue. For this reason, it is critically important that this exemption continue to be made available.

We believe that, should A.B. 78 be passed, the State of Nevada could reasonably expect to immediately see significantly fewer corporate filings as people choose to take their business elsewhere, or decide not to incorporate at all. This translates to less revenue for the State of Nevada. We have tremendous respect for Secretary Miller and his staff and always have been and will continue to engage in dialogue to promote the best interests of the State of Nevada. However, we believe that A.B. 78 falls short of the standard,

and we respectfully ask that the Committee consider our statement and ask that this bill not advance.

Chairman Horne:
Are there any questions? I see none.

Janine Hansen, President, Nevada Eagle Forum:
I have a different testimony this morning, although I support those who have opposed this bill and their specifics. I think this can really affect small local businesses in Nevada. I will give you an example. My daughter had a little business called "Polly Ester Costume Boutique." Because of the economy, she had to close her business and take it home. She was then working full-time. Now she has lost her job and can only find a part-time job. She is trying to open her business again to supplement her income. Just that $200 is significant to her, and every time she has a local business license or other fee to pay, she talks to me about it. She is barely able to keep pace with these since she is not bringing in any money to pay for a business at this time. She continues to work for the time when she can open it. She recently told me she is hoping to be able to actually open a little shop in Reno in conjunction with someone else. This amount of money may seem very small to those who have more, but for someone who is really trying to open a small business, it can make a big difference in whether they can actually launch that business and keep it open. For those who are trying to build something in this bad economy, it can make the difference between filing for a business license and just going under.

If you do not extend this, you will see a significant number of people in the State of Nevada trying to supplement their income by opening a small business but will say, "I cannot make it if there is one more $200 fee." I hope you will take that into consideration for those who are really struggling to build something in Nevada.

Chairman Horne:
Are there any questions for Ms. Hansen? I see none.

John Wagner, representing the Independent American Party:
I am a bit confused hearing about all the stuff about "natural person" and "unnatural person." When I first came here, I had retired from Sony. I thought I would do some consulting on the side. At two different times, I contracted with Sony to go to San Jose and provide maintenance training on their JumboTron screens. At two other times, I contracted with KOLO-TV to do maintenance on their VCRs that were in sad shape. I did not know, and still do

not know, whether I needed a license to do that. I am confused, and do not know whether the Secretary of State's Office can clarify this for me.

In general, I am opposed to the bill. I do not like the idea of raising fees, although I do support their efforts in trying to get rid of people who are cheating.

Tray Abney, Director, Government Relations, Reno/Sparks Chamber of Commerce:
I am going to echo the comments that Mr. Ferrari and others have made. When this bill first came to my attention, I was concerned with the issues Mr. Scherer covered, and what we thought were astronomical fees attached to it. The "willfully" language helps a lot. I still share some of the concerns about the dollar amount and collection agencies and such. We appreciate adding the "willfully" language. I want to also say thanks to Secretary Miller, Mr. Anderson, and Ms. Lamboley for working with me on this bill.

I am concerned about the exemption issue that we have all talked about. You can have two people in exactly the same situation, doing the exact same thing, selling the exact same product from their home, but one is incorporated and one is not. One would be required to pay the $200 fee that we have been talking about and the other would not. We talk about whether people used to pay this, but over the past few years, they have not been required to pay it. If this bill were to pass, this would be a $200 fee increase every year on people who are not currently paying it. That is my concern for the smaller companies.

I agree with Mr. Ferrari. You talk about the mining companies and bowling alleys, go get them. We need to figure out how to stop the people who are taking advantage of the system. It is not fair to all of my members who pay the $200 business license fee, and we need to take care of them. We do not think it is right to go after the small guys who may have decided to incorporate.

Doug Ansell, representing Inenvi, Inc.:
We provide software to legal document companies and registered agent companies nationwide. We see a lot of this firsthand. I will not have cohesive testimony because I do not want to echo anything that has been said already. I understand the concern that some companies were paying this before. Taxation had a very low compliance rate. With the Secretary of State now enjoying 80 percent compliance, I find it unlikely that the 20 percent would be part of the 30 percent that Taxation was collecting previously. Also, it is not unfathomable in this economy that companies have downsized and maybe gone back home, just as some of you have testified earlier. We certainly have seen a lot of that.

Our data also supports Mr. Rowley's testimony regarding certain companies in Nevada having a much higher compliance rate than others just by the nature of the demographics of their customers. For the most part, the larger companies will have a larger percentage of people filing for a business license.

Additionally, the late fee is currently 100 percent, and I think it is being onerous to request up to $10,000 for a late fee. That is going to scare a lot of people away. There was legislation a few years ago related to payday loan companies using onerous late fees. There are also various mechanisms to keep credit card companies and other organizations from abusing customers who are in trouble.

It is not true that these nonresident businesses are not contributing. A lot of the people who incorporate in this state have to come here to open their bank accounts. They stay in our hotels, spend money, and engage in gaming. Many of them come here to have their annual meetings. Speaking of people who are not subject to the exemption, a lot of times they are going to be a higher-end customer for Nevada. They eat in our restaurants and go to our nightclubs. This does not pertain specifically to this exemption, but if Nevada were to get the reputation that this is not the place to incorporate your business, we risk losing some of these people coming to our state, and that could be a lot of revenue.

Currently, the data that we have shows that people are abandoning their business filings in Nevada at a rate higher than new business entities are being formed. I think, if this bill is passed, we will see that increase exponentially. There will be fewer filings, and more people abandoning their existing entities, so those revenue sources will dry up. People who would otherwise be coming to Nevada to spend their money in our state would not be coming. I do not think this is the time to drive more companies out of the state as difficult as it now is.

[Chairman Horne left the room and Assemblyman Frierson assumed the chair.]

