

**MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY**

**Seventy-Sixth Session
February 17, 2011**

The Committee on Judiciary was called to order by Chairman William C. Horne at 8:10 a.m. on Thursday, February 17, 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 James Ohrenschall, Vice Chairman
Assemblyman Steven Brooks
Assemblyman Richard Carrillo
Assemblyman Richard (Skip) Daly
Assemblywoman Olivia Diaz
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:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Nick Anthony, Committee Counsel
Julie Kellen, Committee Secretary
Michael Smith, Committee Assistant

OTHERS PRESENT:

Terry J. Care, Private Citizen, Las Vegas, Nevada

Chairman Horne:

[Roll called.] Today we have a couple of uniform acts. We always have uniform acts that come before the Committee. Assemblyman Segerblom will introduce the first bill. I see former Senator Terry J. Care, who will be presenting both bills. We will hear Assembly Bill 87 first.

Also, members of this Committee will be utilizing the Nevada Electronic Legislative Information System (NELIS) for all of our bills and documents. This means our members will be looking at their computers often. Please do not be slighted by that.

We will now open the hearing on A.B. 87.

Assembly Bill 87: Enacts the Uniform Interstate Depositions and Discovery Act.
(BDR 4-326)

Assemblyman Tick Segerblom, Clark County Assembly District No. 9:

By way of reference, I am on the Uniform Law Commission, and former Senator Care is a prominent member. Assemblyman Ohrenschall is a newly selected member, and Chairman Horne is also a member. We have four Uniform Law Commissioners in the room.

Mr. Care will tell you about the history of the Uniform Law Commission. It is a very distinguished body.

Terry J. Care, Private Citizen, Las Vegas, Nevada:

I will take a few minutes to explain the Uniform Law Commission. Most uniform acts come before the Judiciary Committee. The Uniform Law Commission is a body that was created about 120 years ago. The idea was to promote uniformity amongst the states, usually for rules of commerce. This way you knew that if you went from one state to another, the rules were much the same, absent any federal legislation. The idea was to keep federal legislation

away but let the states enact similar or virtually identical legislation, with a tweak here or there to fit particular states. Examples of uniform acts are the Uniform Arbitration Act and the Uniform Partnership Act. Unquestionably, the most well-known product of the Uniform Law Commission is the Uniform Commercial Code (UCC), which governs practically the whole world on commercial transactions. I will not go into all of that. Some of you have heard of it, and some of you have not.

Presently, there are about 300 Uniform Law Commissioners. It is left to the states to decide how they want to appoint their own commissioners. In Nevada, the appointments are made by the Legislative Commission, so we have legislators who are commissioners. We are also permitted to have two professors from William S. Boyd School of Law. A couple members on the Legislative Commission are themselves Uniform Law Commissioners. In other states, the Governor or Supreme Court appoints them. Every member must be an attorney. We have state and federal trial judges, federal court judges, law school professors, deputy attorneys general, legislators, and practitioners. It is an apolitical organization and has no political agenda. The idea is simply to identify an issue that over time has evolved to the extent that there is concern, and it needs to be addressed in a uniform fashion across state lines.

A uniform act does not happen overnight. What happens is someone makes a proposal to one of the committees with the Uniform Law Commission, and that committee, which is called a study committee, then takes around two years to determine whether there is a need for a uniform act. If the committee makes that determination, the Uniform Law Commission can then decide to appoint a drafting committee who then takes around another two years to draft a uniform act. It is a pretty thorough undertaking to come up with a uniform act.

I have been a Uniform Law Commissioner since 1999, and like all commissioners, I am instructed that once a uniform act has been adopted by the body, to go to my respective state to attempt to seek enactment of the uniform act. That is what we have today with two uniform acts.

The first one is A.B. 87 [Submitted ([Exhibit C](#))]. I know that not everyone on this Committee is an attorney, and that is fine. In Nevada, we pride ourselves on having a citizen Legislature. Everyone comes from a different walk of life. Some of you may still know what a deposition is, and you may have even sat through a deposition. If you have not but have seen the recent motion picture, *The Social Network*, the actor who portrays Mark Zuckerberg is sitting at a table and is asked a number of questions by an attorney. His former business partners are there with their attorneys. That is what a deposition is like. It is part of the discovery phase of civil litigation. Parties are entitled to seek

information from other parties. They can also seek information from nonparties if they believe those nonparties have some sort of information or documents that may be relative to the underlying facts or allegations in the litigation. That does not mean it is admissible during trial, but we are talking about an exploratory phase of civil litigation. You have depositions, requests for production of documents, and that sort of thing, which is all pursuant, when talking about a nonparty witness, to the rules of civil procedure in Nevada.

