MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Eighth Session
May 1, 2015

The Committee on Judiciary was called to order by Chairman Ira Hansen at 8 a.m. on Friday, May 1, 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 Glenn E. Trowbridge

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Senator Patricia Farley, Senate District No. 8

STAFF MEMBERS PRESENT:

Diane Thornton, Committee Policy Analyst
Janet Jones, Committee Secretary
Jamie Tierney, Committee Assistant

OTHERS PRESENT:

Bryan Bedera, representing Nevada Vaping Association
Alfredo Alonso, representing Reynolds American
Hillary A. Bunker, Senior Deputy Attorney General, Tobacco Enforcement Unit, Bureau of Litigation, Office of the Attorney General
Tom McCoy, Nevada Government Relations Director, American Cancer Society, Cancer Action Network
Michael Hackett, representing Nevada Tobacco Prevention Coalition
Dan Musgrove, representing Southern Nevada Health District
Brett Kandt, Special Deputy Attorney General, Office of the Attorney General
Vanessa Spinazola, Legislative and Advocacy Director, American Civil Liberties Union of Nevada
Michael Buckley, Member, Executive Committee, Real Property Section, State Bar of Nevada

Chairman Hansen:
[Roll call was taken. Committee protocol and rules were explained.] We have Senate Bill 136, which is exactly the same as Assembly Bill 12. I am proposing that we rerefer it with no recommendation to the Assembly Committee on Ways and Means.

Senate Bill 136: Provides for the continuation of the diversion program that allows certain probation violators to receive treatment for alcohol or drug abuse or mental illness in lieu of revocation of probation. (BDR 14-162)

The bill also has a fiscal note on it. It provides for the continuation of the diversion program that allows certain probation violators to receive treatment for alcohol or drug abuse or mental illness in lieu of revocation of probation. I would like to entertain a motion to have this bill moved out of our Committee with no recommendation back to the Ways and Means Committee.

ASSEMBLYWOMAN FIORE MOVED TO REREFER SENATE BILL 136 WITHOUT RECOMMENDATION TO THE ASSEMBLY COMMITTEE ON WAYS AND MEANS.

ASSEMBLYMAN JONES SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMAN OHRENSCHALL WAS ABSENT FOR THE VOTE.)

Senate Bill 37: Authorizes GPS tracking of parolees, probationers and certain other offenders who are subject to electronic supervision. (BDR 14-354)

Diane Thornton, Committee Policy Analyst:
Senate Bill 37 was heard in Committee on March 11, 2015. The bill authorizes GPS tracking of parolees, probationers, and certain other offenders who are subject to electronic supervision. The bill provides that an electronic monitoring system used by the Division of Parole and Probation to supervise a probationer or parolee may be capable of using GPS to record or transmit the probationer's or parolee's location and produce, upon request, reports on the probationer's or parolee's presence at or near a crime scene or prohibited area, or his or her departure from a specific geographic area. There were no amendments (Exhibit C).

Chairman Hansen:
I will entertain a motion on S.B. 37.

ASSEMBLYMAN TROWBRIDGE MOVED TO DO PASS SENATE BILL 37.

ASSEMBLYMAN GARDNER SECONDED THE MOTION.

Assemblyman Elliot T. Anderson:
I am worried about the unintended consequences of this bill. We have heard the experience Los Angeles County, California, had with this regarding privacy issues for the offenders. They were drowning in a sea of data and could not adequately protect the community in some cases. For that reason, I will be voting no.

Assemblyman Trowbridge:
I understand that our program is restricted to 250 participants, and the computer system should work here.

Chairman Hansen:
That was my understanding as well. This is a pilot program, and we will be fortunate to learn from the mistakes of Los Angeles County. If this is successful with 250 people, I think we will probably see some requests by Parole and Probation for expansion of the program.

> THE MOTION PASSED. (ASSEMBLYMEN ELLIOT T. ANDERSON, ARAUJO, DIAZ, AND THOMPSON VOTED NO. ASSEMBLYMAN OHRENSCHALL WAS ABSENT FOR THE VOTE.)

Assemblyman O'Neill will take the floor statement.

Senate Bill 40 (1st Reprint): Prohibits certain acts relating to wagering. (BDR 41-353)

Diane Thornton, Committee Policy Analyst:
Senate Bill 40 (1st Reprint) prohibits certain acts relating to wagering. It was sponsored by the Committee on Judiciary on behalf of the State Gaming Control Board and heard in Committee on April 22, 2015. The bill makes it unlawful for any person who is not properly licensed to receive, directly or indirectly, any compensation, reward, or percentage or share of money or property played for accepting, or facilitating the acceptance of, a bet or wager upon an event held at a track involving a horse or other animal, a sporting event, or other event. It is also unlawful under this bill to transmit or deliver anything of value resulting from such activity to or on behalf of another person. A person who violates these provisions is guilty of a category B felony.