Acting Chairman Frierson:
Are there any questions? I see none.

Andrew B. Platt, representing Woods Erickson Whitaker & Maurice LLP:
I want to respond specifically to the question that the Chair continues to ask about whether this fee was paid in the past. Between 2003 and 2009, our clients took advantage of a different exemption. Many of them took advantage of the holding company exemption, which allowed businesses that were not actively conducting business here to not pay the business license fee. So it is not just a question of compliance, there was authority and instructions from

Taxation that we did not have to file on behalf of these entities. The idea that this exemption materialized in 2009 by virtue of an oversight misses the point. We transferred some entities that were not conducting business and had no physical presence in Nevada. They qualified before for a holding company exemption, but now qualified for the home-based business exemption. We are not skating through, we are just adapting to the changing legislative concords.

If this bill passes, we absolutely will be taking some of our estate planning clients and our clients that hold assets passively in Nevada to Wyoming. It does not make business sense or savvy to pay $325 a year for a passive holding company when they can be paying $50 in Wyoming instead. We ask that this bill not advance. Nevada's advantage will not be regained if we lose our stature as a business-friendly state.

Acting Chairman Frierson:
Are there any questions for Mr. Platt? I see none. Is there anyone else in Las Vegas who wants to testify? I see none.

Jed Block, President, State Agent and Transfer Syndicate, Inc.:
We are a registered agent company that was formed in Carson City on April 9, 1903. I want to give a historical perspective for all of you who have not been here for many years.

[Chairman Horne returned to the room and reassumed the chair.]

Prior to 2003, Taxation wanted a $25 one-time business license fee for any corporation that was out of state that had a Nevada domicile. Then they changed that and included LLCs. Later, they included limited partnerships. The registered agent bill in 2003, which I drafted with members of our association and lobbyists, was to take the $25 one-time fee and make it a $50 annual fee with a $50 penalty if people did not pay. In the eleventh hour, somewhere around midnight, that language was taken out of our bill and put over to the Department of Taxation for $100 annually and 100 percent penalty, to be collected through Taxation. In our bill, with the registered agent bill, we wanted the fees collected through the Secretary of State's Office because it made sense to us in the industry.

As of December 12, 2008, there were 318,163 current entities on file with the Nevada Secretary of State's Office. Best guess by Taxation was that they had collected 155,000 of these business licenses. During the last week of December 2008, I called a representative of Taxation and he said that I did not need a state business license for asset protection entities. I had numerous clients that called and none of them knew what the exemptions were. Now, we

come into 2009 and there were 155,000 business licenses, but there were 163,163 without a business license. The governor at the time and the Legislature decided to forgive the $100-plus penalties for the year, times the 6 years they were in arrears. They left over $195 million on the table, so they wanted to double the business license fee from $100 to $200 to make up the $30 million. I would say that we have not made that. Apparently, there was nothing carved in stone with Taxation. I now have an attorney in California that is sending everyone to Wyoming because of the $200. Taxation was administering it, but not collecting it, so 163,000 entities were getting away with not paying the business license fee. That was the big loophole. It is a $100 increase, or basically, $200 since there were ways to get around it before. My clients cannot afford this increase, like Shirley who put her husband George in a rest home that took her life savings. They had incorporated to do the right thing to protect their assets, but now she cannot afford even $100 more a year for medical expenses, much less for business license fees.

Bryan Wachter, Director of Government Affairs, Retail Association of Nevada:
My first point is about using the business license fee as a revenue stream. We want it to be known that, when the business license was first created, it was not intended to be revenue generating for the General Fund. It was to support the activities of the Secretary of State's Office in administering the business license.

The second point I want to bring up is that the business community worked very hard, and we appreciate Secretary Miller's enthusiasm last session to create a business portal. That was one of the reasons the business license went from Taxation to the Secretary of State, to create a portal to make it easy for business—whether in state or out of state—to have a one-stop shop; and to have an uncomplicated system. Part of this discussion is premature until the portal is up and running to see what problems we actually have before we start solving problems that may not be there. We need to get to the original intention of the 2009 legislation, to create the portal.

Chairman Horne:
Are there any questions? I see none. Is there anyone else to testify in opposition? Does anyone want to testify in the neutral? I see none. I will close the hearing on A.B. 78.

We have more work to do on this piece of legislation if it is going to move. We will take a quick recess [at 9:41 a.m.].

The meeting is reconvened [at 9:48 a.m.]. We will open the hearing on Assembly Bill 56.

Assembly Bill 56: Grants subpoena power to the Attorney General, acting through the Medicaid Fraud Control Unit, to obtain certain documents, records or materials. (BDR 18-119)

Keith G. Munro, First Assistant Attorney General and Legislative Liaison, Office of the Attorney General:
As the cover of this bill notes, the Legislature created a Medicaid Fraud Control Unit (MFCU) within our office. This unit has primary jurisdiction to investigate and prosecute fraud by Medicaid providers, misappropriation of money from Medicaid patients, and abuse and neglect of elderly patients. Prosecuting these cases promotes safe living environments for our elderly and returns badly needed and fraudulently obtained taxpayer dollars to the Medicaid system. The money then helps citizens with Medicaid care.

The first part of this bill is the most important part. It authorizes our Medicaid unit to recover from defendants and to retain costs that are incurred in investigating and prosecuting these cases. We are trying to help the Legislature. This bill has gotten the attention of both money committees, and let me explain why. Federal law requires state governments to match 25 percent of the cost for fraud control. We want to create a mechanism for paying this match so the Legislature does not have to use General Funds to pay for this cost.

