MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Eighth Session
February 17, 2015

The Committee on Judiciary was called to order by Chairman Ira Hansen at 8 a.m. on Tuesday, February 17, 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
Assemblywoman Victoria Seaman
Assemblyman Tyrone Thompson
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman Randy Kirner, Assembly District No. 26

STAFF MEMBERS PRESENT:

Diane Thornton, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Karyn Werner, Committee Secretary
Jamie Tierney, Committee Assistant

OTHERS PRESENT:

Kaye Shackford, Private Citizen, Incline Village, Nevada
Warren Hardy II, representing Nevada Restaurant Association
Brett Sutton, representing Nevada Restaurant Association
Megan Bedera, representing National Federation of Independent Businesses
Gerald Eick, Director of Finance and Risk Management, Incline Village General Improvement District
Mark Wenzel, representing Nevada Justice Association
Kristy Oriol, Policy Specialist, Nevada Network Against Domestic Violence
Tonja Brown, Private Citizen, Carson City, Nevada
Sherry Powell, Representative, Ladies of Liberty, Reno, Nevada
Juanita Clark, Member, Charleston Neighborhood Preservation, Las Vegas, Nevada
Steven D. Hill, Director, the Nevada Governor's Office of Economic Development
Julie Butler, Division Administrator, General Services Division, Department of Public Safety
Eric J. Ellman, Senior Vice President of Public Policy and Legal Affairs, Consumer Data Industry Association

Chairman Hansen:
[Roll was taken. Committee protocol and rules were explained.] We have two bills to hear today, Assembly Bill 47 and Assembly Bill 110. We are going to take them out of order and hear A.B. 110 first. Here to present this bill is Assemblyman Kirner.

Assembly Bill 110: Revises provisions governing court sanctions for certain conduct in civil actions. (BDR 2-648)

Assemblyman Randy Kirner, Assembly District No. 26:
Today we are bringing Assembly Bill 110, which is a bill that revises provisions governing court sanctions for certain conduct in civil actions. I am bringing this bill at the request of one of my constituents, Kaye Shackford, who is a resident of Incline Village. She will testify, and then we will go through the bill.

Kaye Shackford, Private Citizen, Incline Village, Nevada:
I have lived in Incline Village since 1992. I am here in support of A.B. 110. Its purpose is to close a loophole in the law that is encouraging widespread abuse of our legal system. [Read from written testimony (Exhibit C).]

Assemblyman Kirner:
Existing law compels the court to require an attorney to personally pay the additional costs, expenses, and attorney's fees reasonably incurred by an opposing party as a result of the attorney's conduct. It then goes on to list some of those actions. This new section amends existing law by adding those provisions, which are also applicable to parties who are not represented by an attorney. You can see, on page 2 of the bill, some of the proposed language changes. We are ready for your questions.

Chairman Hansen:
Have you seen any of the proposed amendments, like the one from Nevada Network Against Domestic Violence (Exhibit D)?

Assemblyman Kirner:
I have seen that, and I have talked with Ms. Shackford about it. She has some questions and concerns, so I am going to let the domestic violence people speak to that themselves.

Chairman Hansen:
Are there any questions for Ms. Shackford or Assemblyman Kirner?

Assemblyman Elliot T. Anderson:
Can you explain to me what it means to unreasonably and vexatiously extend a civil action or filed, maintained, or defended an action that is not well-grounded in fact or warranted by existing law?

Assemblyman Kirner:
I am not an attorney, but we do have one who can address that if you are willing to wait a moment.

Assemblyman Elliot T. Anderson:
Why is it fair to judge you by the same standard as an attorney?

Assemblyman Kirner:
I do not know that I can answer that.

Assemblyman Wheeler:
Is that already written in law for the attorney? Are we just changing it over to include anyone who is not an attorney but files a frivolous lawsuit?

Assemblyman Kirner:
Yes, that is exactly right.

Assemblyman Wheeler:
Would it be fairer to judge that person on his legal abilities as well?

Assemblyman Kirner:
Yes.

Assemblyman Nelson:
I do not know if you have had a chance to read the exhibits. Something that comes up is the "chilling effect" this might have on vulnerable people—people who are not represented by counsel in the areas of domestic violence or child support. They may feel that they cannot pursue their rights in case a judge would rule against them. What is your position on this?

Assemblyman Kirner:
I will allow Ms. Shackford to address that.

Kaye Shackford:
The way the statute is already written, *Nevada Revised Statutes* (NRS) 7.085 says "in all appropriate situations." I trust our judges to know the difference between someone who does not understand the law and has a case but may be stumbling around and someone who is operating in frivolous and vexatious ways. The judge has total discretion to make those decisions, and I trust the judiciary is able to make them.

Chairman Hansen:
Is there anyone else who would like to testify in favor of A.B. 110?

Warren Hardy II, representing Nevada Restaurant Association:
We are always very involved and interested in changing laws regarding frivolous lawsuits. Ms. Shackford's example is why it is such an important issue to us. When Ms. Shackford learned that we were going to be here in support of the bill, she asked if we had an attorney who might come to address any legal questions the Committee might ask. I have with me today Brett Sutton, who is a member of the board of directors of the Nevada Restaurant Association and also happens to be an attorney. I will allow him to address the issues for us.

Brett Sutton, representing Nevada Restaurant Association:
I am an attorney and have been practicing for 26 years. I have done litigation extensively. I am licensed in both Nevada and California. I am a member of the Nevada Restaurant Association board and a resident of Douglas County.

What A.B. 110 does is close an existing loophole in the law. First of all, we are not talking about a "loser pays" system. We are not talking about a system where, just because someone loses a case, they have to pay the other side's attorney's fees. We are only talking about cases where a judge has made a finding that the lawsuit was frivolous and brought in bad faith, brought only for the purpose of harassment. That is the only thing we are talking about. We have had laws on the books for a long time about these cases, but there is a loophole.

As we sit here today, a judge in Nevada could expressly find that a case was frivolous, vexatious, and brought in bad faith solely to harass. Despite that finding, he may not make the victim of that lawsuit whole by awarding the costs and attorney's fees that he had to pay to defend against the frivolous lawsuit. That is the loophole we have today; we want to close it.

We have a couple of laws on the books that apply. The first one is NRS 18.010. It has been on the books for a long time. Basically, what that does is, if a judge finds that a lawsuit was frivolous or brought in bad faith, or brought to harass, he can award attorney's fees to the party who brought the lawsuit. That can be either someone who is represented by an attorney or someone who is pro per. Notice that I just said attorney's fees. I did not say costs or expenses. In lawsuits and litigation, you have all three if an attorney is involved. You have to pay the attorney his fees. In addition, you have to pay a whole bunch of out-of-pocket costs: deposition transcriptions, filing fees, expert witness testimony, cost of subpoenas, service of subpoenas, and all of those types of costs. They are in addition to attorney's fees. The court is only allowed to award attorney's fees per NRS 18.010; it does not say costs.

Then we have NRS 7.085, which was brought back by the Legislature as a response to the watering down of Rule 11 of the Nevada Rules of Civil Procedure. What NRS 7.085 does is make it mandatory that the judge, if he finds the case frivolous, award attorney's fees, costs, and expenses to the victim against the attorney who was on the side of the frivolous lawsuit. There again, while it does cover attorney's fees, costs, and expenses, it does not cover a situation where the frivolous lawsuit was brought by someone without an attorney. There you can see the two loopholes. It does not cover someone without an attorney for costs and expenses. Unlike NRS 7.085, NRS 18.010 is discretionary instead of mandatory, allowing the situation where a judge could

find that a lawsuit was frivolous, baseless, and was brought only to harass, and yet still does not have to award the victim the attorney's fees and costs. We want to fix that, and that is what A.B. 110 does.