The bill also clarifies that it is not a crime for a race book or sports pool that is properly licensed to unknowingly accept a bet from or pay winnings to a person who is in violation of these provisions (Exhibit D).

There is an amendment (Exhibit E) we received yesterday from the Gaming Control Board, and it is on the following page for the Committee to review. The intent of the amendment is to clarify the application of the provisions to activities related to those who facilitate illegal bookmaking.

Chairman Hansen:
Hopefully everyone had an opportunity to review the amendment, which is a friendly amendment from the Gaming Control Board. I will entertain a motion at this time on S.B. 40 (R1).

ASSEMBLYMAN ELLIOT T. ANDERSON MOVED TO AMEND AND DO PASS SENATE BILL 40 (1ST REPRINT).

ASSEMBLYMAN ARAUJO SECONDED THE MOTION.

Assemblyman Elliot T. Anderson:
I wanted to thank the Gaming Control Board for working with me on this amendment. The intent of the amendment was to ensure that a tourist who gave his friend monies to place a bet and they split the proceeds would not be punished under this bill. I feel that taking out the facilitating language in the first paragraph will ensure that it will not affect those people, but will instead go after the bookmakers.

THE MOTION PASSED. (ASSEMBLYMAN OHRENSCHALL WAS ABSENT FOR THE VOTE.)

Assemblyman Anderson will have the floor assignment.

Senate Bill 55: Revises provisions governing waiver of the right of a criminal defendant to be present during sentencing proceedings. (BDR 14-432)

Diane Thornton, Committee Policy Analyst:
Senate Bill 55 revises provisions governing waiver of the right of a criminal defendant to be present during sentencing proceedings. This bill was heard in Committee on April 14, 2015, and brought on behalf of the Attorney General. The bill adds to existing requirements concerning waivers that a waiver of all procedures related to extradition from another state must accompany a waiver to the right to be present at sentencing made by a defendant who is incarcerated in another state. A defendant who waives all of these procedures will be transferred to Nevada without a warrant to complete any remaining portion of their sentence once they are released from incarceration in the other state. There are no amendments (Exhibit F).

Chairman Hansen:
I will entertain a motion for S.B. 55.

ASSEMBLYMAN THOMPSON MOVED TO DO PASS SENATE BILL 55.

ASSEMBLYWOMAN SEAMAN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Assemblyman Thompson will take the floor statement.

Senate Bill 449: Revises provisions governing the Advisory Commission on the Administration of Justice. (BDR 14-1140)

Diane Thornton, Committee Policy Analyst:
Senate Bill 449 revises provisions governing the Advisory Commission on the Administration of Justice. It was sponsored by the Committee on Judiciary and heard in Committee on April 24, 2015. This bill revises the membership of the Advisory Commission on the Administration of Justice by adding as a member a municipal judge or justice of the peace appointed by the governing body of the Nevada Judges of Limited Jurisdiction.

The bill also requires the Commission to conduct an interim study concerning parole and to report its findings and any recommendations for legislation to the full Commission by September 1, 2016. There are no amendments (Exhibit G).

Chairman Hansen:
I will entertain a motion on S.B. 449.

> ASSEMBLYMAN OHRENSCHALL MOVED TO DO PASS SENATE BILL 449.
>
> ASSEMBLYWOMAN FIORE SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY.

Assemblyman Ohrenschall will take the floor statement.

Assemblyman Ohrenschall:
Mr. Chairman, I was running late this morning, but I would like to be recorded as a yes on S.B. 40 (R1) and a no on S.B. 37.

Chairman Hansen:
That will be so noted. The work session is closed. Senate Bill 304 (1st Reprint) has been removed at the request of the sponsor.

Senate Bill 304 (1st Reprint): Revises provisions relating to the use of safety belts in taxicabs. (BDR 43-774)

We will open the hearing on Senate Bill 225 (1st Reprint).

Senate Bill 225 (1st Reprint): Revises provisions relating to the sale and distribution of tobacco products, vapor products and alternative nicotine products. (BDR 15-796)

Senator Patricia Farley, Senate District No. 8:
I want to thank everyone who participated in putting this piece of legislation together. It is a great piece of legislation, and we had a lot of different people assisting on its creation.

In recent years the laws have not kept up with the technological advances in production of liquid nicotine or other vapor products and the sales of the increasingly popular devices known as "e-cigarettes." Estimates reflect that approximately 4 million Americans currently use e-cigarettes, and sales are projected to hit $1 billion in the future. The products that people smoke, or "vape," in the devices come in a variety of flavors, some of which will appeal to children under the age of 18. There are flavors like bubblegum, mango, strawberry, and chocolate, just to name a few that are currently on the market. Vapor products also come in various forms and with varied ingredients. This is the reason for the amendment that we have included in this bill—to be certain that we have captured the range of products that are on the market today. We removed the term "liquid nicotine" and replaced it throughout the bill with the terms "vapor product, alternative nicotine product, and consumable material." Aside from the minor improvements to the terminology, the bill is the same one I originally introduced.

