MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Eighth Session
May 6, 2015

The Committee on Judiciary was called to order by Chairman Ira Hansen at 8 a.m. on Wednesday, May 6, 2015, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/78th2015. In addition, copies of the audio or video of the meeting may be purchased, for personal use only, through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Ira Hansen, Chairman
Assemblyman Erven T. Nelson, Vice Chairman
Assemblyman Elliot T. Anderson
Assemblyman Nelson Araujo
Assemblywoman Olivia Diaz
Assemblywoman Michele Fiore
Assemblyman David M. Gardner
Assemblyman Brent A. Jones
Assemblyman James Ohrenschall
Assemblyman P.K. O'Neill
Assemblyman Tyrone Thompson
Assemblyman Glenn E. Trowbridge

COMMITTEE MEMBERS ABSENT:

Assemblywoman Victoria Seaman (excused)

GUEST LEGISLATORS PRESENT:

Senator Mark A. Manendo, Senate District No. 21
Senator Mark A. Lipparelli, Senate District No. 6

STAFF MEMBERS PRESENT:

Diane Thornton, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Nancy Davis, Committee Secretary
Jamie Tierney, Committee Assistant

OTHERS PRESENT:

Barbara K. Cegavske, Secretary of State, Office of the Secretary of State
Jeff Landerfelt, Deputy Secretary of State, Commercial Recordings, Office of the Secretary of State
Scott W. Anderson, Chief Deputy, Office of the Secretary of State
Sheryl Foster, Deputy Director, Programs, Department of Corrections
Andres Moses, Staff Attorney, Eighth Judicial District Court
Charles J. Hoskin, Judge, Family Division, Eighth Judicial District Court
James L. Wadhams, representing Las Vegas Metro Chamber of Commerce
Steve Morris, Private Citizen, Las Vegas, Nevada
Kurt A. Franke, representing Nevada Justice Association
Ricardo Ehmann, Private Citizen, Las Vegas, Nevada

Chairman Hansen:
[Roll was taken and Committee protocols were reviewed.] I will open the hearing on Senate Bill 39.

Senate Bill 39 (1st Reprint): Revises provisions relating to business associations. (BDR 7-450)

Barbara K. Cegavske, Secretary of State, Office of the Secretary of State:
I would like to turn the introduction of this bill over to the two gentlemen I have with me. Thank you for listening to this bill; we are honored to be here.

Jeff Landerfelt, Deputy Secretary of State, Commercial Recordings, Office of the Secretary of State
Good morning, Mr. Chairman and members of the Committee. Thank you for the opportunity to present Senate Bill 39 (1st Reprint). With me at the table is Scott Anderson, Chief Deputy, Secretary of State's Office. Mr. Anderson preceded me for 17 years as the Deputy for Commercial Recordings and has kindly agreed to join me to assist with questions after my testimony.

I am here today to present S.B. 39 (R1) which is one of the legislative measures proposed by the Office of the Secretary of State. This bill amends statutes related primarily to three general topics: the state business license, the responsibilities of registered agents, and the dissolution and revival of business entities. While this bill is very long, most of the sections simply apply the same provisions across many chapters of *Nevada Revised Statutes* (NRS), Title 7. [Continued to read from prepared testimony (Exhibit C).]

We have discussed and will continue to discuss, as necessary, the provisions of this bill with the Nevada Registered Agent Association (NRAA) and the Business Law Section of the State Bar Association of Nevada. Thank you again for the opportunity to present S.B. 39 (R1).

Assemblyman Jones:
I like the dissolution and revival provisions; it makes practical reality of how businesses are dealing with that. Regarding the record retention, do you think that makes it easier for out-of-state businesses to work within the state, or will this make it harder?

Scott W. Anderson, Chief Deputy, Office of the Secretary of State:
We worked with the NRAA concerning these provisions. There were some antiquated provisions within the law where they were having to hold certain documents within the office of the registered agents. This would allow them to retain documents similar to how other states are requiring it through the Model Business Corporation Act, and we are adopting those provisions. This should make it easier for registered agent companies in relation to these documents.

Assemblyman Ohrenschall:
Page 4 line 12 states, "A business organized pursuant to Chapter 81 of NRS if the business is a nonprofit unit-owners' association." This Chapter also talks about nonprofits, cooperatives, and charitable organizations. What is an example of a nonprofit unit-owners' association?

Scott Anderson:
This section standardizes the treatment of unit-owners' associations. Currently, unit owners' associations will file under NRS Chapter 82, which is the general nonprofit statute; however, some older unit-owners' associations were formed under NRS Chapter 81. Currently, the provisions of state business licenses for exemptions apply only to Chapter 82. We talked with representatives from the unit-owners' associations, and they asked that this be brought in so there was equal treatment. They are nonprofit unit-owners' associations; they are just formed under a different chapter.

Assemblyman Ohrenschall:
So these are not the kinds of associations under NRS Chapter 116?

Scott Anderson:
They are the same.

Assemblyman Ohrenschall:
Regarding the renewal or revival of the limited partnerships, I do not see any time limit. Is this indefinite in terms of any renewal or revival?

Scott Anderson:
Certain limited partnerships have been prohibited from being revived. The general corporation statute allows any corporation or any other business entity to be revived for the purposes of filing with the Secretary of State's Office at any time as long as they have the proper authority to do so. It would not allow someone to come in who does not have the authority to revive the business. If there were a limited partnership that was continuing to do business in this state, it would have a reason to revive. Many times it has to do with holding a piece of property, forgetting to file lists, and going into revocation; there was a prohibition then of them refiling. The state was losing out on this revenue, plus there was a problem with continuity of the limited partnership. We asked and discussed this with the Business Law Section. They said for purposes of filing with the state, this was a good provision and would allow a limited partnership to revive. There really is no time period, similar to corporations, as long as the proper authority is there.

Assemblyman Nelson:
Section 8, subsection 1, refers to satisfactory evidence to prove that the company has not been doing business. What do you contemplate that would be, an affidavit? Sometimes it can be hard to prove a negative.

Scott Anderson:
We may need to parse that out a little bit through our processes. Again, we want to have adequate evidence that they were not doing business. They may show that they have closed their doors, something that shows they have not been conducting business in Nevada and would not be subject to the state business license. It may be an affidavit or some other proof; it could be any number of items as long as they prove satisfactorily that they were not doing business in this state.

Assemblyman Nelson:
Are you still accepting service of process if a plaintiff cannot find a registered agent?

Scott Anderson:
That is correct. Generally we accept service of process after someone has exhausted all the other means of serving an entity.

Assemblyman Gardner:
Basically, if we have a corporation that pays its fees automatically every year, when it decides not to pay its fees and it becomes permanently revoked, how long will it be able to keep the business name? Will it hold that name in perpetuity, or will those names eventually be allowed for other people to use?

Scott Anderson:
Once an entity has been in default for one year—they have not paid their fees or filed their list of officers for one year—they go into what is called revocation, where their right to do business in this state is revoked. At that time, that name is available for use on the records of the Secretary of State. So if someone wanted to use that name, they could. That does not give them the legal right to the name; there could be other legal rights that would preclude them from using it. However, as far as filing is concerned, they can use the name. Simply filing with the Secretary of State does not necessarily give them the right to use the name, but it does allow it to be used.

Chairman Hansen:
Is there a cost to file a certificate of cancellation?

Scott Anderson:
It is similar to a certificate of dissolution, and there is a fee. I am not sure what it is, but it is basically the same as the fee for dissolution, cancellation, or other termination fee.

Chairman Hansen:
Is that different than an article of dissolution?

Scott Anderson:
It is similar in the fact that there are some different terminologies for different entity types. Dissolution generally applies to corporations and limited liability companies (LLC). A cancellation is generally for a limited partnership registration and anything that is foreign qualifications. It is basically the same process, just different terminology.