It would be very helpful to businesses such as restaurants that are frequently the target of frivolous lawsuits and operate on a very thin margin. These types of lawsuits can be devastating. These judges are the same ones we entrust to send people to prison for the rest of their lives. They are very capable of making a decision that the lawsuit is frivolous or vexatious. Their decisions can also be reviewed by the new appellate court under abuse of discretion. I support this bill and it would be an excellent thing for the state.

I read the statements that have been submitted for the record by some of the opponents. It is important to note that the Nevada Supreme Court, on at least three different occasions, has approved both NRS 7.085 and NRS 18.010, the sections that now allow a judge, in some circumstances, to award fees, or in other circumstances the costs for frivolous cases. Some of the arguments made against the chilling effect and such have already been addressed and approved by the Supreme Court of Nevada. I have the case names if you like. If this bill were passed, an amendment would need to be added for one more change. The amendment would need to repeal NRS 18.010, subsection 2(b), once you include this in NRS Chapter 18, where it really should be since NRS Chapter 18 defines cost. It would make NRS 18.010, subsection 2(b), superfluous since it also allows the awarding of attorney's fees. This new statute that would cover attorney's fees will make it consistent with NRS Chapter 7.

Assemblyman Gardner:
My reading of this says that it is not just a frivolous case. You could be fined if you did just one motion that was vexatious. Is that correct?

Brett Sutton:
Nevada Rule of Civil Procedure 11 shows the distinction between attorney's fees, costs, and sanctions. It also gives the judge the power to sanction, or punish, people. Under Rule 11, if someone files a frivolous motion, the judge could award sanctions just to punish him. For example, instead of compensating the other side for attorney's fees, the judge could say that they had to pay a $10,000 fine to the court. That is a sanction. The bill says "filed, maintained, or defended a civil action or proceeding," so I would agree with you.

Assemblyman Ohrenschall:
If passed, this bill will have a broad reach. There is no one here from the Supreme Court, but I feel that the great majority of our citizens—whether it is a family matter or some civil matter—have to proceed in pro per without counsel because of the cost. They cannot afford to be represented. Do you have any data regarding how many people are pro per litigants in this state? My guess is that it is the majority of them. That is my concern from reading section 1, subsection 1, paragraph (a). Someone who is not an attorney and has not been to law school may file a motion and go forward with what they feel is good faith. However, members of the Bar or the Judiciary may not believe him and then he may be subject to these penalties.

Brett Sutton:
I understand the concern. I do not know the statistics, but many people who cannot afford an attorney proceed pro per, and that is fine. We want to protect their right to do so. No one should have the right, whether pro per or represented by an attorney, to bring a frivolous, vexatious, bad-faith lawsuit solely to harass. We have judges and we must trust them to make those determinations. Remember that NRS 18.010, subsection 2(b), has been on the books for a long time and allows the court to award attorney's fees, but not costs or expenses against both pro per and represented parties. I have not seen any evidence that it has in any way deterred pro per litigants from bringing lawsuits. In fact, most of the public discussion is that we have a lot of abusive lawsuits by both pro per and attorneys. This just makes NRS Chapter 7 more consistent.

Assemblyman Ohrenschall:
Looking at lines 9 through 11 on page 2, you will agree that this bill, if passed, would not solely apply to unreasonable or vexatious lawsuits. It would also apply to ones where the judges feel the argument was not made in good faith in terms of existing law. We would also catch those pro per litigants who made a mistake, not just the vexatious litigants.

Brett Sutton:
I agree with your first point that there is an "or." I respectfully disagree with the second point. It says "made in good faith." That is the key. If someone comes in with what he believes to be good faith, but the court finds that he was wrong and rules against him, nothing happens; he just loses. If the judge finds that he acted in bad faith, that the purpose of this lawsuit was not really to prosecute what he is suing for, that it was to harass someone, it was to shake them down, or some purpose other than the legitimate purpose for which our system exists, that is when the judge would make an award.

Assemblyman Gardner:
For many cases when you are pro per, the district court has made available all of the forms that you are going to need. If you follow the forms, it is very unlikely that you will get involved with the statutes. I do not know why people are talking about pro per and pro se; there are forms and free education in the legal libraries.

Assemblyman Nelson:
Looking at the language of the bill in section 1, subsection 1, paragraph (a), it appears to me there are a number of "or's". Are you saying that good faith applies to every one of those? The way I read it is a litigant or attorney could fall into this situation if he or she brings an action that is not well grounded in fact, or is not warranted by existing law. Correct? It does not seem to me that good faith applies to every one of those.

Brett Sutton:
I agree that it does not expressly apply to each one of those; that is true. But it has to be warranted by existing law. If a judge says that you are wrong and you were wrong in the law, that is when it goes to good faith. They are either correct on the law or incorrect, and if they are incorrect, the only way they would be subject to this section is if they did not make the argument in good faith.

Assemblyman Nelson:
I think we would all agree that cases like the witness talked about in Incline Village, and restaurants that are being harassed and sued, should all be stopped and sanctioned. However, you are also saying that the court "shall require," so you are not allowing the court discretion.

Brett Sutton:
I respectfully disagree because the court has discretion to find that the lawsuit meets these requirements. If the court finds that the lawsuit does not meet the requirements, but rather was not filed in good faith, was not grounded in fact, or was brought to harass, they must make the other party whole. I think that is how it has to be; otherwise, you will have a strange situation where you have the court saying that the lawsuit was frivolous, but you are going to have to pay your own attorney's fees.

There is another level of review. The new appellate court could review any such decision on appeal under what is called "an abuse of discretion standard." The Nevada Supreme Court currently has that ability, and they have done it several times.

Assemblyman Elliot T. Anderson:
It seems like, with all of the emails that I get, everyone is a legal scholar and they think that nullification is still a reasonable strategy. They think it is something that works and is well grounded in law. It is not well grounded in history or law. You are asking people to live up to a standard that they cannot possibly meet. They do not know if something is in good faith or not. They may think it is in good faith, but they may be too ignorant to know that what they are doing is not in good faith. It is one thing for an attorney, because we require attorneys to go to law school for three years. It is not fair fundamentally to hold people to the same standard. I do not know how we can expect anyone who is not an attorney to know every nuance of law, and when it is well grounded. Conceptually, it is hard for me to get there. One thing about Rule 11 is that the court gives itself plenty of discretion for parties or attorneys. There is a safe harbor provision, which I think is important because, once you get notice that it may be frivolous, you can stop it. If you get rid of the safe harbor provision, you are going to require that people keep going with the case and not pull back. It is hard for me to get here on this bill.

Brett Sutton:
If you look at the "or" and at the bill, if they are correct on the law, you do not have a problem. It is only when they are incorrect on the law that there is a problem. That is your concern, and it is a valid one. I understand where you are coming from. Remember that it only applies if the judge finds that the erroneous argument was made in bad faith. If they acted in good faith, although erroneous, the statute does not apply. That is the protection.

The judges are sensitive to that issue. The judges bend over backwards to try to help the pro per litigant. We have great judges who really try to help as much as they can. It is difficult sometimes because the pro per litigant does not understand the procedures.

Assemblywoman Fiore:
As I am listening to the argument—and I understand that common sense is not in style any more—this is a bill that has my full attention and support and really needs to be implemented. I want to thank you on the record for bringing it forth.

Assemblywoman Diaz:
I have a question on the language in section 1, subsection 2, lines 21 and 22 that says ". . . and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources . . . ." Is that part going to be different in different areas of the state since judicial resources

are different? For example, the judicial resources in Clark County are different from Washoe County or the rurals. My concern is whether one size really fits all.

Brett Sutton:
Yes, it is different in different counties and locations. This particular section is just a repeat of what is already in NRS 7.085. It was a declaration of express intent by the Legislature to have courts award attorney's fees or sanctions in frivolous cases. It simply repeats that. Overall, as a state, frivolous lawsuits tax our limited judicial resources.