Senate Bill 225 (1st Reprint) adds these vapor products to the list of tobacco or nicotine-related items that cannot be sold to a person under the age of 18. Section 2 of the bill requires that retailers post notices regarding the prohibition against selling these products to minors, and subjects those who violate the prohibition to the same fines that exist for selling tobacco to a minor.

In compliance with federal law, section 3 requires the Attorney General to conduct random inspections of locations where vapor products are sold. This bill is necessary to update the Nevada law and will help us keep pace with the rapidly evolving industry and protect our children from harm. [Referred to written testimony (Exhibit H)].

Bryan Bedera, representing Nevada Vaping Association:
We represent 40 businesses in the state of Nevada that manufacture these products for wholesale and retail. They employ over 3,000 people in the vapor industry. The majority of our members do not sell to minors, and were under the impression that they had to comply with the tobacco statutes. This bill

simply cleans up the existing statutes and clarifies the law regarding this industry. It also ensures that children will not have access to these products. We support the bill; the industry has been working closely with Senator Farley on its creation.

Alfredo Alonso, representing Reynolds American:
We support the Senator's efforts. Obviously these products are not intended for children under the age of 18. Senator Farley has updated the statute to include products that frankly do not exist yet. In anticipation of their coming to market in the near future, they have been included in the bill. This is model legislation that nearly every state is looking at or passing.

Assemblyman Jones:
We have seen some things on vaping come through the Department of Health and Human Services, and I have asked whether there are carcinogens in vaping equipment. But I cannot get an answer from anyone as to the percentage compared to regular tobacco products.

Alfredo Alonso:
In studies that have been done in Europe, many are indicating that vaping is 90 percent safer. There is no safe product, and it would be disingenuous to tell anyone that is the case. There is a national movement attempting to migrate people from anything that is combustible. The goal is to be smoke-free. This is an attempt in harm reduction.

Assemblyman Ohrenschall:
Do we know how severe the problem is with minors using the vapor products in Nevada?

Bryan Bedera:
It is currently not a substantial problem. I can only speak for our 40 members, none of whom sell to minors. None of them are reporting large numbers of minors attempting to purchase the product.

Assemblyman Ohrenschall:
That is good to hear, but I see people who look like they are under 18 years old using them. That has caused me a lot of concern, so thank you for bringing this bill forward.

Chairman Hansen:
What about the black market concept, if in fact there are minors who want to use the product. Is it currently illegal in the schools to use the product?

Bryan Bedera:
Currently, the school districts have individual policies regarding vaping. It has the same challenges that any tobacco product would have as far as the black market and sales to minors. We would be open to solutions that would solve the greater tobacco challenges with the black market. I think bringing vapor products directly in line with how we handle other tobacco products just makes sense.

Assemblywoman Fiore:
Thank you for bringing this bill forward. I am a little concerned because I do not vape or smoke; however, I do know a lot of people who do. I do not see vaping in the same category as tobacco because when someone is vaping next to me, I am not getting the second-hand smoke. I think we need to be really careful about regulating an industry before we actually know the repercussions from the product.

Senator Farley:
This bill is really targeted at minors and labeling. Even for adults when they purchase nicotine products, it must give the percentage of nicotine inside the package. These vaping products are being used by children to do other things. The attempt of this bill is to take them out of the hands of minors.

Bryan Bedera:
We do know that nicotine products are highly addictive, and we believe it is not a good idea to be introducing children to a highly addictive product. Our goal is not to have anyone start using nicotine on a regular basis. I think it makes sense to wait for someone to reach the age of 18, and then they can make an informed decision.

Assemblywoman Fiore:
I understand that. My concern is, this week we just heard a bill from the college campuses that want to ban tobacco on their campuses. We are talking about an industry that has literally given Nevada over $100 million in taxes, and they want to ban them from the college. If we put vaping in the same category, we are talking about adults who go to college. It is just a slippery slope here, and I am nervous about that.

Bryan Bedera:
We have been very specific in writing this bill not to categorize vaping in the same way as usage bans and regulations. These are in separate sections of the law. This is specific only to sales and will not affect usage. No smoking prohibitions are related to this bill. Taxes will not be addressed as well.

Assemblywoman Fiore:
Not yet.

Senator Farley:
There is a friendly amendment that is coming forward. There is some language that needs to be redrafted.

Chairman Hansen:
I am opening the hearing up to general public in support of this bill.

Hillary A. Bunker, Senior Deputy Attorney General, Tobacco Enforcement Unit, Bureau of Litigation, Office of the Attorney General:
As the agency responsible for performing unannounced youth compliance checks of retailers, our office supports this bill in that it prohibits the sale, purchase, or possession of products containing or intending to deliver nicotine in any form to children under the age of 18.