In the second part of this bill, we respectfully request the authority for the unit to have administrative subpoena power. This would ensure accuracy of records and improve timeliness. Last session, this portion of the bill was passed by this Committee. We are not sure why it died on the floor with no explanation given. We are back again this session with that portion of the bill.
With me is Deputy Attorney General Kevin Benson, who will go through the sections of the bill.

Kevin Benson, Deputy Attorney General, Office of the Attorney General:
As Mr. Munro mentioned, there are essentially three aspects to A.B. 56. The first one has to do with the cost match that the state has to put toward Medicaid fraud control according to federal law. As was mentioned, every state has an MFCU, and 75 percent of the cost of running that unit is funded by the federal government, and 25 percent has to be funded by the states. What A.B. 56 would do is permit our fraud control unit to recover the costs of investigations and prosecutions from the perpetrators of Medicaid fraud. It

would also allow us to retain a certain amount of those costs and put that money toward our operational expenses. In other words, to put it toward our 25 percent match that we are required to make. This bill is based on Michigan's law, which also allows their MFCU to do the same. This would allow us to recover our costs up to the 25 percent match and then any money in excess of that would be turned back over to the Medicaid program.

The second aspect would authorize the MFCU to use the administrative subpoena to get records needed in its investigations. Under the current law, the fraud unit must get a search warrant or a grand jury subpoena to get records. Right now, the fraud unit investigates and prosecutes cases through both the criminal and civil courts. One of the problems that we have is that the rural counties do not have standing grand juries. In Clark and Washoe Counties where they do, they have limited resources. We must get the search warrant or grand jury subpoena even if we do not think it will rise to criminal charges. Assembly Bill 56 would give the fraud control unit one more tool in the form of an administrative subpoena to get records that it needs for its investigations.

Chairman Horne:
You said you must get a search warrant even when you do not believe it will rise to criminal prosecution. If you got a subpoena, got the records, and then determined that it is going to rise to a criminal prosecution, you just obtained a document by way of subpoena instead of by search warrant or grand jury subpoena to aid you in a prosecution. That goes counter to our criminal justice system.

Keith Munro:
Let me give you a little background on the program. This is a voluntary process that providers engage in. The State of Nevada agrees to pay providers to provide these services. We are trying to get these records, and we have dual jurisdiction, civil and criminal. If we are proceeding civilly and we recognize that there is something criminal, we would naturally switch to a criminal investigation. It did not start out that way. In answer to your question, yes we can utilize the process, but we also need remedies for civil enforcement as well.

Chairman Horne:
It still seems like an end-around showing probable cause to a magistrate. I am not saying that the Attorney General would use it as a pretext to get documents that they would normally not be able to obtain. But what I am saying is that it could possibly be the back door to a criminal prosecution.

Keith Munro:
You have given us two duties, one to enforce civilly and one to enforce criminally. In order to enforce civilly, we need records, but do not have the basis to go forward with a criminal prosecution and the grand jury moving forward. If you want us to continue to enforce at a high level civilly, we need this.

Chairman Horne:
I am not saying you are not entitled; we are just talking about the mechanism of getting there.

Keith Munro:
Understood, but for that mechanism, if you want us to enforce the civil remedies that are available, and we do not think a crime has occurred, we have no records or ability to get these records. What we are asking for is to get records from people who have intentionally, or intended to, engage in the Medicaid fraud process.

Assemblyman Frierson:
Following up on the Chairman's question, could you explain the difference procedurally of obtaining a search warrant versus an administrative subpoena. You compared the grand jury subpoena to what you are asking to be authorized to do. I do not see that it would be difficult to get a search warrant.

Keith Munro:
You get a search warrant if you have probable cause that a crime occurred. You wear two hats, civil and criminal. If we are going down the civil road, there is no way to go before a judge and say a crime has occurred.

Assemblyman Frierson:
It would be helpful to see the measure that was passed in Michigan. I am curious what you thought of this measure. If you are going to use the administrative subpoena, do you need to make the decision at the beginning whether this is going to be civil or criminal?

Keith Munro:
That is an excellent question. We could agree to an amendment if you want. If we utilize an administrative subpoena, any information gained as a result of that subpoena could only be used for civil purposes. That would be fair because it would help us carry out the two roles you have given us. If that would allay the concerns of this Committee, that would be acceptable. We could utilize the administrative subpoena to carry out our civil enforcement duties.

Assemblyman Kite:
I am not sure what the difference is between an administrative subpoena and a search warrant. This is not going to be a life-threatening situation. I recognize that a lot of counties or local governments have judges but do not have a grand jury, so why would you need to shortcut what has for a long time been the proper way of getting evidence by search warrant?

Keith Munro:
Let me explain. The Legislature has given our office two separate duties when it comes to Medicaid fraud, criminal and civil. Mr. Frierson's question was, "Would it be beneficial to you to just use the administrative subpoena for civil purposes?" and it would be. In criminal cases, you cannot go to a judge and ask him to issue a civil subpoena because he has no mechanism to do that. The judge has jurisdiction if you have a criminal case, probable cause, and believe a crime has occurred. I think Mr. Frierson's question was constructive and a good one. That would be a good way to make this bill better.

Assemblyman Kite:
I understand the difference between civil and criminal. Here it says medical fraud. Fraud to me is criminal. If you are the fraud unit, how does the civil part fit in when you are investigating Medicaid fraud? I still do not understand.

Keith Munro:
In criminal cases, there is usually a *mens rea* element that is intentional. You know you are doing something in violation of the law. If paperwork was not submitted properly, that would be civil. We would need to correct that and recover any delinquent funds. In some cases, you have criminal intent and in others it would be a mistake, a type of civil enforcement.

Assemblyman Daly:
On the part where you reference the U.S. Code [*United States Code*, Title 42, Section 1396] that says you can prosecute under that code, but it is a definition. I looked it up and it is a definition of a Medicaid fraud unit. Do definitions give you authority to do anything, or does the U.S. Code structure it differently from definitions in the NRS? Usually, there is no authority in a definition.