Megan Bedera, representing National Federation of Independent Businesses:
The National Federation of Independent Businesses (NFIB) represents 2,000 businesses here in Nevada. Someone does have to pay these legal bills and attorney's fees. We have a lot of businesses that are operating in good faith. They are coming before the courts, presenting their position, and being stuck with these expenses. Mr. Sutton and Ms. Shackford touched on some of the incidents that show the damage that frivolous lawsuits are doing to small businesses. Frivolous lawsuits are creating a climate of fear for Nevada's small businesses. While some claims are absolutely legitimate, others are without merit. Individuals and entities are sued, and they have to defend themselves. It is costly to the businesses and the consumers. Individuals and attorneys who are filing baseless claims and victimizing innocent people need to be held accountable. The NFIB has made it one of their top national legislative priorities to help create these reforms nationally, which will not happen in the near future. We are asking you to look at the state statute and how we can protect small businesses—not the large businesses—the small businesses that are creating jobs. Until the federal government looks at and closes this loophole, let us close it in Nevada to protect small businesses and citizens like Ms. Shackford, and the situations that she explained. Please support this bill.

Gerald Eick, Director of Finance and Risk Management, Incline Village General Improvement District:
Your consideration of this bill should be on the merits, as they would apply to everyone. Our example has been used, so I will provide clarity on a couple of matters.

At our September 24, 2014, board of trustees meeting, our general counsel reported that since August 2011 there have been 27 claims of action filed against the district by one individual. One remains open and that is a public records request. After those items went through the courts, there was considerable concern in our community about the amount of money that has been spent in defending itself against these claims. It was reported by

general counsel that our district had spent in excess of $120,000 for those claims. In addition, the same group of individuals had brought 10 administrative claims of action, which cost an additional $70,000, a combined total of $190,000. At the end of this report, one of our trustees asked district counsel if we would be able to recover any of those funds. Unfortunately, we do not have an avenue in which to pursue that, because of the nature and manner in which the actions were brought.

The district is not against free speech or against the idea that people have different perspectives, beliefs, and understandings. Through the open meeting law, everyone is provided the opportunity to say what they think and feel through public comment. However, when they do not feel that their actions have gained any traction and they begin to use the courts, we have to consider the constraints on the court system. The court system is not there for making findings of free speech; it is there for making findings of merits of decisions based on law.

As a Certified Public Accountant for 28 years, I was in public practice and looked at internal controls and the question of safeguards. I believe this amendment represents a safeguard that is in the best interest of the public. You have already identified a set of circumstances where sanctions or findings should be made against officers of the court. I have always felt that the best design for any set of circumstances is to cover the broadest range of participants possible. By filling this loophole, it will create a design over the same set of circumstances. I can appreciate the points that have been made that some of the participants in these actions may have different backgrounds and experiences, but they are all using the same system, process, and assumption. Therefore, we believe they should be held to the same standard.

Assemblyman Nelson:
Why are you unable to recover costs and attorney's fees? Is it because of the loophole that the person who brought the lawsuit is not a Nevada licensed attorney?

Gerald Eick:
That is correct, sir.

Assemblyman Nelson:
So, under NRS Chapter 18 you cannot get anything?

Gerald Eick:
That is correct.

Assemblyman Elliot T. Anderson:
Why does Rule 11 not apply? It has been a while since I looked at Rule 11, but is there a provision for sanctioning parties in it?

Gerald Eick:
Again, I am not an attorney to answer your question. I know that our legal counsel felt that, given the nature of the person who brought this forth and the manner in which it was brought, they could not make that rule apply.

Mark Wenzel, representing Nevada Justice Association:
As some of you may know, when this statute was originally enacted many years ago, it was the Nevada Justice Association—then known as the Nevada Trial Lawyers Association—that was a major supporter and, in fact, helped write and promulgate this statute. We are in support of this bill just like we were many years ago when the original bill for NRS 7.085 was enacted. It serves the state's public policy to give the courts, in appropriate circumstances, a vehicle by which to punish attorneys and others who file lawsuits frivolously and vexatiously. It is our goal to limit such conduct and to eliminate it eventually.

Assemblyman Elliot T. Anderson:
We disagree again. Why should parties who do not have the means to hire an attorney and are not experts in the law be held to the same standard as an attorney?

Mark Wenzel:
I have seen pro per litigants both on the defense side and plaintiff side of lawsuits, and I would respectfully disagree with the proposition that they are held to the same standard. Courts bend over backwards to help these individuals. In one of our cases in Washoe County, the judge went into chambers, got out a law book, looked up the applicable statute that the pro per litigant was having questions about, and read it to that person. That would never happen for an attorney. The person had filed something inappropriately or had some fine point wrong. Seeing firsthand the judge do that, I would respectfully disagree with you. They are given every opportunity to comply with the law. It would not have a chilling effect on situations where a person may have a legitimate disagreement or not understand a particular law.

Assemblyman Elliot T. Anderson:
The provisions of this bill make sanction impositions mandatory, where Rule 11 in the sanction provisions applies to any party, not just to attorneys, and are permissive. The discretion that you are talking about is stripped away with this measure. There is no safe harbor provision, so the court would not have the

ability to bend over backwards. I would respectfully disagree with the reading. The way I read this is not the way it reads in the text. It does not matter what we intend for it to do if it says something else. Do you see discretion in this bill? It is a lot different from Rule 11.

Mark Wenzel:
I do see discretion in this bill. From my personal experience I think there are many cases involving pro per litigants where the court does have discretion, especially on the defense side. If you look at section 1, subsection 1, it says, "If a court finds that an attorney or a party who is not represented by an attorney has . . . ." The judge does have discretion, but he has to make that finding first. The court has discretion once it makes a finding of vexatiousness—bad faith conduct. The mandatory nature of the fine steps in when they make that determination. I do not see a judge making the determination that someone has acted in bad faith if it is a close call. It is the repeat offender that this bill tries to capture.

Assemblyman Elliot T. Anderson:
This is a big change from Rule 11. The court can decide not to impose sanctions in Rule 11, and that is different from this bill.

Chairman Hansen:
Assemblyman Anderson, I am sure that the bill's sponsor would be interested in any amendment that you may propose.

Assemblyman Wheeler:
I see at least three lawyers on this Committee and the rest of us are civilians, yet we write law every day that we are in session. In your opinion, how many pro per people study the law before they go to court with a real lawsuit—not a frivolous lawsuit—and do not know court procedures, but know what the law says?

Mark Wenzel:
I do not know what the percentage would be, but some of the people make an effort to find out what the law says. The court libraries and resources are open to the public; the staff is extraordinarily helpful. Assemblyman Gardner pointed out that many of these situations are governed by forms that can be completed. I have experienced only a small percentage of cases when pro per litigations were of a vexatious nature. One was abusive and the person was a repeat offender. We are trying to catch the attorneys who file frivolous lawsuits.

Assemblyman Wheeler:
Does this law give the judge the final discretion on whether the lawsuit is vexatious or frivolous?

Mark Wenzel:
I believe that it does.

Assemblyman Gardner:
I concur with the other attorneys who said that judges bend over backwards. I have seen this in bankruptcy court, family court, and federal court. They do everything they can, barring actually writing their motions for them, to let them know what legal things are out there, where they can get the forms, and where they can go to legal libraries. They do many things they would not do for an attorney.

Chairman Hansen:
Have you had a chance to review any of the cases from the General Improvement District in Incline Village? I understand that the individual who keeps bringing this is an attorney but is not licensed to practice in Nevada. Has anyone actually reviewed those to see how many, if this passes, would be considered unreasonable and vexatious in nature?