Chairman Hansen:
There is a vapor shop across from the Governor's Office. If I sent my 16-year-old daughter there right now, the law would allow them to sell that vapor product to her but if this passes, it will become a crime?

Hillary Bunker:
That is correct. Currently there is no federal age minimum, and in the state of Nevada we do not have an age minimum.

Chairman Hansen:
You anticipate conducting sting operations on vapor shops by sending underage children in to purchase them?

Hillary Bunker:
We have investigators in the north and south who work with three youth investigators. If the bill passes, it would be our intention to start sending them out to do vapor shops.

Assemblyman Ohrenschall:
I work in juvenile justice, and I continue to see children who end up in emergency rooms because they have purchased something that is sold as an air freshener at these smoke shops. I am disgusted that we have not been able to stop the selling of that Spice. Do you think between the prosecutors and law enforcement you will be able to enforce this?

Hillary Bunker:
Currently it is only tobacco products, and the two investigators that work full time are going to all tobacco retailers at least once a year. If a clerk sells a tobacco product to a youth under the age of 18, they have the option of either issuing a warning or writing a citation. If this passes, we expect to enforce the vapor products in the same way.

Assemblyman O'Neill:
From where do you receive your funding?

Hillary Bunker:
Our funding comes from the Master Settlement Agreement and partially from the Synar Amendment, which all states passed specifically to enforce underage stings.

Assemblyman O'Neill:
If this bill passes, will that impact any of your funding or create a challenge to your financial resources?

Hillary Bunker:
No, we do not anticipate that to change. We are going to each of the tobacco retailers at least once a year, and we do not see any reason why we could not maintain that record in addition to going to the vape shops.

Chairman Hansen:
Is there anyone else who would like to testify in favor of S.B. 225 (R1)? [There was no one.] Is there anyone who would like to testify in opposition?

Tom McCoy, Nevada Government Relations Director, American Cancer Society, Cancer Action Network:
Our opposition to S.B. 225 (R1) is not to the goal of restricting Nevada minors' access to nicotine addictive products or not to reduce their exposure from harmful particles and chemicals generated by either combustible or noncombustible nicotine products. Senate Bill 225 (R1) and the current amendment are well meaning, but we believe that they are misguided in attempting to curtail youth access to ambiguously defined products, and should not be passed as is. Our opposition is to the confusing and conflicting definitions that we feel raise more questions than they answer.

The American Cancer Society contends that effective control of e-cigarettes should seek to define them as tobacco products when it comes to youth access. Why would we want to separate by definition here or elsewhere in the *Nevada Revised Statutes* by adding new definitions anyway? Could the answer

be that the industry is seeking preferential treatment for these products? Such a legislative approach to the issue would expose Nevada to increased enforcement challenges and costs moving forward. It would add to NRS new terms and definitions like "alternative nicotine products" and "vapor products" that are just not that clear. They fail to provide adequate specificity as to which products would be considered as "alternative nicotine products" despite the use of that term throughout the bill. Why would we want Nevada law to exempt products that are merely regulated by the Food and Drug Administration (FDA) when the appropriate standard should be "approved" by the FDA?

We would like to see restrictions on the sale and use by children of addictive products containing nicotine and the resulting exposures. However, this legislation fails to get us there with clarity of direction, perhaps from an overabundance of vapor and aerosol.

Chairman Hansen:
Have you had an opportunity to meet with the bill sponsor, and were you able to testify on the Senate side regarding this bill?

Tom McCoy:
I did not testify on the Senate side.

Chairman Hansen:
I am sure you share common goals in trying to reduce use. I would encourage you to talk to the bill sponsor. Is there anyone else who wishes to testify in opposition to S.B. 225 (R1)? [There was no one.] Anyone in the neutral position?

Michael Hackett, representing Nevada Tobacco Prevention Coalition:
I would like to thank Senator Farley for her continued indulgence and cooperation with us in trying to address our concerns. I would like to thank Ms. Bunker with the Office of the Attorney General, Mr. Bedera, Alexis Miller, the Nevada Petroleum Marketers and Convenience Store Association, and the Retail Association of Nevada for their cooperation. When this bill was in the Senate, we did testify neutral. We support the intent of the bill. We feel it does not go far enough and is not comprehensive enough to address what we feel are the risks associated with minors having access to all forms of these products. We feel it should be more comprehensive because there are health risks associated with these products regardless of whether they contain nicotine or not. We feel there are other risks with these products, as Senator Farley indicated—that they can be used for other things. It can be used with e-cannabis, e-spice, and dry synthetic marijuana. Adults can make the decision

whether to assume the risks associated with these products. However, we do not feel minors are mentally or physically capable of making those decisions.