Keith Munro:
I will let Kevin Benson handle that question.

Kevin Benson:
You are correct, that is a definitional section. Again, this is a creature of both federal and state law. We do list what our MFCU's authority is in our statute.

In the federal law, the definition describes what it does: it has statewide authority to prosecute crimes, procedures to provide effective coordination of activities between entities, certain reporting requirements, and so forth. Essentially, what we are trying to do is make our state law definition of our MFCU parallel the federal definition. By referencing that code, we do not have to update our state law every time the federal definition changes.

Assemblyman Daly:
I was looking at this because definitions do not create any authority, and you say that you are authorized to prosecute under that code. If you are comfortable with it, I am just pointing it out.

Keith Munro:
It will keep us from having to come back before this Committee every couple of years if the federal definition changes. We will be able to utilize the federal definition for giving us our jurisdiction.

Chairman Horne:
Are there any more questions? I see none. Is there anyone else present who wishes to testify in support of A.B. 56? There is no one, so we will move to the opposition. Is there anyone present in opposition? Neutral? There is no one.

[A letter from the Attorney General's Office dated January 31, 2011, (Exhibit F) and undated written testimony from Charles Duarte (Exhibit G) were entered into the record.]

We will close the hearing on A.B. 56.

We will open the hearing on Assembly Bill 96.

Assembly Bill 96: Revises provisions governing the admissibility of psychological or psychiatric evidence. (BDR 4-558)

Brett Kandt, Special Deputy Attorney General, Office of the Attorney General:
The Advisory Commission on the Administration of Justice (ACAJ) meets during the interim. Chairman Horne also serves as chair of that Commission. The Attorney General chairs the Victims of Crime Subcommittee of the Advisory Commission on the Administration of Justice. The Subcommittee considered the matter of psychological or psychiatric examination of victims of sexual offenses. The Nevada Supreme Court has gone back and forth on the issue of whether a victim in a criminal prosecution for a sexual offense must submit to such an examination. This proposal for legislation before you today

would prohibit a court from ordering a victim or witness to submit to a psychological or psychiatric examination. The proposed legislation would also authorize the court to exclude such evidence absent a prima facie showing of a compelling need for a psychological or psychiatric examination, or consent of the victim or witness to such an examination. Because these issues are so crucial to the interests of victims, and to the fair administration of justice, the Victims of Crime Subcommittee and the ACAJ deemed this proposal worthy of your consideration.

I will ask Sam Bateman of the Clark County District Attorney's Office and other subject-matter experts to provide detailed testimony on the bill.

Samuel G. Bateman, Deputy District Attorney, Office of the District Attorney, Clark County; and representing the Nevada District Attorneys Association:

Obviously, sexual abuse of children is widespread and pervasive and is occurring with distressingly high frequency. In recent decades, legislators have been enacting increasingly stiffer penalties for sex offenders of children. Law enforcement authorities have expanded the investigation and prosecution of these crimes. This context changes the statutory framework of evidentiary rules and standards of prosecutorial conduct to place greater emphasis on respecting the welfare and rights of child sex abuse victims through the criminal process. It is within this context that I present A.B. 96. It is a bill designed to protect child victims of sexual abuse and essentially bring them back on similar footing with every other victim of every other crime that we prosecute across the state.

Just to provide a little background about how this situation occurs, in criminal cases with regard to sexual abuse victims, there is a report made and it works its way to a law enforcement agency. A law enforcement agency then investigates the crime. They obviously talk to the victim and witnesses, and sometimes speak to defendants. If the law enforcement agency believes that a crime has been committed, it is submitted to the district attorney's office for an independent review of the evidence. If the district attorney's office feels that prosecution is appropriate because there is sufficient evidence to prove the case beyond a reasonable doubt, the district attorney's office files a criminal complaint in Justice Court and goes forward. At some point in the proceedings, a probable cause hearing will occur in which the victim comes forward to testify, or a grand jury is presented to prove probable cause where the victim also comes forward and testifies. Nevada law currently, by case law, allows criminal defendants to motion the court for an order requiring the victim of a sexual crime to submit to a psychological examination by a psychologist chosen by the defendant. It is important to remember that a victim is not a party to the

action. The victim is a witness. The action is brought by the State of Nevada against the defendant.

The current Supreme Court case that allows this motion is *Abbott v. State*, 122 Nev. 715 (2006). *Abbott* creates a test that determines whether to mandate a victim to submit to a psychological examination by a doctor of the defendant's choosing. *Abbott* claims that there is a balancing test. The balancing test balances the rights of victims and the rights of criminal defendants. I would submit, however, that a close reading of the case does not actually create a balancing test at all. In fact, the case leaves many unanswered questions that ultimately leave a hostile atmosphere for victims in a criminal case.

I would like to talk briefly about *Abbott* and this test. Again, it claims the defendant should be entitled to an examination of a victim if the defendant can show a compelling need. That sounds like a balancing test initially. One would think that this compelling need would require a court to look at the effects of this test on a victim and the effects of the need for the test for the defendant. However, if you thought this, you would be wrong. In Nevada, a compelling need hinges on what are essentially three factors. It is an exhaustive list. These compelling reasons are to be weighed by a district court, and not necessarily to be given equal weight. These are the three factors that comprise what a compelling need is: whether the state itself obtains a benefit from a psychological evaluation; the amount of corroboration of the victim's testimony; and whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity, whether he or she is credible.