Mark Wenzel:
I have not had that opportunity. That is an area of practice with which I am not familiar. There may be means by which, even without this being enacted, the cases can be considered by a court vexatious, and litigants may be able to recover their attorney's fees and costs.

Chairman Hansen:
Is there anyone else who would like to testify in favor of the bill? [There was no one.] Is there anyone in Clark County? [There was no one.] Is there anyone who would like to testify in opposition to A.B. 110?

Kristy Oriol, Policy Specialist, Nevada Network Against Domestic Violence:
We are a statewide coalition representing domestic violence programs in Nevada, and I am here today to offer an amendment (Exhibit D) to A.B. 110, which will protect victims of domestic violence, sexual assault, and harassment from being deemed vexatious litigants.

This amendment provides an exception to A.B. 110 for unsuccessful applicants for temporary or extended orders of protection for domestic violence, harassment in the workplace, protection for children, sexual assault, stalking,

and custody petitions. I want to be clear that, regardless of the judicial discretion that has been referred to, this would still result in a chilling effect that would deter victims from engaging in the justice system. It is not simply a matter of whether the judge is going to assist that victim or deem her a vexatious litigant. The concern that the facts would not be proven if she cannot substantiate her abuse is enough to deter her from bringing this to court. The bill asks the court to liberally construe the definition in the bill which could have a chilling effect.

This amendment provides an exemption to A.B. 110 for unsuccessful applicants because it is very common for victims of domestic violence to pursue legal action pro se against his or her abuser. They simply cannot afford an attorney. [Read from written testimony (Exhibit E).] It is estimated that 70 percent of domestic violence victims do not have legal representation. [Continued to read from written testimony (Exhibit E).]

Assemblyman Nelson:
We all agree that victims of domestic abuse and violence should not be chilled against seeking their rights. Your amendment says from paragraph (a) through (e) that those sections are not covered at all by NRS Chapter 18. Is that correct?

Kristy Oriol:
Our proposed amendment lists the specific statutes that refer to the different forms of protection order and common custody areas brought to the court when domestic violence is involved.

Assemblyman Nelson:
It also applies to harassment in the workplace, correct?

Kristy Oriol:
Yes. Harassment in the workplace is under NRS Chapter 33. That is a form of temporary or extended protection order that can be filed by an employer if he feels the abuser is harassing the victim where she is working. There are also protection orders for children that parents can apply for if the child is being harassed by someone 18 years of age or older. Included in an additional section is sexual assault victims, as well as those being harassed in other regards.

Assemblyman Nelson:
It seems to me that we have a pendulum here and it is going back and forth. Sometimes it is too much one way, then it is too much the other way. Do you have evidence of people who, because of the proposed amendment, would

think that they could not file and protect their rights? Is this hypothetical, or is this really happening?

Kristy Oriol:
I can speak anecdotally from my previous work with domestic violence victims. Yes, I do believe this would deter some of the victims that I worked with from pursuing legal remedies. Victims are very sensitive about going to court and not being believed. Typically, that is a manipulative tactic that an abuser will use against a victim: no one will believe them. Once the victims become aware of this law, in my opinion, that will be used against the victim as well. In the cases I have worked with, I feel this will have a chilling effect.

Assemblyman Nelson:
What about false allegation cases? I have been involved in a case where false allegations were made against a friend of mine. It is as hard to prove a negative as it is to prove a positive in these situations. Do you think that the judge should have some discretion to determine whether an allegation is false or frivolous?

Kristy Oriol:
I respectfully believe that the court already has the discretion to deny a protection order for that reason. Certainly, there will be those who manipulate the system; that does occur. Those are very rare. In most cases, that is not true. The abuse that is brought forward has actually occurred. My argument is that the court already has the discretion to deny a protection order. Under Rule 11, that person could still be deemed vexatious. This bill will just add another layer that will deter victims.

Assemblyman Nelson:
Your amendment does the same thing that the bill does. What I am concerned about in the proposed bill is that it takes discretion away from the judge by saying that the judge "shall" do this if the judge makes that finding. Your amendment says the same thing by saying that this section "shall not" apply. My concern is that I have trust in the judges. I get nervous when we say that the judge shall do this or that. The judges hear all of the testimony.

Kristy Oriol:
I understand that concern. When it comes to domestic violence, it is very difficult to legislate issues that are very complicated. I believe, in the vast majority of cases, this will benefit victims. It also refers back to the chilling effect. It is not our contention that judges will deem all domestic and sexual assault victims as vexatious litigants. The effect of this bill will deter that reporting. Our amendment offers greater protection for victims.

Assemblyman Wheeler:
As I told you earlier, I still have a very big problem with paragraph (e) on your list, which says, "attempts to obtain or modify orders for custody of, support of, or visitation with children . . . ." I personally have seen many, many harassing lawsuits brought in pro per from one spouse against the other using the children. This part of the amendment gives me heartburn.

Kristy Oriol:
I understand that the system can be manipulated, but I believe that the current discretion in Rule 11 allows for litigants to be deemed vexatious if it is an ongoing issue. This adds an additional layer that is not necessary.

Assemblyman Gardner:
I want to echo Assemblyman Nelson's and Assemblyman Wheeler's comments. My concern is that there are forms and legal libraries that do most of the things that you are adding in the amendment. I am also concerned with the temporary orders since those are usually done without the other side knowing. The extended orders have a hearing, so all sides have a chance to have their say. Temporary orders issued without the other party present can be construed as saying the court cannot say this is vexatious litigation. I am concerned with that.

I also echo Assemblyman Wheeler's comments about paragraph (e). I have also seen those same fights over custody agreements where a lawsuit is brought every month to try to wear down the other party. I am very concerned that we will end up harming more people than we help. If one party has an attorney and the other person is pro se, how will this help?

Kristy Oriol:
First, victims do have access to legal libraries for assistance, but remember that, when victims are in crisis, they are not focused on information on legal proceedings and they do not have the time to read legal statutes. Hopefully they are working with an advocate.

As for temporary orders, yes, there are emergency temporary orders where the adverse party will not be notified. In most cases, however, there are interviews by the court master with the adverse party and the victim to determine whether a temporary order is granted. There needs to be some indication of abuse. These are not automatically granted just because they are requested. I do not see this as being a situation where vexatious claims will be brought forward.

Assemblyman Gardner:
If one party has a lot more money than the other party, and the party who has an attorney keeps filing motion after motion after motion trying to wear down the other one financially, she would have to hire an attorney even if she cannot afford the attorney. I am concerned that taking away this vexatious language may take away protection against that. Also, I have never seen Rule 11 used, even though it is out there. I am concerned with the judges' decisions in cases where someone is abusing the system.

Kristy Oriol:
Yes, it is difficult to legislate. I have seen cases where victims have been on both sides. I do not think it is appropriate to deem someone a vexatious litigant in cases of custody and protection orders. There are recourses already in the law that protect the victims in those cases. That is what many of our domestic violence programs do: help the victims in those cases either by finding them counsel or providing some type of legal advocacy in the process.

Tonja Brown, Private Citizen, Carson City, Nevada:
What I am about to tell you will answer some of your questions. I am an advocate for inmates and the innocent. My brother, Nolan Klein, was wrongfully convicted and spent 21 years in prison for a crime he did not commit. Just prior to his death in 1989, exculpatory evidence was found hiding in the Washoe County District Attorney's files. As the attorneys were preparing to file a motion for a new trial and bail, Mr. Klein died from lack of medical care, hence a wrongful death suit. I was named the executor of Mr. Klein's estate.