We feel the amendment (Exhibit I) presented to you today is the cleanest and best way to make this bill comprehensive. I would like to go through the amendment that was submitted to the Committee. We want to amend the definition of "vapor products" by removing any reference to nicotine. As we read the original definition, it did not make sense to us. There are self-contained, disposable products that do not contain nicotine. There is also the hardware that you can change out the cartridge and under this definition, by putting in a zero nicotine cartridge, it no longer qualifies as a vapor product. We find that confusing in terms of how these other products cannot be considered a vapor product. The proposed amendment is to strike those references to nicotine and also provide further clarity in terms of what is actually produced by these products. We have added the term "aerosol" in the definition as it is interrelated in the industry.

Chairman Hansen:
Let me interrupt you for just a second. Is there any evidence of a health risk outside of the nicotine aspect? Is it not basically steam they are inhaling? Is there any evidence of any health risks? My understanding is that the nicotine has been the issue.

Michael Hackett:
One of the major problems we have with this industry is that it is totally unregulated. There is nothing in place anywhere to ensure you are getting what you are being told you are getting. There are no quality assurances or control measures implemented at the manufacturing level, no independent laboratory testing of these products, and no requirements that the ingredients have to be disclosed. Testing reports that I have seen from various different authorities have shown that there are risks with these products. That includes carcinogens and concentration of ultrafine particles. Reports from Johns Hopkins University, from the CDC, and from the FDA indicate that ultrafine particles are found in higher levels than in typical combustible tobacco products. We do feel there is a good body of evidence assessing the health risks of these products.

Chairman Hansen:
My instincts say that just because it is not regulated does not mean it is a bad thing. If there are in fact health risks with this, I can see some level of regulation, but regulation just for regulation's sake does not sit well with me. If you can show some evidence that in the absence of regulation there has been some substantial misuse, abuse, or physical damage to underage users of these products, I would consider regulation. In the absence of regulation, that is not

a good enough reason for the government to get involved telling everyone what they can and cannot do with a certain product.

Michael Hackett:
The FDA is currently in the process of promulgating regulations to address all of the facets associated with these products. I just wanted to make sure you were aware of that as well.

The other sections in the amendment were done in cooperation with Ms. Bunker from the Office of the Attorney General, primarily to provide consistency with similar provisions that are currently in statute.

Section 2, subsection 7, is to provide the same restriction on how these products are displayed as tobacco products. The next section is to prohibit Internet sales of these products to minors. We want to see this piece of legislation brought in line with the legislation regarding tobacco Internet sales restrictions. The last two pieces of the amendment are to give the counties the enforcement authority. They currently have that authority for tobacco products.

In closing, to address Mr. McCoy's comments regarding these definitions, we do agree that these definitions of vapor products and alternative nicotine products are getting ahead of the curve. In light of the decision that the FDA has made to regulate these as tobacco products, depending on when those regulations are issued, we may very well be back here in two to four years to go ahead and strike these definitions out of the statute. We do share some of that concern. Considering this is what we have right now, we feel the amendment we are proposing regarding amending the definition of a vapor product is a better way to go.

Chairman Hansen:
Is this a friendly amendment? Have you met with the sponsor of the bill?

Michael Hackett:
Yes, we have met with the sponsor and the stakeholders. I think we have all agreed that it needs to be more comprehensive.

Dan Musgrove, representing Southern Nevada Health District:
The work that Senator Farley has done on this bill is admirable, and we are in support. The only reason we are here today in the neutral category is because we do in fact support the amendment and the work that is being done on the definitions. To your concern, Mr. Chairman, in regard to the overregulation, we just want to be on the side of caution for those 18 years old and under. We are not going after the Nevada Clean Indoor Air Act, where I might disagree with

Assemblywoman Fiore, as I am an aging athlete, but I do not want to be next to someone vaping. As an adult, I have the freedom to leave that establishment. We are focused on the product sales and the ability of those under the age of 18 to get these products, such as the Spice products Assemblyman Ohrenschall talked about. The issue was that you could not narrow it down because they are changing the ingredients daily. Law enforcement could never figure out how to attack the issue. We felt, if we could get some broad-based definitions, that whenever the next new product comes out, at least those under 18 do not have access to it.

Assemblywoman Fiore:
Just to clarify, is our Senator all right with your amendment?

Michael Hackett:
Yes.

Senator Farley:
We did have a hearing in the Senate Committee on Judiciary where we were able to produce a clean bill. Since there have been some changes with the American Cancer Society, whom we support, and it is the first time we have heard from them, I will be inviting them to come back and talk to us regarding their concerns. We received the amendment yesterday and are reviewing it. It appears that there are some definition issues that we need to work out.

I want to bring the focus back to where it should be. This is a bill related to children, and it is related to how we package products that have nicotine so that both adults and children are aware of what is in it. We will make it illegal for children under the age of 18 to possess vaping materials or any type of apparatus. Elementary schools can ban these products and law enforcement will have some direction. With all good intentions, we are not trying to regulate the industry. We are just trying to address the minors and also use the same language that is implemented across the United States regarding these products.