The purpose of this act is as follows. If I am an attorney in Nevada, and I represent a plaintiff or defendant in Nevada or someone who has been sued and all parties are from Nevada, I can go to the clerk's office and get a subpoena issued to serve the person I want to depose or produce documents. The difficulty arises if we have a Nevada state court action and let us say there is a witness in Kansas whom I need to depose, currently I must go to the clerk's office and get a commission for an out-of-state deposition. I must now find an attorney, probably in the county in Kansas in which I believe this nonparty witness resides, and I must have that attorney open up a file called a miscellaneous file in the court there. Then I must have the attorney use my out-of-state commission from Nevada to go to the clerk in Kansas to then issue a Kansas subpoena. That then puts the witness under the jurisdiction of the court in Kansas. The court in Nevada cannot make a witness in Kansas sit in a deposition because the jurisdiction stops at the state borders, when talking about a nonparty witness. This is expensive, time consuming, and inefficient. In 2007, the Uniform Law Commission promulgated this act, and it has already been adopted by 14 states and the District of Columbia.

Let us say an attorney in Kansas has an action in Kansas and wants to depose a witness in Nevada. He or she has the same problem. The Kansas court cannot issue a subpoena for someone in Nevada to sit in a deposition. The way this uniform act would work is the attorney in Kansas would simply get a subpoena from the court in Kansas and fill out the form for a subpoena in Nevada, and those documents come to the clerk in Nevada. The clerk then issues a Nevada subpoena, which can be served on the witness here, and the witness sits for the deposition in Kansas. It cuts out having to hire another attorney and go through getting an out-of-state commission, et cetera. I want to be clear that this act does not compel any other states to do anything. What it does do is recognize foreign depositions and discovery procedures through the process I just detailed. There is no reciprocity in it, but I would point out that because 15 jurisdictions have already enacted this same act, currently Nevada attorneys are extended the privilege of simply going into another state and going through the process I just described. We would hope within a few years all 50 states would recognize this process. This would be a much more efficient and less expensive process for obtaining out-of-state discovery.

Quickly looking through the Act itself, sections 4 through 8 are the definitions contained, and they are straightforward. Section 8 tells the scope of the subpoena. Again, it is for depositions, production and inspection of documents, and inspection of premises. We already do this within this state. Section 9 describes how it works. I already described the process when, for example, an attorney in Kansas gets a Kansas subpoena, comes here and submits it to the clerk in Nevada, and the clerk in Nevada then reissues it here as a Nevada subpoena. Section 10 extends to a Nevada witness the protection of Nevada laws. Once the Kansas attorney obtains the subpoena for a deposition in Nevada and the witness has been served and is sitting in the deposition, the Nevada rules apply at that point. You will not see a person sitting in Nevada subject to the rules of Kansas. Once you get here, it will be the rules of civil procedure that apply in Nevada.

Sometimes in a deposition, a dispute will occur with a witness who refuses to answer a question or is instructed by the attorney not to answer a question. That is usually because there is a privilege involved. Nevada recognizes the accountant and client privilege. What we must do is get the discovery commissioner on the phone. The discovery commissioner is like a judge but has jurisdiction over the discovery disputes on matters at stake. We have a discovery commissioner in Clark County and Washoe County. The discovery commissioner has jurisdiction unless the judge in the case has retained jurisdiction.

Chairman Horne:

In that regard, with the rules of Nevada civil procedure applying, what if, for example, you have a business that is part of a contract dispute, and within that contract it says the procedures and laws of Kansas will apply. Would this statute trump the provision in that contract?

Terry Care:

In the scenario you just described, the procedural aspects of Nevada law would apply. I think what we are talking about there would be the substantive law of the documents. You frequently see that provision in a contract with a choice of law and forum. Under this act, the discovery dispute would still remain under the jurisdiction of the courts of Nevada. In fact, section 11 basically says if one of the parties takes exception to the subpoena and wants to seek a protective order or have the order modified, the petition to that must be filed with the courts in Nevada and not in Kansas.

Section 12 is the same language we have in every uniform act. It simply heightens the importance we would give to the uniformity of this act throughout all the states that choose to adopt it.