During the discovery process, I discovered that the Office of the Attorney General had withheld some evidence in one of his cases. It had a profound impact on his case, and ultimately his lack of medical care. It was delayed by two years because of retaliatory behavior. A report and recommendation was written in 2007. Part of my settlement agreement with the State—and we did not settle for much—was that I could take certain documents to exonerate our name from the information that was disseminated to the State Board of Parole Commissioners, the State Board of Pardons Commissioners, and other places. None of this happened. From that came a breach of settlement agreement. Just prior to any litigation being filed in the breach settlement, my attorney passed away. Due to his death, I had to take it over in pro se. I am there now.

There were certain things that came out, so I went after several different claims, including the breach of settlement agreement. I used the NRS to justify the documents and evidence in my claim. In April or May of 2014, the judge dismissed most of the claims, but left the breach of settlement agreement.

We are moving forward to a trial date of April 6, 2015. This case is against the State of Nevada and the Nevada Department of Corrections; I am pro se. In May 2014, I met with the Office of the Attorney General, who represents the State. The first thing they said was that they were going after me to pay all of the attorney's fees and costs for all of the claims that the judge had dismissed. I told them that the judge did not exactly state that they were unfounded. In August 2014, the Attorney General's office filed a motion on the claims to have them dismissed—basically, a summary judgment. On August 25, 2014, I filed my opposition; on September 5, 2015, they filed their reply.

I will start on October 20, 2014. I presented records as an exhibit on Senate Bill 57 to the Senate Committee on Judiciary on February 12, 2015, where you can check them out on the Nevada Electronic Legislative Information System (NELIS). I filed a notice of appeal in November 2014 and other appeal statements in December 2014. This is the gist of it. On October 20, 2014, the Honorable Judge James Wilson issued an order in the above-entitled case granting the defendant's motion for the judgments on the pleadings. It was the defendant's motion on the judgment on the pleadings that is untimely filed. Respondents must have filed their defendant's reply in support of the motion for the judgment on the pleadings and the request for submission for the judgment on the pleadings no later than September 2, 2014.

Chairman Hansen:
Can you please summarize this?

Tonja Brown:
Basically, I was cited because I had to print approximately 600 exhibits three times—for the court, the Attorney General's Office, and me—but my printer was not working. I took the flash drive to the printers and had them print all of the documents. The request for submission did not get printed however. Because I failed to file my request for submission in a timely manner, I lost the case. What is on appeal right now is their motion, my opposition, and their request. It was their motion to begin with. They were untimely in filing their request for submission, by five days, so the judge should not have heard this case. I should have won based on the technicality, but I lost.

This law as stated right now holds people in pro per to a higher standard than an attorney or the Attorney General's Office. I am the victim in the process, even after I filed this. They continue to breach a settlement agreement. I get phone calls from the Attorney General's Office, and they leave me intimidating, threatening messages. They give me false information. This bill is going to affect everybody, including executors of an estate. I would have had an attorney if he had not passed away. I have to do this. I can cite your

NRS statutes and the claim goes with the statute and I will give the case law. They would come back and give another case law. That is what the judge looks at. He does not really care because I am not the attorney. They are the professionals. I am just an ordinary citizen, and ordinary citizens cannot, or should not, be able to outsmart an attorney. That is how I look at it. Right now, it is on appeal and is on a technical issue. Again, a trial date was set. If the Supreme Court of Nevada dismisses it, they are going to go after me for legal costs and fees, which will make me file bankruptcy all because I had an agreement with the State that they breached. This is how they get around it. I am also a victim of a crime because the crime was the attorney general's office withheld evidence in a particular case. That is also in the appeal. I am asking you to look at S.B. 57 because it will eventually come to you and I will read one little thing to you.

Chairman Hansen:
Please make it brief.

Tonja Brown:
I will. In my amended complaint, I said that the counsel states on page 10, line 23, that the crime according to Brown was that defendant Deputy Attorney General Geddes' alleged withholding evidence in a federal civil case, even if the alleged discovery violation had hypothetically occurred in Mr. Klein's federal civil case, the civil discovery violation does not constitute a crime. That is what the breach of settlement agreement was: that we could take those documents that exonerated us that they withheld in the case that had an adverse effect on his case. To this day, they have refused to do that. Our statutes say that, if you withhold evidence, it is a crime.

Sherry Powell, Representative, Ladies of Liberty, Reno, Nevada:
The documents and forms that are set up in courts in Nevada—and I have looked at almost every one of them—are minimal at best. Pro per litigants, such as victims or family court litigants, have zero help from the law library. In fact, what they are told is, "I am not an attorney; go get one." Retainers are immense. Hourly rates for lawyers are huge, and most pro per litigants do not have the money to pay the fine for this or they would have gotten a lawyer in the first place.

I sat through 36 judicial selection applicants. I do not have an extensive faith in all judges; in fact, I could name a few that are not adequate. I also noticed the three Governor-appointees, who are technically the average citizen, watched attorney after attorney lean over and say, "You know." No, they do not know. They do not know anything about the law, which is why they asked questions

that baffled some of the candidates. One in particular, who is a civilian, was discretionary on their applications. We asked for 10 pages and he gave us 15.

Chairman Hansen:
Please keep on the bill.

Sherry Powell:
I do not think discretion—which is a word that I would love to take out of all laws—should be applied to anyone. We are citizens, we pay our taxes, we have a right to access our courts, and if it was your case, it would probably not be considered frivolous at all. I have chased three cases in excess of 11 years, and was successful. I am sure there were many people who wanted to say that was frivolous, but in all actuality, it was important to the litigants. I personally think this is unconstitutional and believe that pro per litigants should be given attention to the equality of their education, which is usually minimal at best. To hold them financially responsible is ridiculous because they would not be pro per if they could afford a lawyer.

Chairman Hansen:
Is there anyone else in the north who would like to testify in opposition? Seeing no one, let us go south.

Juanita Clark, Member, Charleston Neighborhood Preservation, Las Vegas, Nevada:
I am not an attorney and I know very little about the law other than I know that, because I am poor and not learned in the law, I would be incarcerated. This is not what law is to be. The term "pro per" that I am hearing used here is evidently the category I would be put in. Anyone without an attorney is already guilty. If I am accused of anything, and do not have the money to hire an attorney, I am guilty. As soon as anyone is accused, he is guilty. I am sure some of you are attorneys, and some of you are talking about experiences with judges, and experiences where judges were very trustworthy. We all know not every judge is trustworthy, yet they have been elected and not all are going to be honorable in every situation. Not only that, but we all know that attorneys know attorneys and judges. A pro per person probably does not. The whole thing strikes of, if I am accused, I am guilty. I cannot imagine that people who are learned in the law would even consider an issue such as this. Someone with a vendetta, or lots of vendettas, who cannot afford an attorney is guilty. I would like to have justification—a phrase or a paragraph—of why this is a proper thing to even consider.

Chairman Hansen:
Is there anyone else who would like to testify in opposition on A.B. 110 in the south? [There was no one.] Is there anyone who would like to testify in the neutral position on A.B. 110 in the north or the south? Seeing no one, I will bring Mr. Kirner back up for closing remarks.

Assemblyman Kirner:
I will let Ms. Shackford summarize.

Kaye Shackford:
I have two statements. First, a long time ago I was a single parent with two small children in a divorce situation. I have a great deal of sympathy for women in domestic violence situations or harassment in the workplace. I do not believe that this proposed amendment would be helpful in the whole. It is too inclusive and too exclusionary. I am open to something that is less exclusionary, but I do not think this is it.

I would like to state again that this bill allows judges discretion and the right to lean over backwards in all appropriate situations. I very much value the statements that have been made here in support of this bill and ask you to go forward with it.

Chairman Hansen:
We will now close the hearing on A.B. 110. [Also provided but not mentioned were (Exhibit F), (Exhibit G), and (Exhibit H).]

We will open the hearing on Assembly Bill 47. Mr. Hill is here to present the bill.