Chairman Hansen:
All of the licenses I am involved with, if I do not renew the license, I am not required to file paperwork to state that I am no longer going to use that license; for example, if my contractor's license or my driver's license lapses. My family

had an LLC for some property we had. We decided we were no longer going to use the LLC, and we let it lapse. Later, we found out we could be subject to a $5,000 fine. I am wondering, if I have an LLC in Montana, for example, and I decide to let that license lapse, would I have to actually file an article of dissolution?

Scott Anderson:
There are different processes in different states. Generally, if you do not file a termination or dissolution in Nevada, the fees continue to accumulate. We do not assess those fees directly on the entity, but if the entity does come back and wants to renew that registration, those fees would apply. The provisions in this bill would allow us to give some relief to that, when the entity provides satisfactory evidence that they have not been doing business in this state. After the entity goes into default and into revocation, the notices stop, but the fees and penalties continue to accumulate. Granted, the entity may never come back and file dissolution paperwork; they just show up on our registry as a permanently revoked status. That is somewhat standard with business registries.

Chairman Hansen:
For example, I had a contractor's license, and after 30 years of being a contractor, I decide not to renew my license. Five years go by, and I decide I want to go back in business; it sounds like I am going to have to pay a business license fee and prove to you that I did not conduct any business in this state for the last five years. Because there is a series of different licenses, and someone who lets a business lapse and then decides to renew, the burden of proof is on them to prove to you they did not have a business during that period of time, correct?

Scott Anderson:
That is correct. Generally when business entities are formed, they are a separate entity, and for them to be cancelled or terminated, there has to be some sort of filing with the office that officially takes them off the record and ends their existence. Unless that is done, the state assumes that the entity continues until such a time that they file the documents. Therefore, it would be incumbent upon the entity to show that they had not done business in this state.

Chairman Hansen:
In other words, the failure to actually renew a business license is not prima facie evidence that I am no longer doing business.

Scott Anderson:
That is correct. There are many reasons why a business license or registration would not be renewed. In many cases, it is just oversight. Oftentimes an entity will not renew its registration with us because there are financial difficulties. We do not know the reasons why they do not file with us. We have a reinstatement process with those entities that should have filed and a revival process as well.

Chairman Hansen:
Thank you for your testimony. Is there anyone who would like to testify in favor of this bill? Seeing no one, is there anyone to testify in opposition? Seeing no one, is there anyone in the neutral position? Seeing no one, I will close the hearing on Senate Bill 39 (1st Reprint) and open the hearing on Senate Bill 17 (1st Reprint).

Senate Bill 17 (1st Reprint): Authorizes a deputy director of the Department of Corrections to accept part-time employment as an instructor at an institution of higher education. (BDR 16-339)

Sheryl Foster, Deputy Director, Programs, Department of Corrections:
Currently, *Nevada Revised Statutes* (NRS) 209.151 prohibits deputy directors of the Department of Corrections (NDOC) from engaging in any other gainful employment or occupation. We are requesting to amend this NRS to allow deputy directors to teach part-time in institutions of higher education as secondary employment.

As stated in previous testimony, we feel it is extremely important to be mentors and role models for young students who are just starting their college career and who are still deciding their future career paths. Corrections is a very misunderstood profession. Most people believe what they see on television and the movies. They are afraid to enter the field. Others enter the field for the wrong reasons and with the wrong motivations. We feel that having correctional professionals teaching college-level students helps to break down the misconceptions of this field and provides better understanding of the career opportunities available in corrections. Students relate better when real-life scenarios and examples from the job illustrate the topic being discussed. Likewise, students can see how their hard work in both school and on the job can lead to a long and distinguished career. As we all focus on succession planning, we must also be mindful of the importance in educational achievement and career planning for those just starting out.

A deputy director can be much more than a teacher. They can be a role model and mentor for students who are anticipating a career in corrections, law enforcement, or in any other state job. It is essential that we realize the importance of education and how we, as administrators, can be a positive force in providing an educational foundation for college students. On behalf of Director James G. (Greg) Cox, we are in total support of this bill and the amendment.

Assemblyman Thompson:
You mentioned being a mentor and a role model. Those are things that we do on a voluntary basis. You also mentioned instruction. It sounds like this is a very specific issue for a very specific employee. Is this because we are trying to have transparency so it is not an appearance of being paid out of two state funds? Will you please explain in greater detail?

Sheryl Foster:
We have four deputy directors in NDOC. We all have a wide variety of experience and training. Most of us have been involved in teaching college-level courses at some time in our career. I did, as a warden, for many years. E. K. McDaniel taught when he was a warden at Ely State Prison, and I believe that Scott Sisco has done some teaching. As soon as we became deputy directors, we were no longer allowed to teach in the colleges. This bill will remove that one particular barrier and give us the opportunity to teach. Currently, we can have no other type of employment. We are looking at teaching specifically because it does give us an opportunity to mentor students and provide education and instruction at the college level.

Assemblyman Thompson:
I am pretty sure that the reason for this bill is so that you would be compensated. Would you be able to do this without compensation and not have to change the law?

Sheryl Foster:
That is a question for the educational institutions. I do not know, other than guest speaking, that they would allow someone to teach an entire course without compensation. We do that in our own training programs within NDOC and we sometimes do guest lectures in various entities throughout the state. In regard to teaching an entire class, I would doubt that an institution would allow someone to do that for a full semester without compensation.

Assemblyman Elliot T. Anderson:
Do NDOC personnel have time to do this? I know there have been some challenges lately; is this the best use of NDOC's time?

Sheryl Foster:
This is strictly for nonwork hours, part-time teaching, in the evenings and weekends, not during regular work time. When I was a warden and was teaching, it never interfered with my job. There were two times when I had to have a guest lecturer teach for me because something was happening with my job. This is not something that would conflict with my employment.

Assemblyman Jones:
There are four deputy directors; that is a very high-level position in NDOC. I think those types of positions usually do not work 9 to 5. They have more responsibilities that just 9 to 5. Also, being a teacher and preparing course work could be a significant distraction. It seems that was the intent originally in not allowing that high-level position to do more than one job.

Sheryl Foster:
We are on call 24 hours a day, 7 days a week. Our normal work hours are Monday through Friday, 8 to 5. We are available 24 hours a day and are ready to respond to any situation that occurs. Preparing lesson plans would be on the nonworking hours. If there is something that needs to be dealt with within NDOC, that is where 100 percent of our responsibility is. We all have downtime. We are not constantly needing to report to the institutions. Within our own personal life, we have time to prepare for this. It would never interfere with our responsibilities as deputy directors with NDOC.

Chairman Hansen:
Is there anyone here to testify in favor of this bill? Seeing no one, is there anyone who would like to testify in opposition? Seeing no one, is there anyone in the neutral position? Seeing no one, I will close the hearing on S.B. 17 (R1) and open the hearing on Senate Bill 388 (1st Reprint).

Senate Bill 388 (1st Reprint): Establishing additional fees for filing certain motions in a divorce action. (BDR 2-1046)

Senator Mark A. Manendo, Senate District No. 21:
I happened to have a spare bill request, and I decided to give it to the courts. I had a chance to hear a little bit about this situation and thought it was worthy of putting in a bill draft request. This bill is designed to correct an inequity. Persons who initially file for an uncontested divorce are forecasting a lower level of judicial resources to finalize their issue. Because they elect to divorce without court involvement, on their own terms, the court's oversight for the potential of evidentiary hearings and trials is not necessary. It is anticipated the

court will review their agreement for enforceability and required language, and approve their petition without a court hearing, if appropriate. For this, the case has a lower filing fee. [Continued to read from prepared testimony (Exhibit D).] Thank you for allowing me to give some opening remarks.

Andres Moses, Staff Attorney, Eighth Judicial District Court:
As Senator Manendo stated, this bill closes a gap in our filing fees. I would like to have Judge Charles Hoskin, our presiding family court judge, give his comments on this bill.

Charles J. Hoskin, Judge, Family Division, Eighth Judicial District Court:
Essentially, what we are trying to accomplish with this bill is to put similarly situated individuals in a similar situation. Currently that is not the case. There are a substantial number of cases that begin as uncontested joint petitions, which is a lower filing fee, and end up reopening for an extended period of time and additional judicial resources are utilized in order to make that happen. This is simply an effort to ensure everyone is treated the same and that those who utilize judicial resources are able to be similarly situated with regard to the fees they pay for those services.