I appreciate that not everyone here is an attorney. However, if you have been through this process, I think you would appreciate how much easier this makes it when you are trying to do something from out of state.

Again, this bill does not compel another state to do anything. It allows other states to do this here, but Nevada litigators can already do this in the states that have adopted this same act.

Chairman Horne:

Are there any questions?

Assemblyman Hammond:

If I understand this right, this process eliminates the use of an additional attorney in whichever state you are asking for discovery. Is that correct?

Terry Care:

That is correct. If I am trying to take a deposition of an out-of-state witness who is not in one of the states that has already adopted this act, I cannot get a subpoena from the clerk in Nevada to tell a witness in Kansas, for example, to sit in a deposition. The court does not have jurisdiction to do that. I must find an attorney in Kansas to go to the courthouse and open a miscellaneous file using that subpoena. The Kansas clerk must reissue a subpoena.

Assemblyman Hammond:

If this eliminates one more process, I am okay with that. I just want to make sure you are okay with it.

Assemblywoman Dondero Loop:

Does it ever happen where one state has enacted a law that fights with another state's law? Does it ever happen when two states have differing opinions and there is somewhat of a stalemate?

Terry Care:

That can happen when you are talking about the application of substantive law, which applies to how we are going to decide a case substantively. You then get into a field of law called choice of law, and that is a fascinating thing altogether. You might have a court in one state that is looking at documents that say the law of another state will apply. Some states then go through an analysis on whether it really does apply because they have their own choice of law. Then they go through an exercise to determine whether, in fact, the other state's laws are going to apply. This uniform act is more procedural.

Assemblyman Frierson:

We talked about the UCC provisions in months and years past. Since my background is not necessarily civil practice, I just want to verify there is not an industry of attorneys who are providing this service for an out-of-state attorney. This is more of a favor or walking down to the clerk's office. Is that accurate?

Terry Care:

I think that is true. I know in my case, for example, if I need to take a deposition in Salt Lake City, the first thing I do is email my partners and associates to ask if they know any attorneys in Salt Lake City. If all answer no, then your paralegal must get on the phone and start calling attorneys in Salt Lake City to find one. There is no cottage industry that I am aware of for this.

Chairman Horne:

Are there any other questions? [There were none.]

We will close the hearing on A.B. 87.

We will open the hearing on Assembly Bill 88.

Assembly Bill 88: Enacts the Uniform Unsworn Foreign Declarations Act.
(BDR 4-325)

Assemblyman James Ohrenschall, Clark County Assembly District No. 12:

I was just appointed to the Uniform Law Commission. I am happy to introduce A.B. 88.

In the past, if you were an American citizen living and working abroad or in the military overseas, and you needed to have an affidavit on a case here in the United States (U.S.), you had to go to a U.S. embassy or consulate to have your statement given under oath so it could be used here in a U.S. court. After the attacks that occurred on September 11, 2001, some of our embassies closed and it was harder for Americans abroad to get to an embassy to have a statement taken under oath. The American Bar Association recommended to the Uniform Law Commission that a model act be passed that would make it easier for Americans overseas to submit a declaration even if they could not get to a U.S. embassy or consulate. The Uniform Law Commission promulgated this model act, and it has been enacted in nine states and the District of Columbia. It is being introduced this year in Nevada, North Dakota, and Washington State. An example of what this act would do is as follows. If I am overseas and Mr. Care needs a statement of mine for a case, this would allow me to produce an unsworn declaration under penalty of perjury and send it to

Mr. Care. He would be able to use the declaration in the case even though I was not able to get to a U.S. embassy or consulate.

As you go through the bill, the latter sections affect, in terms of filings that had to be done, mostly the Real Estate Division.

Terry J. Care, Private Citizen, Las Vegas, Nevada:

[Submitted ([Exhibit D](#)).] I need to point out that in many cases Nevada already recognizes unsworn declarations. Here we are talking about unsworn foreign declarations for the reasons Assemblyman Ohrenschall just gave. After September 11, 2001, it became virtually impossible in some instances to gain access to an American embassy or consulate. Declarations are always made under the penalty of perjury. I would point out that this act specifically says that you cannot use these under certain circumstances. In section 12, subsection 2, it says, "The provisions of sections 2 to 16, inclusive, of this act do not apply to: (a) A deposition; (b) An oath of Office; (c) An oath required to be given before a specified official other than a notary public; (d) A document intended to be recorded pursuant to chapter 111 of NRS; or (e) A self-proving declaration or affidavit signed pursuant to NRS 133.050 or 133.055."