Chairman Hansen:
With that, we will conclude the testimony on S.B. 225 (R1). We will now open the hearing on Senate Bill 53 (1st Reprint), which revises provisions relating to certain postconviction petitions for writs of habeas corpus and will be presented by Brett Kandt, Special Deputy Attorney General.

Senate Bill 53 (1st Reprint): Revises provisions relating to certain postconviction petitions for writs of habeas corpus. (BDR 15-796)

Brett Kandt, Special Deputy Attorney General, Office of the Attorney General: This bill proposes a change to the statute that governs inmate challenges to the computations of their time credits. The computation of these time credits is governed by a complex statutory scheme. Inmates can earn time credits based on work performed in the prison, good behavior during their incarceration, or certain educational and rehabilitative programs. The Department of Corrections (NDOC), in calculating these time credits, also has to take into account whether an inmate has forfeited any time credits due to disciplinary action. They also have to consider these factors: whether these time credits must be applied to the minimum or maximum sentence that the inmate is serving, whether the inmate is serving multiple sentences, which sentence or sentences those credits would be applied to, and whether those credits applied to each of those unexpired sentences.

In short, the computation of these time credits can be complex and, not surprisingly, can lead to disputes between the inmate and NDOC over the computation. If the inmate wishes to challenge the computation of their time credit, it is intended to do so through an existing administration process, called an inmate grievance process. The purpose of that administrative process is to address and resolve any concerns at the administrative level to avoid litigation. *Nevada Revised Statutes* (NRS) 34.724 is the statute that governs the challenge that the inmate can make to the computation of time credits. It does not expressly state that the inmate must exhaust their administrative remedies before they can initiate litigation. It is not unusual for an inmate to file a writ petition in district court and initiate litigation before they have exhausted the administrative process. That is the purpose of this bill. It seeks to clarify in that statute that the inmate must exhaust their administrative remedies before they initiate litigation and put us into the costly and resource-intensive process of defending a case in the judicial system.

Section 1 of the bill revises that statute to require the inmate to exhaust the administrative process. Section 2 amends NRS 34.810 to require a court to dismiss a petition if the inmate has not exhausted all administrative remedies. Section 2.5, which was added on the Senate side, specifies that NDOC must adopt regulations to ensure that if an inmate is challenging the computation of their sentence and time credits within 180 days of their anticipated release date, there has to be an expedited process for resolving that. [Referred to letter of explanation (Exhibit J).]

In reality, NDOC always gives priority to resolving any issues in regard to computation of time credits if an inmate is nearing the end of their sentence, because frankly we do not want to be in a position of unlawfully detaining someone beyond their actual sentence because that creates liability for the state. Section 2.5 will require a formal process to ensure that is done. It sends a clear policy directive from the Legislature that you do not want an instance where an inmate could possibly be unlawfully detained past their date.

I asked our Appellant Division to go back the last two years and look at the rate of occurrence regarding this issue. In terms of the state district court actions, there were 174 cases of inmates challenging their time credits. In approximately 152, 87 percent of those cases, the inmate failed to fully exhaust their administrative remedies before they requested litigation. Of the 174 petitions, NDOC discovered and corrected a time calculation error in 8 cases. In only one of the 174 cases did the court itself find that NDOC had erred in their calculations. In the nine petitions that were found in the inmates' favor, only one was fully grieved using the grievance process.

I want to give you an idea of how this impacts our office. Of those 174 cases, on average one attorney spent 15 hours on each case, so over the course of the biennium that was 2,610 hours. That is a half-time position, so this does have a fiscal impact. That does not take into account the impact on the state district courts.

Once again, we do not want to prevent inmates from pursuing a state habeas corpus petition challenging their calculation; we just ask that they utilize the existing administrative process before they take that step of litigation.

Assemblyman Elliot T. Anderson:
The inmate could still file for all of the other constitutional claims without exhausting the administrative remedies, or does this apply to one claim as part of the habeas petition? If we were to pass this forward, we would need to toll any statutes of limitation while they are going through the administrative process. I would not want them to lose their right, and I do not know what the statute of limitation is before habeas petitions.

Brett Kandt:
This only applies to writ petitions challenging the computation of time, not writ petitions challenging some other constitutional issue. Secondly, we can certainly look at the tolling issue, but I do not believe it applies in this instance because we are talking about resolving this before they are released. The fact of the matter is, if we do not calculate it properly and unlawfully detain them beyond their sentence, that creates liability for the state.

Assemblyman Elliot T. Anderson:
Do we have time limits on how long you can file these things? Or is it that you can do it at any time?

Brett Kandt:
To the extent there are some tolling provisions necessary, our office will certainly work with you to determine that. I am not sure that it is necessary, but I think it is a legitimate concern of yours. We will work with you to explore that and determine whether any language is necessary.

Assemblyman Araujo:
You cited some numbers, but I am curious what the average time frame is for a prisoner to get their administrative remedy resolved. I ask that because I am concerned that now we are forcing them to go through this process before they petition, and they were doing so because there was such a delay to get an administrative remedy. We might be doubling the time frame that initially prompted them to file a petition.