Assemblywoman Diaz:
Where did the fee amounts come from?

Charles Hoskin:
The way the numbers are generated is that initially you can file a complaint; the complaint fee is currently $289. The other side has to file an answer fee, which is $217. If you file a joint petition, where you both file together, there is one fee of $289. There is a reopen fee of $25 that is not being considered as part of this bill, but I think the Committee needs to be aware that is assessed whenever any action is reopened after it has been closed in the Family Division. The effort with these two amounts is to bring them back in closer to the $217, which is the difference currently between filing a complaint or filing a joint petition.

Assemblyman Nelson:
Section 1, subsection 2 states that the money will go into a fund to be used for only certain purposes. Is that how other filing fees are treated?

Charles Hoskin:
Most fees are delineated very specifically that a certain percentage goes to one department, and a certain percentage goes to another department. What we are trying to do is ensure the fees that are being taken from the litigants are kept in the courts or systems that are utilized. This is an effort to ensure the fees have a parallel to where they are going.

Chairman Hansen:
Is there anyone here who would like to testify in favor of this bill? Seeing no one, is there anyone in opposition? Seeing no one, is there anyone who would like to testify in the neutral position? Seeing no one, I will close the hearing on S.B. 388 (R1) and open the hearing on Senate Bill 329 (1st Reprint).

Senate Bill 329 (1st Reprint): Revises provisions relating to partnerships. (BDR 7-784)

Senator Mark A. Lipparelli, Senate District No. 6:
We have some experts here to take you through the details of this bill. They will be much more productive than I because there are some technical elements to the legal side of this bill. Generally speaking, what the bill attempts to address is a growing trend among businesses using partnerships and associations among various people. There is some lack of clarity in the law. There were some cases that developed that precipitated this idea of providing additional clarity to the practitioners and the courts.

James L. Wadhams, representing Las Vegas Metro Chamber of Commerce:
I am here representing the 4500 members of the Las Vegas Metro Chamber of Commerce in support of this important business bill. Ironically, this bill relates back to the first bill you heard today, which was the Secretary of State's bill. This bill addresses the formation of business entities, limited liability companies (LLC), and corporations for the purpose of business development. Nevada has adopted the Uniform Partnership Act and iterations of that have been in place since 1914. It is generally applicable across the United States and in each of the states. In the Senate Committee on Judiciary, we actually brought in the former Chief Justice of the Delaware Supreme Court. The purpose of his visit was to apprise that committee of the development of the Delaware law that protects the security of individuals who form corporations or business entities to hold that risk. As many of you know, if you do something as a sole proprietor, your entire back pocket is exposed. If you choose to form an LLC or a corporation, that becomes a person in itself and is separate from you and it

becomes a way of containing that risk. In southern Nevada, before the recession, we would see many businesses come together and form LLCs for the purpose of developing shopping centers, residential subdivisions, and other forms of business.

From the Las Vegas Metro Chamber of Commerce's standpoint, it is important to address the issue of a very subtle common law and statutory rule that deals with persons who have spoken to the public that they are forming a partnership and someone relies upon that statement, irrespective of whether the other person knows it or not, and both persons can be held liable as being partners for anyone who has invested or extended credit to that relationship. That is an important distinction from two businesses who say we are going to come together and form a corporation to establish a new shopping center in Las Vegas. The point that has to be made is that if two businesses are announcing they are forming a third entity that will be the owner of a business, and it will be registered with the Secretary of State as an LLC or a corporation, that is the business entity to which any purchaser of services from that corporation has to look to. We had a case in the Supreme Court of Nevada recently in which a partnership by estoppel was interpreted and took Nevada out of the mainstream as the law is interpreted in every other state. The purpose of this bill is to make it clear that if people are announcing they are forming a corporation, that they are going into a business development that will end up as an LLC or a corporation, the statement that they are forming this entity does not make them partners independent of the entity they formed. As we are coming out of this recession in Nevada and seeing people trying to catch a little bit of the upswing, the opportunity to form entities and let them become the enterprise and the legal entity is important. We support the passage of this bill.

Chairman Hansen:
After reading through the existing law and the amendment, I have some major concerns.

Assemblyman Elliot T. Anderson:
I would like to go back to your statement about the Nevada Uniform Partnership Act and how that act is interpreted in other states. I am reading from *Cay Clubs In Re:* 130 Nev. Adv. Op. 14 (March 6, 2014). It says that other jurisdictions have adopted the same interpretation extending partnership by estoppel liability to joint ventures. Could you comment on what states are in which camp?

James Wadhams:
Our research indicates that every state has interpreted the rule of partnership by estoppel differently than our court did in *Cay Clubs*. That is precisely the reason this bill has been brought: to bring Nevada back into a similar interpretation so that we do not discourage the formation of business development corporations here and otherwise encourage them to form in Arizona, Utah, or other neighboring states. The simple answer, as I understand it, is two people are forming a business activity and announce they are forming it and project a notion that they are going to become partners. That is a much different process than simply saying we are going to form a corporation and I expect other people will be investing in that corporation and forming a unique separate business entity that will in turn do business with the public. It could be a subdivision, professional business, or a contracting company. I think the distinction is really to bring Nevada's interpretation consistent with the interpretation of the Uniform Partnership Act in all other states.

Assemblyman Elliot T. Anderson:
I bring that up because the court actually cited two other jurisdictions that have the same interpretation. There are a couple of issues I read in the case, the definition of credit and whether, in fact, liability from partnership by estoppel extends to joint ventures. Do you know which part of the interpretation you are referring to, because if you are talking about extending liability for partnership by estoppel to joint ventures, they actually cited two other jurisdictions that do that. Is there a document that lays out all the states and what they do, or is it just Nevada and the two other states?

James Wadhams:
I can obtain that information for you.

Chairman Hansen:
As I read the section of the existing law, it seems it is primarily designed to protect investments, people who are investing under the assumption that a partnership is either going to occur or has occurred. It is hard for me to say that the Supreme Court did not follow statute. Section 1 and section 2 of the existing law, which you are trying to have exempted, is mainly designed to protect investments.

Assemblyman Jones:
For clarification, you have company A and company B make an announcement that they are going to joint venture or do a partnership with company C. Is that correct?

James Wadhams:
No, sir, but that truly illustrates the problem with the analysis. If two of us are going to announce that we are forming a partnership and investors rely upon that statement and invest money in either you or me on the basis that we are going to become partners, that is what the existing statute is designed to deal with. We cannot say we did not become partners. We are estopped, which precludes us from saying we are not partners if we projected it. On the other hand, that is the distinction in this case: for example, you and I say we are coming together to form a business, we are going to have a Chick-fil-A franchise that will cover Nevada. We are going to form a corporation to be the holder of that franchise. That does not make you and me partners; that makes you and me investors in a stand-alone corporation. The historic rule is that if we are telling people we are coming together and they think we are going to be partners, as the rule is, it does not even matter if you know it. If I make the statement and you do not object, and people begin to make investments with us, as opposed to the LLC that we formed, that is the distinction.

Assemblyman Jones:
So the problem is, if company C does not get formed, there is detrimental reliance, and people are, in fact, investing based on this information, someone has to be liable.

James Wadhams:
You are amplifying my testimony. The detrimental reliance would be if someone invests in that corporation that we formed that has a filing fee and needs a certificate of extinction if it is not going to exist. They are not investing in you or me, they are investing in the corporation we formed. For example, we are going to form an LLC for a strip shopping center at a key location, and people put deposits down to rent with that corporation. Their risk is with that corporation, not with you or me who actually invested money to form that corporation. We have not become partners, but you are correct, the use of the word "partners" has become very common in our emerging economy for people to pull other businesses together and form a corporation. If we do form a corporation and people cut deals with that corporation, they cannot come back behind it and break open the corporate veil and say, that did not work out and I am holding you responsible.