I think Assemblyman Ohrenschall hit on the highlights of the act. This does not do anything that does not exist under Nevada law except allow for the recognition, in some circumstances, of unsworn declarations that happen to be overseas rather than within Nevada.

Starting at section 18, you will notice that this permits unsworn foreign declarations where unsworn declarations are already permitted. Most of those beginning in section 18 and going on to section 24 deal with common-interest communities, homeowners' associations, sale of subdivided land, timeshares, memberships and campgrounds, and the Department of Business and Industry. There are several dealing with the Real Estate Division going to brokers, salesmen, appraisers, and inspectors of structures. There the administrator already has a discretion pursuant to regulation in certain circumstances to recognize unsworn declarations. This bill says that discretion will still exist but extend to an unsworn foreign declaration.

Assemblyman Brooks:

I do not know why you would need an unsworn statement. Can you give me an example in which an unsworn declaration would be relevant?

Terry Care:

An example would be in litigation. I am looking to file some sort of motion with the court, and I need to get a statement from a witness. Maybe the witness

was in Nevada a year ago and saw whatever the underlying conduct or incident was, but now that witness is in Uganda. I need a statement from that witness, but that witness cannot go to the embassy or consulate to execute an affidavit. The best I can come up with is a declaration from that witness subject to penalty of perjury. I would point out there may still be a credibility issue with that witness, but that is a different matter altogether, and that can be determined by the finder of fact whether this witness is believable.

Assemblyman Sherwood:

With respect to ex-patriots who have spouses from another country in custody, this is becoming more of an issue. Does this help with custody disputes where one spouse is from a foreign country?

Terry Care:

I suppose it could. I know Assemblyman Ohrenschall talked about American citizens. Neither this act, nor Nevada law, makes a distinction. It just says a declarant in the instances where these are allowed. If you are talking about an unsworn declaration from a spouse overseas, I guess to that extent, yes.

Chairman Horne:

Are there any other questions? [There were none.]

We will close the hearing on A.B. 88.

Assemblyman Hansen:

The uniform concept is new to me. They offer laws that are uniform across the country, and we are trying to get Nevada law in line with everyone else. Does that impact at all the prerogative of the Nevada Legislature of the past? It seems as if they change existing law based on national prerogative versus what is best for Nevada. I am just curious. The idea is to get in line with everyone else?

Chairman Horne:

It is to provide some continuity across the country on certain issues. We have things from what you heard today to family law and commerce. It gives people some uniformity from state to state on knowing what the procedure will be. We are not bound to adopt it. These commissioners find common issues and what the best way is to resolve them or protect the public. We come to a consensus. Mr. Care might be able to explain it better.

Assemblyman Hansen:

Mr. Care explained it well.

Chairman Horne:

These particular issues will be treated the same in Nevada as in Arkansas or New York, et cetera.

Assemblyman Segerblom:

This is not the federal government telling Nevada to do this. We are voluntarily doing this, and we can voluntarily undo it. It is a state's rights issue.

Terry Care:

I have had it happen where I have introduced uniform acts in Nevada, and the Legislature said no. I will give you an example. You probably know what a limited liability company is. Nevada recognized limited liability companies before the Uniform Law Commission ever did. The business law section of the State Bar of Nevada here likes its own law and evolving case law in Nevada; so the Uniform Law Commission then came up with its uniform limited liability company act and came to Nevada, and Nevada said no.

Assemblyman Hansen:

I just wanted to clarify and try to understand how this whole process works.

Chairman Horne:

The Chairman will accept a motion on Assembly Bill 87.

ASSEMBLYMAN OHRENSCHALL MOVED TO DO PASS
ASSEMBLY BILL 87.

ASSEMBLYMAN FRIERSON SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

The Chairman will accept a motion on Assembly Bill 88.

ASSEMBLYMAN SHERWOOD MOVED TO DO PASS
ASSEMBLY BILL 88.

ASSEMBLYMAN DALY SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

The meeting is adjourned [at 8:44 a.m.].

RESPECTFULLY SUBMITTED:

Julie Kellen
Committee Secretary

APPROVED BY:

Assemblyman William C. Horne, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: February 17, 2011

Time of Meeting: 8:10 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 87	C	Terry J. Care	Description of Uniform Interstate Deposition and Discovery Act
A.B. 88	D	Terry J. Care	Description of Uniform Unsworn Foreign Declarations Act