Assembly Bill 47: Revises provisions governing the dissemination of records of criminal history. (BDR 14-294)

Steven D. Hill, Director, the Nevada Governor's Office of Economic Development:
I am the director of the Nevada Governor's Office of Economic Development (GOED). I appreciate the opportunity to present Assembly Bill 47. This bill deals with employment background checks. This is, from a substantive standpoint, a very straightforward bill. It has been a topic of conversation since I started in my position. The topics involved are very straightforward. The administrative process, and the language that describes it correctly and has allowed us to remain in compliance with a similar federal program, has taken work.

I would like to thank the industry, particularly Deputy Director James Wright and Julie Butler, for three years of working with us to reach what we all feel is a proper and helpful resolution. The difficulty in finding the key that unlocked the door to the correct language is something that you are experiencing here. Recently, the Department of Public Safety (DPS), in cooperation with our office, submitted an amendment (Exhibit I), which is really a substitution amendment for what was originally submitted in the bill. That language is supported by the DPS, GOED, and, we think, by the industry as well. We also feel that it resolves any concern that the language may have in other areas. I will explain that briefly.

The State of Nevada has a Central Repository for Nevada Records of Criminal History where it gathers information on the criminal history from each of the counties. The Central Repository can be accessed through agreement with the DPS by employers or by third-party companies that perform background checks as their business. In fact, the company that I used to own employed a third party that we felt had more experience and expertise in those background checks as we were considering applicants for employment in my company. I have personal history with this as well.

The way the statute is currently written has been interpreted that the third-party company that has been hired by the potential employer is not permitted to provide the information that they receive to that potential employer when they ask for that background check information. Following the receipt of permission by the applicant, the employer is permitted to gather information if the employer goes directly to the Central Repository. The third party is also permitted to gather that information, but the third party—given the way the statute is currently written—is deemed not to be allowed to pass that information on to the employer. That has created a situation that has made it difficult for companies to hire employees quickly. It has also made it difficult to rapidly increase their workforce during periods where companies need to be able to do so.

That causes a couple of problems. It causes problems for the employees who cannot be hired, particularly during the holiday season when the workforce needs to be rapidly increased in the retail, logistics, and distribution industries. It is also a deterrent for companies choosing between locating in Nevada or another state.

The bill itself clarifies that those different types of entities can all gain access to the Central Repository. It clarifies that a third-party company may only pass that information on to the potential employer that has hired that third-party company. It provides the Central Repository the ability to audit all of the

entities that gain access to it. The difficulty in writing the language—which we discussed last legislative session—comes from the fact that there is similar, but more tightly controlled, language at a federal level that is operated by the Federal Bureau of Investigation (FBI). The methods for access to both of those criminal history repositories are outlined currently in *Nevada Revised Statutes* (NRS) Chapter 179. Determining language that would specifically change the way we deal with the Central Repository in Nevada, while not upsetting the process that is federally mandated, has been the difficulty in writing this language. The DPS recently suggested that a separate section of the statute be created so that the distinction can be made very clear. We support that recommendation, and that is in the amendment that has been submitted. We are asking that you look favorably on that amendment. We believe it will be helpful for making the business environment better in Nevada and allow more Nevadans to be hired more quickly.

Assemblywoman Fiore:
I am an employer and I have hired over 2,000 individuals in the past decade. We have no issues with getting background checks. They get fingerprinted very quickly and receive their criminality status if they have any within a short period of time.

Why is this bill necessary? As an employer, I do this. If any potential employees want to work with my company, they will have a background check completed rather than my having to get their permission. I think it is very important for everyone to be aware of what is happening, that someone is doing a background on him or her.

As an employer and someone who creates jobs, we are constantly hit with audits from the Department of Taxation and the Employment Security Division of Nevada Department of Employment, Training, and Rehabilitation since we are matching the federal laws. Now we are looking at another agency coming in to audit us for these backgrounds. This bill seems action-packed with problems, especially considering last session the repository system was 80,000 records behind.

Steven Hill:
Ms. Butler with the Department of Public Safety has joined me, and I will briefly answer those questions but then turn it over to the expert.

You referred to the fingerprint process for background checks. That indicates that you were accessing the federal system, which requires a fingerprint, where the state system does not. The applicant for any job is required to consent to that background check prior to any background check being run, both at a state and federal level. The employer has the right, if the prospective employee withholds that consent, not to offer employment.

I will let Ms. Butler discuss the audit process. The key point in this bill is that some companies want the opportunity, and take the opportunity, to administer the background check process in-house. Others feel that third-party companies that have specific expertise in this area are better suited for them to do it. Currently under our law, when a company chooses the third-party method of processing the background check, it is at that point that the third party is not legally permitted to pass the information received from the Central Repository to the prospective employer. That is what this bill, at its core, solves.

Assemblyman Gardner:
Can you please explain the difference between the federal and state systems? It says in section 1, subsection 5 of the amendment (Exhibit I) that the only thing you will get in the criminal history is the convictions, and/or if they are still in the system. What would it not give us?

Chairman Hansen:
Before we go to the questions, we will let Ms. Butler testify; maybe some of the questions will be answered by her testimony.

Julie Butler, Division Administrator, General Services Division, Department of Public Safety:
For reference, the General Services Division houses the Central Repository, which is the statewide file cabinet for arrest and disposition records. We also conduct fingerprint-based and name-based background checks for various occupational and employment purposes.

I am here this morning to offer a friendly amendment (Exhibit I) to Assembly Bill 47 in cooperation with the Nevada Governor's Office of Economic Development. The amendment is intended to clarify that the changes that were originally sought with A.B. 47 were only intended to apply to the Central Repository, rather than any Nevada criminal justice agency as currently written. Furthermore, the amendment clarifies that these changes only apply to the name-based criminal history records provided by the repository and not the fingerprint-based criminal history records.

Since 1998, the Central Repository has offered a name-based background check program for Nevada employers, primarily the gaming industry operating under the authority of NRS 179A.100. The name-based option provides only Nevada records of criminal history and Nevada wants and warrants, as opposed to a fingerprint-based background check, that provides Nevada criminal history records, as well as the criminal history records of other states via the FBI. Employers enrolled in the name-based background check service connect to the arrest database at the Central Repository, the virtual private network. Employers pay $20 per name to screen prospective employees or volunteers, and the revenue has been a specific line-item in the Repository's budget since the program's inception in 1998. Program participants are audited by repository staff to ensure they are using, storing, and disposing of individuals' criminal history records in accordance with the rules of the program, and to afford the maximum privacy protection for individuals.

Last session, the Governor's Office of Economic Development approached the Repository asking to make some changes to the name-based background check program in order to recognize the significant seasonal hiring that occurs in some of Nevada's industries, as well as to eliminate the dual-consent waiver that is required for some employers to use the program. Some employers use third-party screening companies to assist with hiring decisions as Mr. Hill has alluded to. However, the name-based service offered by the Repository did not allow for the sharing of the criminal history records between these third parties and the employer. That problem is remedied by section 1, subsection 7 of the proposed amendment. Further, these third-party employers must follow the Fair Credit Reporting Act (FCRA), which requires a specific form to gather the applicants' consent to run personal information about the applicant. Employers that participate in the name-based background check program are also required to obtain the applicants' consent to run the criminal history records as a condition of participating in the program. The Repository received feedback that the dual consent forms were burdensome on employers that used third-party screening companies. This is remedied by section 1, subsection 6 of the amendment, which allows employers to use either the Central Repository's waiver form, or a form that complies with the provisions of the FCRA.

Finally, the original bill and the amendment are intended to broaden the program to apply to current employees and prospective volunteers, as well as to allow employers that contract with other businesses, such as installation or repair persons, the authority to participate in the name-based screening program. Some employers also have a need to screen current employees and prospective volunteers, but without specific statutory authority to do so, and absent authority under federal law for a fingerprint-based option, we are left with no

other options to screen their staff. The amendment to A.B. 47 remedies that in subsection 2.