Assemblyman Jones:
So if they do, in fact, invest in the newly formed company C, investors should not be able to go back to company A or company B.

James Wadhams:
Correct.

Assemblyman Jones:
So that is what this bill addresses?

James Wadhams:
Yes, sir.

Chairman Hansen:
It is also contradicting current law.

Assemblyman Nelson:
For the record, I would like to ensure that this is only if the entity is, in fact, established, correct?

James Wadhams:
Yes. If two of us are talking about forming a business entity, and neither one of us accepts an investment from someone, but an investment is made in the corporation or LLC that we formed to be the project, you cannot go behind that corporation. That is why they are formed and why the Secretary of State keeps a record of who they are; that is how we protect ourselves from the unlimited liability to our pocketbook. The distinction is if we take the money as two people coming together to form a partnership, that is much different than if the money or credit is extended to the business entity we formed. The amendment from the Senate made it clear that it is the formation of a corporation or LLC.

Assemblyman Nelson:
It seems to me that this is just protecting the corporate veil, as you mentioned. My question is, is it broad enough? Section 1, subsection 3 discusses the development that is undertaken by one or more corporations or LLCs. Most of these are done by a corporation or LLC, but there are times when people will use a limited partnership also.

James Wadhams:
That amendment came from the Senate to narrow that range. The original bill said any entity formed under Title 7 of *Nevada Revised Statutes*. The Senate unanimously passed this with the requirement of the formation of a corporation or LLC.

Assemblyman Gardner:
Do we have a definition of "sole purpose of a business development"? Also, what if these joint ventures wanted to be a partnership, would they do that through a partnership agreement, or would they be able to do a partnership by estoppel?

James Wadhams:
If we are going to form a partnership, we register a partnership with the Secretary of State. What this law is intended to do is to preclude people from being harmed by the suggestion that they are going to form a partnership, inducing people to invest in what they think is going to be a partnership, then not having a place for that responsibility. This correction is to ensure that if we form a business entity and people invest in that entity, that is the protection and security of that vehicle. The purpose of the law is to prevent us from inducing people by representation. That risk and liability is still there. We could, if this passes, be held as partners even though we may not have become such. If we form a corporation or an LLC for a business development purpose, that will be the place where the risk falls.

Chairman Hansen:
The example we have been given is "MGM Mirage and South Florida-based Turnberry Associates today announced a joint venture to build a luxury condominium-hotel complex on the northeast end of the famed MGM Grand resort's 115-acre property." If I am an investor, and I know this involves the extremely credible MGM, I am going to invest in this. Then MGM backs out of the deal. This bill, section 1, subsection 2 states:

> When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, the person is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he or she were a partner in fact, with respect to persons who rely upon the representation.

Section 2 states:

> If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership.

How is it that if I am an investor and I read a press release by a reputable company and then, for whatever reason, that partnership does not come to fruition, why should I not be allowed to say, I invested in good faith, based on

the representation of a very reputable company, and now I have to claim this is unfair. I invested under the assumption that this was going forward; it did not go forward. Why is it that only one of the partners be held accountable for making right my investment?

James Wadhams:
I think the answer is precisely the way you phrased it. If we say we are coming together to form a partnership and do not do so, and someone makes an investment to me or to you, it does not matter which, we cannot deny that. That is the purpose of the law as it sits. The problem is, if we simply say we are forming a corporation to create a shopping center and the investment is made in that newly formed LLC or corporation, they cannot pierce that corporate veil and come back to those of us who announced we were forming that business. They invested in company C, the corporation or the LLC. The existing rule of law as is applied in every other state on partnership by estoppel continues. That will still be the case in Nevada. If we form a third business entity and the investment is made in that third business entity, that is the limit of the risk of that corporation or LLC.

Chairman Hansen:
I think there is a gap there that could leave some very well-intentioned investors in a pickle.

Assemblyman Nelson:
In the hypotheticals, you have been saying if someone wants to invest. This is not limited to investors, correct? Partners can have a lot of other potential liabilities. I do not think you want to limit this just to a situation where someone might invest with company A, B, or C. It would provide all of the corporate veil protections assuming that the entity is formed, correct?

James Wadhams:
That is correct. It is the sanctity of the independent corporate entity and the security of the corporate veil. If I want to protect my family assets and I put $100,000 in a corporation along with you, that should be the limit of my risk. The fact that I did it with you, or told the world I was going to make this investment with you, should not preclude me from creating that corporation and limiting my liability.

Chairman Hansen:
Is there anyone else here to testify in favor of S.B. 329 (R1)?

[Assemblyman Nelson assumed the Chair.]

Steve Morris, Private Citizen, Las Vegas, Nevada:
I am a lawyer with an office in Las Vegas. I am a commercial trial lawyer. I was raised in Sparks and graduated from Sparks High School and moved to Las Vegas several years ago. I would like to speak in favor of this bill. In doing so, I would like to answer some of the previously asked questions.

Assemblyman Anderson, you asked for the number of states that have dealt with partnerships and joint ventures. I believe the issue with *Cay Clubs*, which you addressed, was that the *Cay Clubs* decision was the first opportunity the Nevada Supreme Court has had to say that a joint venture can be considered a partner. A joint venture is a form of partnership. The Nevada Supreme Court took the opportunity in *Cay Clubs* to say that. The terms are, for our purposes, interchangeable.

That is not the issue that this bill addresses. This bill, as I understand it, does not repeal the doctrine of common law or a partnership by estoppel. That remains intact just as it is written in NRS 87.160 that you have before you. What section 1, subsection 3 says is what I believe is an unprecedented decision in our state extending the doctrine of partnership by estoppel to instances in which no other state has done so.

Mr. Wadhams said that if, for example, Morris and Trowbridge come together and we say we are partnering, or we are going to joint venture the development of a shopping center, we create the Morris Trowbridge Shopping Center, LLC, and we fund it. We put our money into that LLC. Mr. Wadhams said that the money we put in should be the limit of our risk or our liability if something goes wrong or someone makes a claim against our LLC. That is responsive to Assemblyman Nelson's remark that we are not talking about extending liability to people who come together and say, Morris and Trowbridge developed this shopping center and I dealt with that shopping center; I put a lease deposit down, and the shopping center went defunct. Because Morris and Trowbridge said they were partnering to create the shopping center, they should be held liable to me for the damage I suffered when the LLC defaulted and did not accept my rent or went out of business and made my lease inoperative. It should not extend beyond that. That is what the *Cay Clubs* decision did. It said, if you say to someone we are going to joint venture, or we are going to partner to create a development and you do that, you form a development under the corporate statutes. Whether it is an LLC or a traditional corporation, and you fund it, you cannot thereafter be held liable as an individual for the default of the corporation. That is not unfair.

Chairman Hansen referred to a specific example that arose in Las Vegas. It involved a joint venture and an announcement by two companies, one a Florida developer, Turnberry Associates, and the MGM Grand. They said we are going to joint venture to develop condominiums. They put together an LLC under Nevada law. That LLC exists today; it has never defaulted. That LLC borrowed hundreds of millions of dollars to construct the condominiums. People bought them, many of whom are still living in them. Some of the people who bought them said, I am disappointed. I am not happy with what I bought because I believed I was getting something other than what I got. I want to hold liable the people who said, years ago, that we are coming together to joint venture a development project for condominiums in Las Vegas. They did so, and they funded it, and they operated it, and it is still operative, but there are people who become dissatisfied with the results of their expenditure of money, whether it be considered an investment or a purchase. They looked for someone other than the entity with whom they dealt to respond in damages to them. This amendment does not allow someone who deals with an entity that was put together and described as a joint venture or a partnership, an LLC, or corporation, to say that I am not happy with the dealings I had with the LLC, and I want to hold the organizers liable. This amendment prohibits that because the *Cay Clubs* decision endorses that.

With that, the explanation for this is, the common law partnership or partnership by estoppel will not allow the imposition of partnership liability on the constituents, the creators, the people who came together and formed an LLC for a specific purpose and carried it out.