I would ask that the Committee, and this is the reason we are here in front of you, consider this balancing test that the Supreme Court has provided compared to a balancing test in other jurisdictions. I will provide just one. It is from the West Virginia Supreme Court. That balancing test looks to the nature of the examination requested and the intrusiveness inherent in that examination to the victim, the victim's age, the resulting physical or emotional affects of the examination on the victim, the probative value of the examination to the issue before the court, and some additional factors that would bear on the need for the examination. Those are the factors that would cause a court to take a look at both the victim's and the defendant's points of view. If you look across many of the states that actually allow this type of examination, they have a much broader and clearer balancing test of the factors in the rights of victims than our Supreme Court has provided.

Another problem that was created by that Supreme Court opinion is that no evidentiary hearing is necessarily required. A defendant can simply file a motion and make allegations about a victim's mental state, and if a court chooses not to have an evidentiary hearing and chooses to believe the motion, it can grant the motion at that point. No sworn testimony is required to be taken and no burden of proof exists on the defendant. The Nevada Supreme Court is silent on whether the district court should put parameters on the psychological evaluation if this motion is granted. In other words, the victim is required to simply show up at the door of the defendant's expert and submit to any and all questions that the expert wishes to ask.

The third issue is that there is a long-standing rule in Nevada and across the country that experts may not come into court and opine about the credibility of another witness. In essence, the Supreme Court has not actually answered the question, "What is this expert supposed to testify to if it ever gets to trial?" It cannot win when the expert cannot, by law, testify to the credibility of this witness. The Nevada Supreme Court was silent on this issue in *Abbott* and, oftentimes district courts do not consider this issue when granting the motion.

With cases like this, Committees want to see what happens in other jurisdictions, especially this Committee. It is something that the District Attorneys Association is asking for that is out of whack with what everyone else does. My preliminary research on this breaks the states down in four categories. One is jurisdictions that have precluded the evaluations by statute. There are approximately four. California, Illinois, Idaho, and to some extent New Mexico have said by statute that courts may not allow psychological examinations for child victims, or any sexual assault victims for that matter, to determine their credibility. We are not asking to go that far in this statute.

The second category encompasses jurisdictions in which courts themselves have said that district courts do not have the authority to require a victim witness to submit to an examination, a nonparty to the action.

The third category is somewhat of a hybrid. The one that I could find is in Massachusetts where the court stated that the district court does not have the authority to compel a witness, but the legislature got involved and gave limited authority to the courts to do it. Specifically, the limited authority was for the courts to determine the competency of the witness, not the credibility of the witness. Again, going back to that tension in the law between an expert being disallowed to testify about credibility, but still doing an examination on the victim's credibility.

Finally, in the fourth category, are several states that do allow some level of examination of child victims. However, as I said before, these balancing tests in these other courts seem to take into account more specifically the importance to the victim of not being retried or put on trial in the case against the perpetrator. These states have specific factors that are to be considered that our state does not have. Essentially, what the District Attorneys Association attempted was to come up with a hybrid statute. We are not going so far as to completely preclude all psychological examinations, but we also recognize that right now, in terms of our research, we are way on the other side where the concerns of the victim are not clearly delineated and taken into account.

There is one problem with the bill that can be cleaned up. The first section states that the court may not compel a victim to undergo a psychological examination. It should probably end with "unless" since that is when we get into the second part of the statute. If the state is seeking to introduce expert testimony regarding the testing of a child victim, it is usually the one that has access to the victim, who is usually cooperative. Sometimes there is psychological testimony that the state wishes to present. In that case, there is a mechanism for the defense to have a psychological examination at that point if the defense meets certain requirements. This is fair and what is normally done in most other criminal cases. It is a "we get to do it, they get to do it" thing. It is a way to keep the process fair. The main crux of what we are presenting is that a victim of sexual abuse should not be undergoing a psychological examination unless the state is also seeking to present that testimony. It does not preclude it altogether as some states do statutorily. This statute also gives the victim the right to say "no." The victim is not a party to the case. If a victim refuses a granted examination by the defense's expert, there is a penalty. The state is precluded from use of expert testimony and is not able to use that evidence.

We finally attempt to limit the content of the psychological evaluation to the concerns of a witness's competency, which is consistent with what they can testify to in these cases. If witnesses who are children have an issue with competency, their ability to understand or relate facts should and can be addressed through expert testimony. We have attempted to limit this to what an expert can actually testify to in the courtroom.

I received the amendment at 5 o'clock last night, so I am willing to sit down and talk about amendments and adjusting language in the statute. The more minds that are put together, the better the product we come up with. This is an issue that we should have known was going forward. The amendments are not really amendments. It is essentially codifying the status quo, which needs to change in some respects. It is its own freestanding bill, codifying the current

law. In our opinion, compelling a victim to submit to an examination violates the public policy designed to protect the victim's right to privacy and to prevent further trauma to the victim. We have brought this ongoing problem to your attention. You, the legislators, have the final say on these issues and we appreciate your time and attention. We will expect a decision on the matter.

I have asked the head of our special victims unit to be available. His name is Jim Sweetin, but I do not know whether he has additional comments. He is here to bring in his expertise if anyone has any questions about what is going on in Clark County.

Chairman Horne:
You started off your testimony saying that this is to protect child victims, but nothing in this bill suggests it is limited to that target group. Also, you highlighted West Virginia and other states and their different ways of dealing with this, but your testimony does not say that we should preclude all forms of testing. It actually says that we should preclude all forms of testing unless the district attorney also wants the test.

Sam Bateman:
Regarding child victims, this line of case law initially started out specific to child victims. There is loose language in a number of these cases that allow defendants to make the argument that it ought to apply to adult victims as well. There is a case from Storey County in front of the Supreme Court that was argued just a few weeks ago. The issue was that a district court judge compelled an examination of an adult sexual assault victim. This initially started for children, but it is now being expanded to adults as well, which is common practice, so we wrote it this way. Maybe the Supreme Court will address that.