Eric J. Ellman, Senior Vice President of Public Policy and Legal Affairs, Consumer Data Industry Association:
We are a trade association that is over 100 years old. We represent, among others, companies that perform criminal background checks on behalf of businesses seeking to screen employees, other businesses seeking to screen contractors, and volunteer organizations seeking to do criminal background checks on volunteers, like churches, synagogues, and other religious organizations.

This bill would correct a problem and is largely intended to get people on the job working more quickly, which benefits both employers and employees. In Nevada, as you heard, there is a statutory impediment that makes it significantly more time-consuming for an employer to perform a criminal background check than in almost any other state. You have a chart that I put in your packets (Exhibit J) which shows that, in Nevada, it takes an average of 203 hours to do a criminal background check as opposed to Arizona, where the average is 61 hours. Colorado is at 33 hours, and Texas at 21 hours. It takes longer in Nevada largely because state statute prohibits a criminal background check company from sharing the DPS data directly with the employer seeking to do the background check.

The bill that you have in front of you and the amendment that we support would remove that statutory impediment and allow the criminal background check company to share the information directly with the employer. This is something that the employer can get himself or herself, but it streamlines the process to get people on the job more quickly.

To answer a couple of questions that came up earlier, federal law currently requires the subject of a background check to consent to it. Nevada statute also requires a second consent. The bill that you have in front of you would eliminate the dual consent so that, as long as there is either a federal consent or a Nevada consent, that is sufficient to get the criminal history information from DPS rather than dual consents, which is duplicative and time-consuming.

There was a question about audits. The audit is not of the employer; it is of the criminal background check company.

Assemblyman Gardner:
Most of my questions were answered. I would like a little more information on section 1, subsection 5 of the amendment which talks about what will be disseminated in these reports. Are there things that are not included in the reports? Is there more in the report that is not going to the employer? Why this particular language?

Julie Butler:
Basically, what this language does is to codify the program that has been in place for many, many years in the Central Repository. This language is actually taken from existing statute that allows the Central Repository to distribute to an employer, upon request, any information that reflects convictions. Those are public records and pertain to an incident for which the employee is currently in place within the criminal justice system. Basically, it is existing language that we are moving to a different section.

Assemblyman Elliot T. Anderson:
The intent, as I read it, is to simplify the procedure for businesses to have one procedure to comply with, so they do not have as many compliance steps to do. What is the definition of "consumer report," and what exactly will it have us report in addition to what the statute already says? The way I read it, it is a very broad definition federally, but I would assume that we do not have credit data in the state repository. Do you interpret the new definition as requiring the state to provide anything in addition to what we are already doing?

Steven Hill:
I do not. This is reflective of the current process other than it allows the third-party company to provide the information to the prospective employer. There is a contract agreement included in the release that the applicant signs, so that everyone knows about the process. The information that will be provided is the same information that is being provided now.

Eric Ellman:
Under both federal and Nevada law, there is a very specific definition under the FCRA and Nevada statute called a consumer reporting agency and the consumer report. Under both federal and state law, a criminal background check is called a consumer report; it is a statutory term. The intent of the statute is to be consistent with what a criminal background check is called. Obviously, all that is involved here is the criminal history information.

Assemblyman O'Neill:
For the record, I retired in 2009 as the division chief of what was then called Records and Technology, which is now Ms. Butler's division.

Listening to you talk, where do you gather your data that it takes 200 hours to respond to a criminal name check? That is what we are talking about, correct? A fingerprint-based check is the national check.

Eric Ellman:
That is correct. We have several national criminal background-check companies that are members of our association, and they compiled this data for us. Here is how it works in Nevada. Under Nevada statute, a criminal background check company working on behalf of an employer first collects the criminal information from DPS. Under statute, a criminal background-check company is not permitted to share that DPS information with the employer. What the criminal background-check company has to do is to take the information that it gets from DPS and then go to the individual courthouses on the data subject, confirm the information at the courthouse, and then turn around and give that information from the courthouse to the employer, because DPS data cannot go from the company to the employer.

Assemblyman O'Neill:
They are getting the information from DPS; they have a computer sitting at their table. They enter the name and get a reply within moments, correct?

Eric Ellman:
Correct.

Assemblyman O'Neill:
How is this going to save time for the employer? They have the same access from the same computers at the employer's desk, and they get the reply back from DPS. The screening company would then have to follow up. I question that you skewed 200 hours, and I also question where the time saving is.

Eric Ellman:
If and when the bill is passed, the time savings will come because it will allow the criminal background-check company to give the data from DPS directly to the employer. Employers oftentimes prefer to have a criminal background-check company do the research for them rather than themselves, just like an employer subcontracts for many other services like trucking, janitorial, administrative, or clerical. Employers like the ability, convenience, and expertise that comes with hiring a criminal background-check company. There are plenty of employers, however, that do it themselves. When an employer contacts a consumer

reporting agency to do the criminal background check, we are constrained by the statute that prohibits the data flow to go directly from DPS to the criminal background-check company to the employer. This bill would cut out the courthouse process, which would dramatically shorten the time that it takes to get people in Nevada working.

Assemblyman Thompson:
If I am hearing this correctly, if this passes, the employer is going to be able to work directly with the third-party company and, therefore, eliminate the role of DPS employees. Is that correct?

Julie Butler:
What happens is NRS 179A.110 deals with secondary dissemination, which means that I cannot give you a criminal history and then you cannot give it to Assemblyman Jones. What we are trying to clear up with this proposed amendment is to say that, if you hire Mr. Jones to do criminal-history work for you on your behalf and he collects the criminal history, he can then share it with you to make the ultimate employment decision. Right now, because of that statute on secondary dissemination, we do not allow that. What we are trying to do with this amendment is to create a carve-out specific to our name-based criminal history background check program where an employer using a third-party screening company to make hiring decisions can share the criminal history back and forth for the employer to make the ultimate decision.

Assemblyman Thompson:
It sounds like now they are not contacting you.

Julie Butler:
No, they still contact us. The third-party screening company would still receive the name-based criminal history records from DPS. Right now, either the employer can get it or the third-party company can get it from DPS, but those two cannot share between them because of secondary dissemination. With the amendment we can still have a third party do the screening, but they would go directly to DPS for the information, but then take the records back to the employer and share that information. That is what this amendment is intended to do—streamline that.

Assemblyman Ohrenschall:
It seems like every day you pick up the paper and read about a data breach, whether it is one of the big stores or credit agencies. My concern is that, if this bill passes and we allow third parties to have this information, what protections are there against data breaches? What about inaccuracies in what is being given to potential employers from the third parties that used to come directly

from the state? I am all for streamlining, but I am concerned given what we have seen in the recent years.

Steven Hill:
It is important to understand that the information that is in the Repository is public information. To address the other question, I have talked with several very large, publicly-traded employers in Nevada. They are in the retail, logistics, and distribution environments. This is a problem for them because they will not hire employees without knowing the specifics of the information that comes from the Repository. That information is also publicly available at the courthouses, and you can use it. If the third-party company goes to those individual courthouses and obtains that information, that information can be passed on to the employer. It is just the way the law is written right now. Where you get the information is what takes the extra time to satisfy employers in Nevada who are not going to hire an employee until they know the specifics of what is in the background check. Some employers may not require the third-party company to do that, but when they do, it obviously takes more time to gather the information by a legal method.

Julie Butler:
That was one of the reasons that we put the audit provision in the amendment as well. Currently, the participants in the program are audited by the Central Repository staff to ensure they are appropriately storing and disposing of the data, and that it is not being disseminated to people who are not allowed to see it. They make sure it is not lying on the desk so the janitor can walk by and see it. With the audit provisions contained in the bill, it gives us the authority to audit those third-party screening companies, as well as the employers who receive that information, to make sure the individual's privacy is protected to the extent that we can.