If, as Chairman Hansen said, we get together and say we are going to partner and someone invests money in that and one of the partners backs out, it is unfair and they should not be held liable. That is the current law. This amendment does not change that. If I say to you, Jim Wadhams and I are partners, and Mr. Wadhams says yes, we are partners, but we never created a partnership, if any of you loan money to us on faith of our representation to you that we were partners, we are liable to you for what you invested with us. That is personal liability, and that is the state of the law today. The *Cay Clubs* decision changed that dramatically. To use Mr. Wadhams' example, if we come together to form a partnership, we create an LLC and we put our own money into the LLC, and someone dealing with that LLC makes a claim against that entity, they cannot also make a claim against Mr. Wadhams and me because we said we are coming together to form that LLC.

Vice Chairman Nelson:
Thank you, Mr. Morris. You have an excellent reputation, and I am honored to meet you today.

Assemblyman Elliot T. Anderson:
I would like to readdress *Cay Clubs*. Maybe we are talking about different things, but I am reading straight from the case. It says "Other jurisdictions have concluded the same, and they have applied the partnership-by-estoppel doctrine to impose liability for the representation of a joint venture." Then it cites *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.* 290 F.3d 42, 56 (1st Cir. 2002) and *John's, Inc. v. Island Garden Ctr. Of Nassau, Inc.,* 269 N.Y.S.2d 231, 236 (Dist. Ct. 1966), and *Allan Const. Co., Inc. v. Parker Bros. & Co., Inc.,* 535 S.W.2d 751, 754-55 (Tex. Civ. App. 1976). I am wondering what the disconnect is, because I just read that straight out of the *Cay Clubs* case. This looks like it has been extended in some other states and the testimony has been that this is unprecedented.

Steve Morris:
I believe the answer is, the entity or the person who was held liable in *Cay Clubs* was not one of the organizers of the corporation with whom the Cay Clubs' plaintiffs dealt and which failed. It was a lender to that project developer who did not directly deal with and had no relationship with any of the plaintiffs. The cases you mentioned are appropriate for this proposition. If you hold yourself out as a partner and you say to the public, I am in partnership with this business and I need money from you, I need you to invest in my partnership and the investment is made. If the investment is made to the ostensible partnership or credit is given to the ostensible partnership, not the actual entity, then there is common law or partnership by estoppel liability for the person or entity to which you gave money in response to that representation.

Assemblyman Elliot T. Anderson:
Getting into the credit issue, it is more than just actual money, right? The court interpreted credit to also be a representation. Maybe I am getting lost in the weeds now, but I am wondering if the proposed bill is drafted a little broadly for what you are trying to get to. If you are worried about the factual circumstance of *Cay Clubs*, maybe this could be written a little differently.

Steve Morris:
An example of the term "credit given" would be if someone says I am partners with Wadhams and we are going to build some homes. You are a cement contractor and I want you to start working on the foundations. That is not money changing hands, because the cement contractor extends credit, it does the work, and is not paid for it. Under those circumstances, we could be liable as a partnership. The protection against the application of liability under partnership by estoppel should be extended to anyone who says I am partnering or joint venturing with someone else to create a project. I have the cement foundation completed, or money is invested to purchase one of the homes, and

they are not built. In the *Cay Clubs* case, that created liability against the developer. The *Cay Clubs* decision goes beyond that. It is saying all the involved parties, including one of the lenders who said when this development was announced, not when it was built, were partnering with others to provide funds and support for this project. The project failed and the people who said they were supporting this are not individually liable for that failure.

Assemblywoman Diaz:
In looking at the Uniform Partnership Act, I do not see any language where it displaces the laws of equity. I also saw a little bit on laws of contract. It says, the doctrine that provides that if a party changes his or her position substantially, either by acting or forbearing from acting in reliance upon a gratuitous promise, the party can enforce the promise. My question is, what is the effect of passing this law on the contract remedy of promissory estoppel?

Steve Morris:
This amendment does not eliminate or modify the concept of promissory estoppel. For example, I say to you, if you give me $100, I promise to repay $120. If you give me $100 and I do not repay you and we do not have a contract, all we have is my assurance to you that I will pay you $120 and your reliance on that in advancing money to me, then I am still liable. This amendment does not change that. This amendment says, with respect to someone who does not make a promise, that you cannot be held liable as if you did make a promise for the failure of someone else. If you promote it, or you said I am a supporter of an entity that failed, I cannot be held liable for the promise that the entity made to you by contract, but failed to perform when the project was not developed. You should not be able to come to me and say, I am trying to enforce a promise that you did not make. If I did make a promise and you advance money on it, I am liable.

Assemblywoman Diaz:
I do not think that what you are stating right now matches up with the language that is in the bill. I think it is way broader than what you just explained to me. I think there is a nexus between words and conduct. Did I rely on a promise that you made and did you know that I relied on a promise that you made? That basically was what drove my decision in engaging with you. If that is what you are seeking to do, I think this language does not match up.

Steve Morris:
If you put this in the context of the decision that we have been considering, the people who organized or were in support of the Cay Clubs development did not make a promise to anyone. What they said was, we are supporting this project, we are going to partner with all these other people to create this entity. They

did that, but they did not say to the people with whom that entity dealt and disappointed by failing to perform its contract, we make a promise to you. In other words, what this amendment addresses is imputed liability as a consequence of announcing an association with others to carry out a development and the development is carried out in the name of an entity formed under Nevada law, and the entity does not deliver on whatever promises it may have made to the people who dealt with it. This simply says by virtue of association, and using the word partnering, or joint venturing, or any similar term, you do not automatically become liable under the doctrine of partnership by estoppel for the debts or the default of the entity. That is not unlike shareholders of a corporation, who are not liable for the debts of the corporation.

Assemblyman Gardner:
Thank you for bringing this bill. I think we are getting a little in the weeds. Single-purpose entities are used all time. I do contract work and have used them quite a bit in the proposals we have done. I do not think we have ever had this concern that we could possibly be liable just because of the fact that we were the one proposing the single-purpose entity. I appreciate this, and I think it is a good bill.

Vice Chairman Nelson:
Is there anyone else who would like to testify in favor of this bill? Seeing no one, is there anyone in opposition to this bill?

Kurt A. Franke, representing Nevada Justice Association:
I am here on behalf of the Nevada Justice Association (NJA) business committee to testify in opposition to the bill. This bill is intended to modify the common law rule of partnership by estoppel and, thereby, neutralize the Nevada Supreme Court's ruling in *Cay Clubs*. [Continued to read from prepared testimony (Exhibit E).] In opposition to what was said earlier, the court did not create a partnership by estoppel, it sent it back down to the wise decision of a jury. In this way, this bill targets the right to trial by jury. [Continued to read from (Exhibit E).] The law, as it stands now, essentially says, if you allow someone, or if you give someone the authority to bargain on your behalf, you own it; you are stuck with that contract. The proposed amendment is the exception that would swallow this rule entirely. You might as well cross out the first two sections.

The rule already has safeguards. First of all, the person being held accountable must know of the representation and allow it to be made. Second, the person relying upon it must rely upon it reasonably. In other words, they must rely upon the fact that these people claim to be partners. Those safeguards are

already in the bill. The dangers that it has are that no matter how reasonable a person acted in that reliance, now you can disavow it by later saying that was for the purpose of business development. Frankly, I do not have a lot of problems with what Mr. Wadhams and Mr. Morris testified the bill was intended to do. I tend to agree with most of the things they said in that regard, but the way it is worded does not accomplish that objective. It essentially negates the entire first two clauses of that statute and the common law principle of partnership by estoppel. I point to the fact that the person announces an association of persons for the sole purpose of business development. Does that have to be disclosed? Apparently, they do not have to disclose that we are going to create a new entity, and that is what they said would be the fair thing. If they said they were going to create a new entity, then your investment will go with the new entity, then you should not be held liable. I do not know if I have a big problem with that, but that is not what this statute says; it says for the sole purpose of business development. It does not even say they have to make that part of the announcement, regardless of whether such an announcement uses the words partners or joint venturing. So ostensibly, a party could claim to be partners or joint ventures continuously through an entire process of garnering investor money, and at the last second spring upon the investors an LLC that was created. That is where the investment will go. I do not think that is a safeguard to Nevada citizens and their investment money.