Brett Kandt:
On the Senate side the Department of Corrections provided information on the time frames for resolving inmate grievances, and I will provide that information to the Committee. I think it is a 30-, 45-, or 60-day time frame for each of the three levels of the grievance process. I am not sure those numbers are correct, so I will provide the correct information to the Committee.

Assemblyman Thompson:
Section 1, subsection 3, reads, "the person must exhaust all administrative remedies." What are the inmates given so they know the total process? Would there be any education on the administrative procedures? If they do not know, they cannot follow the correct procedures.

Brett Kandt:
That is a very valid point. Since that is a function that NDOC performs, I will get that information from them and have it presented along with the details of the inmate grievance process to the Committee.

Assemblyman Thompson:
Are there considerations in place for those who may be borderline or illiterate? Are there case workers assisting them in the process?

Brett Kandt:
Great question, and I will follow up and get the information to the Committee.

Assemblyman Ohrenschall:
One thing I have learned from being a criminal defense attorney and visiting the prison is that the most important person to the inmates is a person in Carson City called The Timekeeper, in regard to time to visit with their family or earning good-time credits to get back home. You mentioned 174 total writs of habeas corpus appeals that your office had to handle last year. Were those solely on computation of time or was that the number in total?

Brett Kandt:
Those were only the cases challenging the computation of time credits. We handle many more writ petitions challenging other things.

Assemblyman Ohrenschall:
Do you have that total figure?

Brett Kandt:
I will try to get the last two years for you, as these figures were based on the last two years.

Assemblyman Ohrenschall:
Of the 174 you mentioned, there were 8 corrections that were handled administratively and 1 corrected by the court?

Brett Kandt:
Correct. There was only one instance that the court found that there was an error in computation by NDOC.

Assemblyman Ohrenschall:
Of those 174 petitions based on an error of computation of time, that is out of 14,000 inmates?

Brett Kandt:
You are correct. I do not have the exact inmate population figure, but I think you are close.

Assemblyman Ohrenschall:
It is still a pretty small fraction. I guess my concern has to do with what the time is to exhaust all the administrative processes. I get letters from inmates who tell me that the administrative procedures are not moving as quickly as they should. If you could get that information, I would appreciate it.

Brett Kandt:
I certainly will. Maybe the time frames do not move as quickly as the inmates would like, but that does not mean they are not reasonable. We will get you those time frames, and you can make the determination as to whether you think they are reasonable.

Chairman Hansen:
I will now open up the testimony to the public. [There was no one.] Is there anyone in opposition? [There was no one.] Is there anyone in the neutral position?

Vanessa Spinazola, Legislative and Advocacy Director, American Civil Liberties Union of Nevada:
We are neutral on this bill. Our only potential concern was the tolling issue that had been brought up. We had talked to Mr. Kandt regarding that. I just wanted to go on record that I do think the major problem is with the administrative grievance procedure. That is outside the scope of this bill. We hear from inmates repeatedly that they either get no response or it takes too much time. The most concerning thing is that a lot of inmates allege that they receive retaliation for filing grievance procedures, and so they prefer to go directly to the court.

Chairman Hansen:
We will close the hearing on Senate Bill 53 (1st Reprint) and open the hearing on Senate Bill 453 (1st Reprint), which revises provisions relating to real property.

Senate Bill 453 (1st Reprint): Revises provisions relating to real property. (BDR 3-1085)

Michael Buckley, Member, Executive Committee, Real Property Section, State Bar of Nevada:
Senate Bill 453 (1st Reprint) is basically a lawyer's bill. By State Bar of Nevada rules and our section rules, we are precluded from proposing policy changes. Since 2009 with all the foreclosure issues, there have been a number of additions to the foreclosure statutes, particularly in Chapter 40 of *Nevada Revised Statutes* (NRS). There were bills that have been added in the process, and there are new definitions that have been added, causing some repetition in the statutes. We have tried to go through these statutes and clean them up. I can walk you through exactly what we did.

Sections 2 through 5 consist of definitions already in the law. We just pulled them out and put them in a separate definitions section so they can be used consistently throughout.

In section 4, we added a reference to NRS Chapter 116B. This section defines "mortgage or other lien." These statutes deal with mortgage liens and excluded homeowners' association liens. When the statute was originally enacted, there were no hotel condos, so we added those assessments into section 4 with reference to NRS Chapter 116B.

Section 5.5 amends NRS 40.430, the "one action rule." The statute has many exceptions for things that do not constitute an action so as to violate the one action rule. We have added a reference to a lawsuit brought in district court to determine the ownership of a promissory note. In the last legislative session, the affidavit that goes with the foreclosure needs to be completed by the person who holds the note. If there is a lost note, a person can bring an action in district court to determine ownership of the note. We made it clear that an action to determine who owns the note is not an action under the one action rule.