Assemblyman Ohrenschall:
I am applying for a job and the employer says that they would have liked to hire me, but the murder conviction ten years ago made them decide not to hire me, but all I have ever had are speeding tickets. If this bill passes, would my remedy lay with DPS or the third party that furnished that inaccurate information?

Julie Butler:
There is a process in current law that allows an individual to challenge his or her criminal history if he or she feels that it is inaccurate. They would avail themselves to that process.

Assemblyman Ohrenschall:
So nothing would change under this.

Julie Butler:
No.

Assemblywoman Diaz:
Along the same vein, how is the data stored and then discarded by third-party companies after doing the legwork for the employers? Is this information ever shared other than with the employer?

Eric Ellman:
First, the area of criminal background check data housed with consumer reporting agencies is very tightly controlled by both federal and state law under the FCRA. It is called the Fair Credit Reporting Act but that name is a bit of a misnomer. It really includes a lot of other things, including criminal background check information. The FCRA was the nation's first national privacy statute passed in 1971 and has been amended many time since. We in the consumer reporting industry are bound by very tight federal rules and statutes, not only under the FCRA, but also the Gramm-Leach-Bliley Act, and other controls. There are audit provisions under this bill as well.

Keep in mind that we are talking about public record information. Even if there is a security breach, we are really only talking about public information becoming public. All public information still is public, but it gets streamlined and gets people working more quickly.

Assemblywoman Diaz:
I understand that you are sharing public records with the employer, but my concern is with a data breach. If someone else receives the information that should not, they then have information they can use to defraud individuals because they know certain things about them and can manipulate situations. From that perspective, I want to be comfortable that their information is not going to ever go to anyone other than the employer.

Eric Ellman:
Under the federal and Nevada laws, we cannot share information about a person unless we have a statutorily permissible purpose. A permissible purpose is really a term meaning a really good state-sanctioned reason, such as you are applying for a job or insurance. We cannot provide that information except for a statutory reason.

With regard to data security, we are bound by ethical considerations, not just by federal and state statutes and rules that require us to be good stewards of the data.

Assemblyman O'Neill:
If you were able to get the adjudications from the courts, would that negate the need for this bill?

Julie Butler:
Possibly. We like the bill because it provides a specific carve-out for the name-based background check program that the Repository is currently running. It makes it clear that those provisions only apply to the Repository. While we believe that we have statutory authority to operate this program, the provisions of this amendment make it abundantly clear that we do.

Assemblyman O'Neill:
The bill would restrict both the employer and the third-party company to maintain the information in Nevada. It has to be a Nevada employer. It would not allow an Arizona outfit to circumvent the Interstate Identification Index backgrounds.

Julie Butler:
That is correct. We would not be mixing Interstate Identification Index information—that is FBI information—so they would not get that in any case. It is only for Nevada employers and Nevada third-party background screeners.

Assemblyman O'Neill:
And they cannot transfer to an out-of-state business at all.

Julie Butler:
Correct.

Assemblyman Araujo:
Assuming this bill were to pass, with the implementation phase, would we now create a new disclaimer on all applications for employment informing folks that they could now potentially have their record screened by a third party rather than just the original screener?

Steven Hill:
There is a release form that the third-party company would hand to the applicant that would briefly outline the simple form that says the applicant agrees to allow the request for information to be made by the third-party company and to be provided to this specific potential employer. They would know exactly what was going to take place, and they would interact with both of the companies in the process.

Assemblyman Araujo:
If they were not comfortable with authorizing the third party, could they still be screened by the employer using the original method?

Steven Hill:
That would be up to the employer. The employer still has the right to say that this is how he is willing to consider you for employment; that does not change as a result of this bill.

Assemblyman Elliot T. Anderson:
Can you tell us exactly what information our criminal repository maintains now. If we are worried about data breaches, what exactly is included inside that system? Is it just the records of convictions?

Julie Butler:
The Central Repository maintains a lot of information. As I said in my earlier testimony, we are essentially the file cabinet for all arrest and disposition records that occur in the state of Nevada. Any time anyone is arrested in the state of Nevada, that arrest record comes up to the Central Repository and is stored in databases. When that arrest makes its way through the criminal justice system, if the prosecutor decides to press charges, if it goes to court, if they are convicted or whatever that final disposition is, we get that information as well and match it up to the arrest, so it completes the arrest cycle.

We also house the Nevada State Sex Offender Registry. We connect the name-based background check program for the transfer of firearms, which relies on state and federal data. We house the Uniform Crime Reporting program to report Nevada crime statistics to the FBI. We have a pretty impressive database that houses a lot of criminal justice information statewide. We have wants and warrants, protection orders, and other things that I am probably forgetting. It is an extensive database.

As far as what is transferred with the civil name-check program, the participants in the program get Nevada records of criminal history, wants and warrants, and sex offender status. Those are the pieces of information that are transferred in a civil name check.

Chairman Hansen:
One of the concerns is a fear that this information may be used by people other than whom it was specifically given to. In the other states that you work in, do they have certain statutory provisions that are absent in ours that may help alleviate some of these concerns?

Eric Ellman:
Anyone who accesses the DPS information has to enter into an agreement with the state to get that information. Our member companies have agreements with states all across the country. The only thing that makes Nevada unique among other states is the roadblock about getting the criminal history information into the hands of the employer. The employer can get it directly. The criminal background check company can get it directly from DPS. The only roadblock is the statute prohibiting the background check company from sharing the information with the employer. Most other states do not have that impediment. Most other states have standards in place that allow criminal background check companies to access and share that information. Nevada will as well. All we are talking about is keeping public information public and removing the obstacle that stands in the way of getting people on the job quickly.

Chairman Hansen:
Following up on Mr. Ohrenschall's point of being falsely accused and that information, how often does that happen? How often has your agency been accused of giving out inaccurate data?

Julie Butler:
I do not have exact statistics. We get people who challenge their record daily for a variety of reasons. Whether that is for employment, adoption, or immigration purposes, it is a daily fact. Errors do happen, but there is a statutory remedy, a process by which people can challenge their records both through the state of Nevada and at the FBI, and we do follow that process to make sure our records are as correct as possible.

Chairman Hansen:
Is there anyone else who would like to testify in favor of Assembly Bill 47? Seeing no one, is there anyone who would like to testify against the bill? [There was no one.] Is there anyone who would like to testify in the neutral position? I see no one, so we will close the hearing on A.B. 47 at this time. [Also provided but not mentioned was (Exhibit K).]

Is there any public comment? [There was none.] Is there any further business that needs to be brought before the Committee? Seeing none, this meeting is adjourned [at 10:12 a.m.].

RESPECTFULLY SUBMITTED:

_____
Karyn Werner
Committee Secretary

APPROVED BY:

_____
Assemblyman Ira Hansen, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: February 17, 2015 **Time of Meeting: 8 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 110	C	Kaye Shackford	Written testimony
A.B. 110	D	Kristy Oriol, Nevada Network Against Domestic Violence	Proposed amendment
A.B. 110	E	Kristy Oriol, Nevada Network Against Domestic Violence	Proposed amendment and written testimony
A.B. 110	F	Aaron Katz	Letter of opposition
A.B. 110	G	Judith Miller	Letter of opposition
A.B. 110	H	Wes Henderson	Letter in support
A.B. 47	I	Steven Hill, the Nevada Governor's Office of Economic Development	Proposed amendment
A.B. 47	J	Eric Ellman, Consumer Data Industry Association	Packet of information in support
A.B. 47	K	Nevada Governor's Office of Economic Development	Information on Background Checks