The way this is worded does not only work on a grand scale of large investments and large projects, but it works on a simpler person-to-person business transaction as well. I thought a great example was the concrete contractor who does work in reliance upon somebody saying they have the authority to make that $15,000 contract for this large-scale project. Later, he says, no I was just saying that solely for the purpose of business development. I represent businesses every day that do these types of contracts with people. If they cannot rely upon someone's representation, that they represent a partnership or they are allowed to speak on behalf of the joint venture, then this will require them, in every one of these small transactions, to get every partnership agreement, every partnership amendment, and every partnership list up to the day of that transaction. This is not only an anticonsumer bill, it is an antibusiness bill.

Assemblyman Jones:
We have two different explanations: one, we have the proponents saying it is limited to when a third entity is created by two people and the liability is limited there. Your testimony seems to indicate that is not what is going on. I read this as so long as a business development is undertaken by one or more corporations or LLCs, they must specifically state that a single entity or

additional entity will be created to undertake the business venture. Are you saying that even though that happens, the people should still be able to go upstream and get the higher level entities?

Kurt Franke:
My problem is that the original announcement does not have to contain that statement. So you can honor this money, support, and confidence of the people by saying we two are partners and we have this great history in business development, come invest in our partnership or joint venture. You can do that up until the day you create that business entity. There is nothing here that says that money has to go into that entity, it just says they have to create one. The way this is written makes it difficult for a court to interpret it later on.

Assemblyman Jones:
I would say that if the money did not go into the entity, then the people are still liable because they took the money themselves. There would be a nexus, there would be a tie. If the contract was entered into with the second entity, then the corporate veil should prevent it from going upstream.

Kurt Franke:
Again, I would say that announcement should include something that says you will be investing with a separate entity, not us, if you are going to call yourselves partners or a joint venture. I do not think the bill says that you have to then invest all the money in the separate entity. Depending on the representations made, you may have a fraud cause of action, but this would tend to exclude or exempt them from liability.

Assemblyman Jones:
Could we add a simple amendment that says the contract or monies must be invested with the independent entity?

Kurt Franke:
My concern would be on the original announcement. The announcement must disclose that there will be a separate entity created. If you are inducing investments by claiming to be partners and using the credibility of each separate partner to induce that investment and then stepping away and saying you were not investing with me, you were investing in another entity, that seems to be inequitable to the investors.

Assemblyman Jones:
The practical reality in society is that marketing people put these brochures together, not lawyers. If lawyers had to put these marketing brochures together, nobody would read them. In general society, we say two people are

coming together to do this great thing and they create a new company to do it. That has been going on for years and years. How many people read the five pages of a boilerplate on the back of a contract?

Kurt Franke:
Is it not the marketers intent to gain money for that project? If they are going to gain money for the project, then it seems to me there should be full disclosure.

Assemblyman Jones:
Yes, but then you just open up liability for everything to anybody if they just say I have a friend here who I believe is going to do a good job, now you are liable.

Kurt Franke:
I think you are containing the liability by writing the amendment incorrectly.

Vice Chairman Nelson:
Maybe we need to work on the language a little bit.

Assemblyman Elliot T. Anderson:
I know one of the concerns that I have heard has been about tort liability. I know that whether it is tort liability or contract liability, there still needs to be some reasonable reliance. My impression would be that for tort liability, before an injury happens, people are not thinking, this is a partnership so I do not know if there is reliance. In your experience, how hard or easy would reliance attach in a tort situation? Do you have any experience with extending a tort type claim, and how a partnership by estoppel would apply?

Kurt Franke:
Generally, partnership by estoppel is based upon the common law theory of apparent authority, and a third party is relying upon it. In tort liability, this does not apply, so partnership by estoppel would not apply for the reason you stated. If someone trips and falls or is struck by someone's car who was working on behalf of a partnership or corporation, he is not relying upon that partnership or representation that someone was clothed with authority. There is not the reliance factor so apparent authority, partnership by estoppel, was never meant to apply to those situations.

Assemblyman Elliot T. Anderson:
I found in *Cay Clubs* where it does say that it can; it is just an issue of showing reliance.

Kurt Franke:
It was the fraud element, so you are right, that is a tort cause of action. I thought we were talking about slip and falls.

Assemblyman Elliot T. Anderson:
That would be one that I think a lot of operators are worried about, where you have a night club in a casino that is doing things it should not be doing. In that case, it would be very tough to show that, correct?

Kurt Franke:
Yes. My concern would be that it is not the scrupulous business people, it is people who would exploit this exclusion for exactly that reason, thus committing fraud and then hiding behind this exemption, claiming it was all done for business development.

Vice Chairman Nelson:
If they did that, they would be subject to the securities laws regardless of whether there was an LLC formed.

Kurt Franke:
That is correct, but I do not know that is a reason to exempt it under this law.

Assemblyman Gardner:
There are a lot of companies, like Hulu, for example, which are joint ventures. But if Hulu does something wrong, I cannot sue Fox or NBC. I think that is what this bill is doing. Also, I have done a lot of single-purpose entities. Before anyone gives me any money, he has a long contract that I wrote up to ensure he is absolutely, positively aware of every possible scenario. You do not do that in the marketing on the front end, but by the time he has given me the money, he has signed my contract and is well aware of every possibility that could happen. I am concerned that we are going to say that just because of the marketing, suddenly there is a liability. I believe your example regarding concrete is a promissory estoppel because I said I am promising to do this work and I have the authority to do it. This bill deals only with partnership by estoppel. My question is if this is not changed, how do you think this will affect single-purpose entities, seeing as basically every development in Las Vegas and throughout the state is done by a single-purpose entity? How will this affect them if we do not fix this possible liability?

Kurt Franke:
I do not think we are fixing anything. The *Cay Clubs* sent the liability question to the jury. Wiser men than me have said the government always thinks it has the answers when the citizens are the ones who have the power and

intelligence and can do things for themselves. All the *Cay Clubs* did was send it to a panel of citizen jurors to answer that question. I do not think the *Cay Clubs* case needs to be fixed. I think it will be a warning sign to be careful of what you represent to investors and to ensure they understand, going in, that you give them plenty of notice that this is going to be a contract with a separate entity, not with these people claiming to be partners. The investor needs to know that we are not trying to get your money by claiming to be partners and using the credibility of our associations to get your money and then back out at the last minute by creating a separate entity. These Nevada citizens are bringing in their checks and are then presented with a contract that says this is a separate entity, do not worry about it, just sign away. If the disclosure is up front on this, I do not know that there is as big a problem. Again, the unscrupulous businessmen can take advantage of the wording of this exemption from this statute.

Assemblyman Gardner:
I would say that the warning is up front. Before money changes hands, there are dozens of pages of documents showing every possibility that could happen that are written by attorneys like myself. I do not see your scenario as common. Most of the people I deal with are sophisticated investors. If you are investing $100,000, you typically will have your own attorney read the contract. I am not sure that I would be concerned because the investor is going to have those answers before they invest their money.

Kurt Franke:
Maybe I am talking about a less sophisticated investor. At the same time, all I am saying is let the jury decide. This amendment will take it out of the jury's hands.

Assemblyman Araujo:
Have you had an opportunity to discuss any potential amendments with the bill's sponsor?

Kurt Franke:
I have not.

Assemblyman Ohrenschall:
Nevada Revised Statutes 87.4322 is not in the bill, but it deals with formation of a partnership. It states: "the association of two or more persons to carry on as co-owners of a business for profit forms a partnership, whether or not the persons intend to form a partnership." I am having trouble squaring that

statute, which seems like the legislative intent is pretty broad in terms of catching partnerships, whether formal paperwork is drafted or not, versus the proposed new language. I am wondering if you think they can harmonize or are they at odds?