When I say "a hybrid," what we did was pull some of the language from a case that occurred two years prior to *Abbott*. This is what Mr. Kandt talked about when he said the case law has gone back and forth. It is a case called *Romano* [*State v. District Court (Romano)* 120 Nev. 613,97 P.3d 594] and it occurred in 2004. First, does the court even have the jurisdiction or power to compel a nonparty to submit to examination? They looked at that and came up with the framework created in statute, which does not entirely say the court can never do it. Two years later we had *Abbott,* which now allowed the examination if the state was also seeking it. If you look at these two cases and the way they have gone back and forth, it appears to be somewhat of a struggle between two different ideologies and between former Justices Shearing and Rose. In fact, Justice Rose had a dissent in the *Romano* case that he then cited as his authority in *Abbott* for his arguments in the majority. Our concern is because of the back and forth. This may be an appropriate thing for the Legislature to look

at from a policy standpoint and not depend on who is on the Supreme Court and what their particular positions are. That is what happened when you had a complete reversal within two years, and the difference was who was on the Supreme Court at the time.

The bill brings the issue in line with what we do with other criminal cases. There is a context of what you are doing. The state bears the burden of proving beyond a reasonable doubt that the defendant did it, so what the defense can do is in relation to what evidence we are presenting in our case. That is what we are bringing it back to.

Chairman Horne:
At the risk of arguing with you, what you are doing is precluding it unless we make an issue of it; you are limiting the defense. You do not get to drive the defense's arguments on how they defend against the charges. You may still use that witness, although you may not seek a psychological evaluation, the defense may have evidence through its own investigation that is relevant and probative and wish to use it. In your bill, you are limiting that. It seems unfair in my opinion. I do not know whether you discussed that, but it is a concern, and I would like to have it addressed.

Brett Kandt:
I think you just touched on the area in which we share common ground, and that is the purpose of the examination. As Mr. Bateman touched on, we do not believe the purpose of the examination should be to determine the credibility of the witness. But, if it is to determine the competency of the witness, that is something we all agree upon. In terms of working on a proposal that builds upon that foundation or premise, that is something we would like to do.

Assemblyman Segerblom:
As I read Justice Rose's opinion, he is saying that due process requires that the defense has the right to have this examination. I do not see how we, as a Legislature, can override something that is basically a constitutional decision by the Supreme Court.

Brett Kandt:
I would submit that just two years earlier in the *Romano* case, the court had determined that due process did not require that. Also, legislative acts are presumed constitutional and my office is responsible for defending those. If you pass it, we will defend it.

James Sweetin, Deputy District Attorney, Office of the District Attorney, Clark County:
I think Mr. Bateman covered most of what I had, but I would point out that the nexus of this line of cases that allows a sexual abuse victim to have a psychological evaluation rises out of an antiquated law. In Nevada, it dates back to about 1980 and references a California case, which makes reference to its rationale by stating that women falsely accuse men of sex crimes as a result of mental conditions that transform into fantasy, wishful biological urges in women who have aggressive tendencies directed at the accused, or a childish desire for notoriety. It is an antiquated way of looking at it and, to put it into context, this sort of test is not done in any other type of case. We have prosecuted a number of cases similar to a sexual abuse case where the victim details the abuse. In that type of case, there is no mechanism such as on evaluations. However, even without performing a psychological evaluation on the victim, the state can still mount a prosecution defense. There are other remedies, including discovery, to obtain relevant information regarding the victim's history, both psychological and medical, or other instances in the victim's past. As long as the information is relevant it comes forward. The defense or the prosecution can have its own expert evaluate and comment on it in the course of the trial, just as in any other case.

I would also note that the statutory language we proposed does not specifically make reference to what the state has to do before a psychological evaluation is ordered. It is the same for both parties in the action. Either party can take the same steps as the other, so it is even footing. There are so many unanswered questions in the current case law that the courts are not working in the same direction. What happens if the victims say they do not want to have a psychological evaluation and the court orders it? What is the remedy? The Supreme Court has not given us a remedy in the most recent case. Is it to dismiss the case? Is it to eliminate expert testimony? Does it preclude the victim herself from testifying? Is it to arrest the victim and hold her in contempt? We have no answers to any of these questions. What is the extent of an examination of a victim? We have no guidance. I would submit that the statutory scheme is so important.

Chairman Horne:
Do those things not get fleshed out in the courtroom context? In doing this, would we not be limiting the discretion of the judges in making these decisions? The complaints that you are now articulating are addressed in court. The defense attorney comes and brings a motion. The judge can hear that motion and make the decision on whether an evidentiary hearing is necessary. If the victim states that she does not wish to participate in the evaluation, the judge can say that that particular portion of evidence is excluded. I do not know

whether any judge would put the victim in jail for failure to participate, but there are remedies in which we grant the judge discretion on a case-by-case basis. Putting this in statute limits the judge and puts him in a box.

James Sweetin:
What we do is protect the rights of the victim, which until now have not even been considered. That would provide a mechanism so that the defense can provide their defense, the state can provide their prosecution, but the victim is not victimized again through providing a psychological evaluation. There are other remedies to accomplish the same thing. That is the point that I am trying to make.

Chairman Horne:
I know there are defense attorneys who would use this procedure in an inappropriate way, but I am trying to find balance. I do not necessarily think they are looking to further victimize the victim, but rather to defend their client. I think it is two separate things. I am looking for a balance.

Are there any questions? I see none. Is there anyone else wishing to testify in favor of A.B. 96? In opposition?

Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office:
We oppose this bill. Right now, it is flatly unconstitutional. Mr. Segerblom hit it right on the head that this body cannot pass something that the Supreme Court has already weighed in on. It is not by some policy that the Supreme Court has changed its mind or modified a balancing test. This is what the Supreme Court said in *Abbott,* "By denying the defendant an opportunity to examine the victim could have disastrous consequences, especially in instances where the victim's veracity is seriously called into question and the defendant needs an independent psychological examination to present an adequate defense." The rule in *Romano* allows the state to ". . . have absolute control over whether or not an examination by a defendant could be obtained. The state's use or nonuse of an expert should not constitute a threshold determining factor in such matters."

Although it is necessary to protect a victim's privacy in sexual assault cases, this cannot come at the expense of a defendant's right to a fair trial. This is a due process issue. This is a confrontation issue. The idea that conducting a thorough investigation to ensure that there is not a false accusation against somebody is a revictimization is just not true. It is absolutely critical that any defense be able to completely and thoroughly examine everything. Every one of the cases mentioned before, and any criminal matter, is incredibly fact-specific.

That is why judges have discretion, why this is a judicial function, and why it is a separate branch of government, because these are also fact-specific. Any sex case, and in particular a child sex case, is awful. Nobody likes these cases and nobody likes to have to work on these cases. It is incredibly difficult, but what makes it awful is that children are so malleable in terms of having things suggested to them. We had a case in Washoe County a couple of years ago defended by my office where a man had been accused of sexually abusing his daughter. After four years of being wrung through the system and trying to get the proper discovery, the case was dismissed because it turned out that all of the evidence against him was false. That is the kind of nightmare that these psychological examinations can prevent up front. With the best of intentions, people who perform the initial investigation may make a suggestion to a child that remains in the child's head. Now we have false accusations that can destroy someone's life. When someone is looking at 35 years to life on a child sexual assault case, it is imperative that every rock be turned to ensure we discover the absolute truth. That is not a matter of policy; it is a matter of fundamental constitutional rights to a fair trial.

Assemblyman Hammond:
When you come before us and talk about constitutional rights, I get concerned. In the grand scheme of government, the court system is to provide stability. We look to them to render decisions that have long-term merit. We look at our Supreme Courts to give us decisions that are unchanging for a very long period of time, until society changes. When you talk about a two-year difference between decisions, *Romano* and then *Abbott*, it is cause for concern. I think it should open up discussions on what is fair and what is not, criminally; what are the rights of the accused and what are the rights of the victim. I am not sure that I can accept the argument that the *U.S. Constitution* is clear on this. I think it is a great discussion, but I am giving pause to that. Do you not think that the two year difference should open up a dialogue?

Orrin Johnson:
I agree with you that no court is perfect. There are certainly Supreme Court decisions that I disagree with. In this particular case though, *Abbott* was decided with only one dissenting justice. This was not a closely divided court. *Romano* itself was a change from an earlier test that *Abbott* went back to. It appears that *Romano* is the outlier in that case as the Supreme Court realized that they had stepped out of bounds and corrected themselves pretty quickly.

The other thing in terms of the balancing of the criminal justice system is to remember that the constitutional protections are from both the state and federal constitutions as applied to the accused. You have the right to confront your accuser. The *U.S. Constitution* does not say that you have a right to confront

your accuser sometimes and in some circumstances. You have a right to a fair trial. You have a right to due process. The defense has a right to fully investigate and defend its case. It cannot be that the prosecutor gets to pick and choose how and what investigations the defense can make. That completely goes against the idea that every person brought before a court in a criminal matter is innocent until proven guilty beyond a reasonable doubt. As part of the balancing test, the more serious the risk of loss to the person who is facing charges, the more protections are demanded, and 35 years to life is about as serious as it gets. I urge you to read *Abbott.* Everyone has a copy (Exhibit H). It is clear and talks about how Mr. Abbott's rights were violated in a horrifying way.

Assemblyman Hammond:
I understand and completely agree that the defense for the defendant is paramount. I believe that is the most important part of the constitutional document, that we always protect the rights of the accused. However, in light of recent history, the rights of the victims also need to balance. That is why I do not want to disengage from the dialogue so quickly.

Assemblyman Brooks:
You spoke very eloquently and pose a very good case. Our Chairman has expressed his concerns, and I have the same concerns on credibility versus competency, especially when we are dealing with children and victims. We have to be very careful what we put them through, and in particular, these types of evaluations. Children get confused and this may make them feel victimized again. I want to encourage you and ask that you work with the other side to see whether there is common ground.

I want to say that the Chairman posed some very good ideas. I believe it is paramount that someone who is possibly being wrongfully accused be able to pull out everything to prove his innocence as in the case you described earlier.

Orrin Johnson:
To clarify, a psychological examination need not be, and usually is not, a four- or five-year-old child sitting under a bare light bulb being screamed at or being interrogated. That is not what this is about. It must be done properly or the exam itself loses credibility and the defense falls apart. It is critical to get to the truth.

Chairman Horne:
I see no further questions.

Rebecca Gasca, Legislative and Policy Director, American Civil Liberties Union of Nevada:
From our perspective, the current reality that allows a judge to waive relevance and issue facts balances the competing interests between the victim and the accused. The law allows the judge discretion to weigh carefully the facts presented before him or her. Since involuntary psychological testing on victims is rare, there is a need to guarantee the privacy rights of the victim, but also guarantee the constitutional rights of due process for the accused. We believe this bill forbids such tests, with the exception of the gatekeeper role that the district attorney can play. We do not think that this bill strikes the right balance and, in reality, feel that it is likely to result in mistrials or reversals when such a test is wrongfully, unconstitutionally denied. We strongly favor the current system because it grants the flexibility under the judge's purview and discretion, and allows him to order such testing when defendants have shown a compelling need to have that test occur.