Kurt Franke:
I think they can harmonize as long as the disclosure is up front. That might be a reason in and of itself to oppose this amendment because these are really securities laws issues. There are companies that are not governed by the securities laws because of the specific product they sell, so this opens up that whole field, in my opinion, to fraud and unscrupulous business practices. I think this is fixing a problem that was never there, and I do not think *Cay Clubs* created a problem.

Vice Chairman Nelson:
Is there anyone else here to speak in opposition?

Ricardo Ehmann, Private Citizen, Las Vegas, Nevada:
My firm has represented hundreds of condominium buyers, including Cay Clubs and the MGM Grand. I am here to oppose S.B. 329 (R1). Supporters of the bill contend that the amendment is needed to foster business development for the state, and that without the amendment companies will somehow be scared away from doing business in Nevada. In fact, a great majority of states have similar partnerships by estoppel statutes under the Uniform Partnership Act. Most states interpret their partnership by estoppel in the same way it was interpreted by the Nevada Supreme Court's *Cay Clubs* decision. Here the proposed amendment is an exception that would swallow the rule. The amendment is unnecessary because the statute, as written, has safeguards already built in. The statute requires consent. The statute does not apply if a company does not consent to it being called a partner or a joint venture. You need reasonable reliance, a person must have relied to the detriment on the partnership representation. This is the extension of credit, part of the *Cay Clubs* case.

I can tell you that the following states interpret this the same as the Nevada Supreme Court: Florida, Georgia, Texas, Michigan, Montana, New Hampshire, New York, South Carolina, Illinois, and Wisconsin. There must be a transaction with a purported partnership. Even if these requirements are met, the issue is ultimately decided by a jury of Nevada citizens. So why would a company represent to the public that it is partnering with another company and forming a joint venture? Clearly there is a certain amount of credibility that comes with representations that one company is joining forces with another company, or that they are now partners. People, citizens, consumers tend to rely upon

these representations, especially if they appear in press releases or marketing materials. That is the point of the partnership by estoppel statute: to prevent companies from allowing themselves to be referred to as partners or joint ventures, accepting the benefits that come with such representations, for example, customers and investors, and later claiming no responsibility if the business venture is brought to court for violating the law. This amendment essentially gives companies a license to mislead Nevada citizens about the true nature of a business venture. Instead of fostering a fair business environment, it will attract unethical companies to set up shop in Nevada knowing they can use the terms "joint venture" and "partnership" without fear of answering for the misrepresentation in court.

Most importantly, this amendment removes an important consumer protection for Nevada citizens and in keeping businesses honest about how they represent their business developments.

I think it would be helpful to look at a real-life example about how this all plays out. I have provided a press release from MGM Mirage and Turnberry regarding the Signature at MGM Grand in 2002 (Exhibit F). This clearly announces a joint venture to build a luxury condominium complex on the northeast end of the famed MGM Grand resort's property. It says: "We are pleased to be moving forward on our joint development with Turnberry." The next press release from May of 2004 (Exhibit G) says: "Sales soar at the Residences at MGM Grand." By this time there has already been a contract and a single-purpose LLC formed, yet there is no mention of that in the press release. It is still MGM Grand, Turnberry, joint venture. There is a quote that reads "The MGM Grand project is a wonderful opportunity for us to partner with one of the country's most recognized hotels." Clearly they are trying to use their credibility to attract investors.

Then there is a press release dated June 10, 2004 (Exhibit H). It is the same thing, joint venture between the MGM Grand Hotel and Casino and South Florida-based Turnberry Associates. Another press release from October 19, 2004 (Exhibit I) states: "A joint venture between the MGM Grand Hotel and Casino and South Florida-based Turnberry Associates." Then you follow that up with marketing materials (Exhibit J) which state: "Brought to you by Turnberry and the MGM Grand. A more perfect partnership…would be difficult to find." If laws are broken in this development, under the proposed amendment, these companies will be able to say, there is no partnership, there is no joint venture, you should deal with the single-purpose LLC that we formed, which is often a shell company.

In closing, I would like to say the proponents of this amendment have emphasized that businesses need certainty and this amendment helps in that respect. What about the citizens of Nevada? Do they need to accept the fact that the term, "partner" means nothing? That "joint venture" means nothing? Does this amendment undermine a certainty of who you are dealing with as a citizen when entering into business transactions? I believe that it does. The Nevada Supreme Court got it right in *Cay Clubs*. The statute should not be amended. I respectfully oppose this amendment for the reasons set forth. [Also provided but not mentioned is a Cay Clubs brochure (Exhibit K).]

Assemblyman Elliot T. Anderson:
I am trying to think of ways to try to get to a compromise. If the word "solely" was added, would that be helpful? So maybe you do not get liability solely because you say joint venture?

Ricardo Ehmann:
I think the Nevada Supreme Court got it right, and that they interpreted the statute correctly. I do not think it should be changed at all. This is a consumer protection statute and it opens up the opportunity for misleading the public and having a license to do so.

Vice Chairman Nelson:
Is there anyone else in opposition to this bill? Seeing no one, is there anyone neutral on this bill? Seeing no one, Senator Lipparelli, would you like to make closing remarks?

Senator Lipparelli:
I think the testimony that you heard today is the reason for the bill's existence. Clearly the court ruled based on the law they had before them. That is the import of the change in the bill. If there is a way to make the bill better, I am more than willing to take that into consideration. I do think it is an important change to our Nevada law to encourage businesses to continue to develop. Without it, given the *Cay Clubs* case, that risk is now on the table, and I think there needs to be clarity on this issue.

James Wadhams:
I would like to caution the Committee—as you think about these issues and the testimony—I would encourage you to think about the kind of examples that were mentioned by Assemblyman Gardner. These are everyday occurrences. We might have some grand project, but this happens in everyday business where people come together. If I have a new application for shared grocery shopping and I say my partner and I are going to form an entity, you might rely upon that, but you would invest in that new application. Please be cautious.

I think the issue is the sanctity of the business entity in which the investment is made. If they invest in me, that is promissory estoppel; if they invest in a corporation that I formed, that is the limited liability.

Vice Chairman Nelson:
I think in light of the questions that have come up, you probably should get the stakeholders to come together and work out something everyone can agree upon.

[Chairman Hansen reassumed the Chair.]

Chairman Hansen:
I will close the hearing on Senate Bill 329 (1st Reprint) and open the hearing on Senate Bill 442 (1st Reprint).

Senate Bill 442 (1st Reprint): Revises provisions governing arbitration. (BDR 3-1138)

James L. Wadhams, representing Las Vegas Metro Chamber of Commerce:
We are here to support this bill. This issue is about arbitration and the fundamental issue in this process is the opportunity in an arbitration process to be able to deal with a potentially biased arbitrator. This is a fairly short bill. I would like to draw your attention to the new language added in section 1, subsection 4. The critical component to this is if a party in an arbitration discovers a fact that may imply that the arbitrator has a previously undisclosed bias, the party to the arbitration can approach the court and have the arbitrator removed and, in fact, should an award be made, that award can be set aside on the basis of bias. This bill precludes the opportunity for an arbitrator to continue through a process when there is a bias that is discovered. This allows that to be addressed early and quickly.

Chairman Hansen:
I assume there are rules. For example, I am having a negotiation with a union, and it turns out the arbitrator's brother-in-law is the foreman for the union. After the arbitrator has ruled against me, can I then go to court and claim that the arbitrator was biased? Is this bill similar to other states?

James Wadhams:
The issue of bias is not unique to Nevada. That can occur anywhere at any time. The issue of bias should be decided by a court. We do not want to preclude an individual who is in an arbitration process if they discover a fact that they believe might cause bias by that arbitrator. The example you gave is a little obvious. I am sure that would be disclosed, but if it is not disclosed and

is subsequently found through other means, this amendment allows the party who discovers that to bring it to the attention of the court, even while the process is underway. If it is after the fact, that is certainly a basis to challenge the arbitration.

Assemblyman Ohrenschall:
Is there currently a problem with arbitrators consolidating separate proceedings?

James Wadhams:
Arbitration is a matter of a contract between parties. This is to make clear that unless the contract provides that, or the parties subsequently agree to consolidate proceedings that might otherwise be separate, it ought not to be done simply by the decision of the arbitrator. The contract that the arbitration is based on should be honored and should not be set aside unless the parties of the two separate contracts agree to consolidate them.

Assemblyman Nelson:
There are very few grounds upon which you can overturn an arbitration decision. You practically have to prove fraud. Is this a departure from that?

Steve Morris, Private Citizen, Las Vegas, Nevada:
Some other states have done likewise with this bill. Arbitrator disqualification is not unique to Nevada or to any number of states. Arbitrator disqualification occurs under statute, both federal statute and state statute, in accordance with the legislative enactments which set forth the grounds for arbitrator disqualification. This bill does not change the law in any respect with bias. What this bill says is if there are reasonable grounds to believe that an arbitrator has failed to disclose facts, and a reasonable person would conclude that the arbitrator failed to disclose a fact which indicates his or her evident partiality, that is grounds for a court to say the arbitrator is disqualified. The difference this bill makes in that proposition is that today, under the statute as currently written, if an arbitrator fails to disclose a fact that a reasonable person would say disqualifies the arbitrator, that issue cannot be raised until the arbitration has run its course and an award has been entered. This bill says if the failure to disclose becomes known during the course of arbitration, and the court agrees that this is a failure to disclose a fact that would disqualify the arbitrator, you do not have to endure the time and expense of going to conclusion before raising that point.

Assemblyman Ohrenschall:
My question was on section 1, subsection 4 on consolidation. Could you address that?

Steve Morris:
This is an attempt to reflect what the United States Supreme Court has said most recently regarding mass or class arbitrations. This has become a hot-button issue in arbitration, particularly in the federal courts where you have people coming to court and saying, I bought something or I dealt with someone, and I am typical, and I entered into a contract which has an arbitration clause. I want to arbitrate my dispute with the company, but I want to arbitrate on behalf of everybody who entered into this contract. I would like to conduct a class arbitration. The United States Supreme Court addressed that recently in the case *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l; Corp.,* 559 U.S. 662, 130 S. Ct. 1758 (2010). The Supreme Court said you cannot conduct a class arbitration. You cannot say that the person with whom you contracted is going to be subjected to class arbitration involving potentially dozens, hundreds, or thousands of people unless, in your arbitration contract, you have agreed to class arbitration. Arbitration is a matter of contract. You cannot force someone to arbitrate if there is no contract that says arbitration is applicable.

Arbitration by contract is a legal term called "bilateral," that is the person against whom the claim is being made and the person who is making the claim. That is a two-party, or bilateral, arbitration. It comes out of a contract. Assemblyman Ohrenschall, if you sell me something under a contract with an arbitration clause in it, and we have a dispute, it has to be resolved in a one-on-one arbitration. Today, as a consequence of the proliferation of claimants and claim shopping by enterprising lawyers, what they try to do to avoid the Supreme Court's prohibition against class or mass arbitration is by claim aggregation. A lawyer may file 100 separate complaints based on the contract that you and I have signed and demand arbitration. They will then go to arbitration and the lawyer will say I want to aggregate all 100 claims and arbitrate this as one whopping big claim. [Also provided but not discussed was a proposed amendment to S.B. 442 (R1) (Exhibit L).]

Assemblyman Ohrenschall:
Is that 100 claims for the same claimant, or for multiple injured parties?

Steve Morris:
Different people, just like a class action, with one person acting on behalf of many. To avoid that prohibition, the lawyer files a separate complaint for each one of these people. The contract under which it is filed does not say anything about consolidated or class arbitration. He will just bring all these separate claims that he would have filed as a class action together in one proceeding.

He will have the arbitrator combine them. This bill says that is fine; the arbitrator can conduct consolidated proceedings if the contract that was signed permits consolidated arbitration, or claim aggregation.

Assemblywoman Diaz:
I need to understand how the court will determine when to let go of an arbitrator because they are finding they are not being impartial or something is found out that there is a connection with one party versus the other. How would the court come upon the information to apply section 2, subsection 4, paragraphs (a) and (b)?

Steve Morris:
This proposed amendment does not change or alter the grounds for disqualifying an arbitrator, or what they call vacating an arbitrator's award. The statute currently says that if facts are presented to a court which would lead the court to conclude that the arbitrator was evidently partial or biased, then the arbitrator shall be disqualified and his or her arbitration award will be vacated. That process has to run now to the end of arbitration. An example of that would be if you had someone aggregating claims, consolidating hundreds and conducting a single arbitration, and during the course of that, you discovered that the arbitrator failed to disclose that he has a business relationship with one of the lawyers or a familial relationship with one of the lawyers or one of the essential witnesses. If the arbitrator failed to disclose that, you would have to wait until all 100 claims have been adjudicated and an award entered before you could raise that disqualifying fact. This bill simply says, when the arbitration started and the arbitrator was appointed, the arbitrator did not say, I am related to one of these lawyers. The arbitrator did not say, I am actually in business against one or more of the parties, and he did not disclose that fact. Then the court could conclude that that is a fact that a reasonable person would consider as a disqualification of the arbitrator. He would indicate his or her partiality for one party over another, then the person will be disqualified. This bill simply says that if that process develops, it can be considered by the court before the arbitration is concluded.

Assemblywoman Diaz:
When you mentioned the familial relationships, is the law clear how close that relationship needs to be? There might be a fifth cousin who ends up being an arbitrator without even knowing they are related. Is there a degree of consanguinity, how close a relationship has to be? I want to prevent fishing expeditions. I want to ensure that the record is very clear about the level of scrutiny or the degree of consanguinity we are considering.

Steve Morris:
In an attenuated conflict such as an eighth cousin, courts do this daily, they evaluate specific facts. There is not a single discreet test for determining partiality or whether an arbitrator should be disqualified. It depends on the facts of each case. Courts have said a conflict that arises by virtue of a relationship that is distant, or attenuated, is not sufficient to establish bias for the purpose of determining whether the arbitrator should continue. The example currently in statute is, if the facts give rise to the conclusion in the court that a reasonable person would consider this fact, which was not disclosed, to be sufficient to indicate a bias, then the arbitrator would be removed, irrespective of what stage the proceedings are in.

Chairman Hansen:
Thank you for your testimony. Is there anyone here in opposition to this bill? Seeing no one, is there anyone in the neutral position? Seeing no one, I will close the hearing on S.B. 442 (R1) and open it up to public comment.

Assemblyman Ohrenschall:
It is rare we get an attorney who has been practicing law for almost 50 years in Nevada to appear before us. I would like to recognize and thank Mr. Morris.

Chairman Hansen:
Seeing no other business, this meeting is adjourned [at 10:23 a.m.].

RESPECTFULLY SUBMITTED:

_____
Nancy Davis
Committee Secretary

APPROVED BY:

_____
Assemblyman Ira Hansen, Chairman

DATE: _____

EXHIBITS

Committee Name: Assembly Committee on Judiciary

Date: May 6, 2015 **Time of Meeting: 8 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 39 (R1)	C	Jeff Landerfelt, Deputy Secretary of State, Commercial Recordings, Office of the Secretary of State	Prepared Testimony
S.B. 388 (R1)	D	Senator Mark A. Manendo, Senate District No. 21	Prepared Testimony
S.B. 329 (R1)	E	Kurt A. Franke, representing Nevada Justice Association	Letter in Opposition
S.B. 329 (R1)	F	Ricardo Ehmann, Private Citizen, Las Vegas, Nevada	Press Release
S.B. 329 (R1)	G	Ricardo Ehmann	Press Release
S.B. 329 (R1)	H	Ricardo Ehmann	Press Release
S.B. 329 (R1)	I	Ricardo Ehmann	Press Release
S.B. 329 (R1)	J	Ricardo Ehmann	Sales Brochure
S.B. 329 (R1)	K	Ricardo Ehmann	Sales Brochure
S.B. 442 (R1)	L	Steve Morris, Private Citizen, Las Vegas, Nevada	Proposed Amendment