It is important that this record reflect that the American Civil Liberties Union of Nevada was present when this issue first came up in the ACAJ and the subcommittee hearing for Victims of Crime. We were present for the initial presentation when Mr. Kandt came and presented this issue to the Victims Committee, and I want the record to reflect that there were people present on the Victims Subcommittee that expressed the same concern that we are presenting to you today. Even that subcommittee saw problems with this proposal when it was brought forward by the Subcommittee to the full ACAJ. I want the record to also reflect that the entire ACAJ also discussed this and they thought it was worthy of your consideration, but there were several members of the committee that did express some deep concern about the bill as presented to you. I hope you take that into consideration. We have not had the opportunity to fully review the amendments put forward by the ACAJ.

Chairman Horne:
Are there any questions? I see none.

Amy Coffee, representing Nevada Attorneys for Criminal Justice:
I want to briefly add to everything that Mr. Johnson and Ms. Gasca said. I fully support and agree with them. I want to talk from the point of view of a practitioner. I have been doing sex cases for the last six years, defending them as a member of the Clark County Public Defender's Office. I have requested these exams numerous times. I have had this motion granted twice, and one time because the prosecutor agreed to it. In practice, I do not see this type of exam granted all the time; therefore, I do not want the Committee to think this is something that is happening on an extensive basis. With that, I do think this is a very important issue. The *Abbott* case points out what is really at issue

here with respect to the rights of victims. We understand the concerns with their privacy, but there is a concern about defendants and people being accused. Nevada has extremely high penalties for these crimes and allows the uncorroborated word of a victim, no matter how young, to be used to convict someone. We are talking essentially about a fairness issue and that is the due process issue that we are referring to. *Abbott* points that out.

I want to talk about some particulars of the bill. I think we can work with Mr. Bateman, and I am hopeful that we can come up with something workable. The bill as written does not give any authority to a judge to order the exam. It says that the judge "shall not" and nowhere in the bill does it ever actually grant the authority. The bill is unduly restrictive as written. It goes back to the *Romano* case standard, which is very restrictive, and puts all of the power in the hands of the prosecutor. The *Romano* case was clearly an anomaly. The case law had been around for years and *Abbott* reinstated it, and it has been the law for the last several years. At the end of the day, what we have submitted still allows for judicial discretion. We have even gone so far as to include the provision "if a victim should refuse." What we have done to modify this bill conforms almost exactly to the wording in *Abbott* and keeps with the spirit of the law as stated in *Abbott.* What *Abbott* essentially says is, if you want this kind of exam, you have to come forward and show a couple things. You have to show that there is minimum or no corroboration, and there is a reasonable basis for believing there are issues with your victim. As the *Abbott* case points out, the victim had made prior allegations, and so forth.

Finally, the state may or may not benefit from expert testimony. *Abbott* points out that expert testimony is not just from psychologists, but in that case, a detective. The detective got up on the stand and led the jury to believe that he was an expert in interviewing child victims and that he thought the victim was credible. That is very powerful testimony in front of a jury. *Abbott* essentially says that there are factors that the defense has to show, but there is still judicial discretion. Mr. Bateman said it is often a psychologist of the defense's choice. In my practice, I have not seen that to be the case. It is often someone that the court and prosecutor agree to. We are talking about sitting down in an office and talking to them. We are not talking about something unduly invasive or harsh or that in any way should be threatening or hurt a victim. To ensure a fair trial and due process, that is a minimum to require, and that is the concern here.

The changes that we have proposed incorporate the expanded definition of expert testimony. It is a verbatim quote from the *Abbott* case. It talks about a judge ordering the examination. I agree with Mr. Bateman when he said the word "unless" should be in section 1.

The draft that we proposed (Exhibit H) can be worked on and can be improved. We also want to add something to the last section about refusal. We want to ensure that, if a victim refuses, the state cannot backdoor the expert testimony. There might be situations where the defense wants the testimony, so we want to include a provision that the defense can ask for it if they want. We have not worded that in the draft.

Finally, I have a few words about what Mr. Bateman said. He talked about the other states. I know there are some states that allow the judge to order evaluations, and some say that it is judicial discretion. There are many states that have something similar to what we have in Nevada. I do not think what we are proposing, or what is in the *Abbott* case, is unusual or far from what is going on. The problem with the *Romano* case is that it is very restrictive and it is a one-sided test in which the state controls the entire process. That was part of the problem; it was so restrictive it restricted the exams out of existence.

Chairman Horne:
Are there any questions? I see none.

Lisa Rasmussen, representing Nevada Attorneys for Criminal Justice:
I would like to mirror what everyone else has said. I would like to offer to answer any questions on *Abbott* since I am intimately familiar with the case.

Chairman Horne:
I see no questions at this time.

With that said, we would like all of you with expertise to salvage this bill. It does need work, so we will pull it back, and close the hearing on A.B. 96. If there are no other questions or business before the Committee, we are adjourned [at 10:59 a.m.].

RESPECTFULLY SUBMITTED:

Karyn Werner
Committee Secretary

APPROVED BY:

Assemblyman William C. Horne, Chairman

DATE:

EXHIBITS

Committee Name: Committee on Judiciary

Date: February 23, 2011 Time of Meeting: 8:10 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 78	C	Scott Anderson	Testimony on Behalf of Secretary of State Ross Miller dated 2/23/11
A.B. 78	D	Scott Anderson	Proposed Amendment
A.B. 78	E	Scott Scherer	Memorandum dated February 22, 2011
A.B. 56	F	Assemblyman Horne	Letter received from the Office of the Attorney General dated 1/31/11
A.B. 56	G	Assemblyman Horne	Undated testimony received from Charles Duarte
A.B. 96	H	Orrin Johnson	Handout from the Nevada Attorneys for Criminal Justice