Regarding section 6, on page 6, we cleaned up the language which deals with foreclosure mediation. Foreclosure mediation was added to judicial foreclosures in the last session, but the nonjudicial foreclosures were changed in 2013 to make it necessary to opt out rather than opt in. This will make it consistent with the nonjudicial foreclosure that you have to opt out rather than opt in. On page 7, we have added a definition of "mortgagor" to section 6, subsection 11, paragraph (b), because the term was used without being defined.

In section 7, we cleaned up the language. The change in section 8 uses the newly defined term. Subsection 4, line 27 on page 8 addresses a deficiency action which is commenced by an application. There is no real definition of an application. Sometimes the lenders sue guarantors before there is a foreclosure. Section 8, subsection 4 is intended to make it clear that a preexisting lawsuit can be called an application. Regarding sections 10 and 11, we are using the newly defined terms.

Lastly, in section 14, we are basically eliminating the cross references and using the defined terms which are now located in one area. [Michael Buckley also submitted written testimony (Exhibit K).]

Assemblyman Nelson:
Thank you for bringing this bill and cleaning up a lot of these issues. I have a question about section 8, subsection 4. This does not make it so that a creditor is not required to file a deficiency action, does it? It just redefines the application.

Michael Buckley:
Correct. You still have to make the application within the existing lawsuit for the deficiency.

Assemblyman Nelson:
As far as guarantors, what are your feelings of suing a guarantor before there is a foreclosure and trying to figure out the amount of the deficiency? I know that is not addressed in this bill, but have you thought of doing that in the future?

Michael Buckley:
I think with the changes in 2013 to NRS 40.495, regardless of when the guarantor is sued, the guarantor gets the credit for the real estate. Basically it does not matter when you sue; you still get to raise the issue if you have the real estate collateral. Therefore, it is a question of what the value of the real estate is.

Assemblyman Jones:
Your memorandum helps cut through all the clutter and is written in plain language. Is this basically a cleanup bill? We have a number of other bills relating to mortgage foreclosures, priority liens, and such. Have you looked at these new bills, and is it going to affect the cleanup because of the new bills?

Michael Buckley:
I have not looked at the other bills. Our section has been involved with some of those bills. We are also happy to participate and provide our thoughts and help to make sure the language is consistent.

Assemblyman Thompson:
Section 6, subsection 1, paragraph (a), subparagraph (3), lines 16 through 20, of page 5 is changing to say that the mortgagor has to pay a portion of the mediation. Previously, was it something that was automatically available? Explain that process to me.

Michael Buckley:
The fees have always been there; that is, the fee you have to pay in order to participate in the mediation. I do not have the statute in front of me, but I think if you look at NRS 107.086, this is just following that same language.

The foreclosure mediation was never free; I think each side had to pay $200 to participate. I think you are automatically enrolled, but if you do not pay the fee, then you will not go forward.

Assemblyman Thompson:
Were there some problems that required you to be more specific in making the changes that you did?

Michael Buckley:
We were trying to make the nonjudicial process the same as the judicial process. If you are involved in a foreclosure, you go through mediation. The mediation for nonjudicial said it automatically applies unless you opt out, and the foreclosure mediation without this amendment says you have to actually send in a notice to participate. We were trying to make the two processes the same.

Assemblyman Elliot T. Anderson:
Section 8, subsection 4 references the definition of an application. I think that people have been looking to *Nevada Rules of Civil Procedure* Rule 7(b) for an application for NRS Chapter 40. How will this definition work with the court rules on applications? My other question is regarding the "sale in lieu of foreclosure." I think NRS Chapter 107 uses the terminology "sale in lieu of foreclosure," but I know other NRS chapters use "deed in lieu of foreclosure." I am wondering what "sale in lieu of foreclosure" brings in that "deed in lieu of foreclosure" does not?

Michael Buckley:
I cannot answer your question about section 8 because I am not a litigator. I would have to ask someone who knows the *Nevada Rules of Civil Procedure*. I think the intent is that you would not have to file a new lawsuit if you already have a lawsuit, but you would have to make an application within that lawsuit for the deficiency. I will be happy to follow up on that particular question.

With regard to the issue of the "deed in lieu of foreclosure" or "sale in lieu of foreclosure," I always thought that the term "sale in lieu of foreclosure" was confusing. We did not try to change anything. If you look on page 10 of the bill, "sale in lieu of a foreclosure sale" is an existing definition; we just moved it out of a particular statute and into its own section, section 5. "Sale in lieu of a foreclosure" can also include a short sale, so it is broader than saying "deed in lieu of foreclosure" because it could include both terms.

Assemblyman Elliot T. Anderson:
That answered my question, thank you. I think from what your answer is that what you anticipate for an application is that there would be another pleading. I think that would fit with what I am thinking. Do not worry about the civil procedure question.

Assemblyman Ohrenschall:
My question is about section 5.5 of the bill and the newly proposed language shown on lines 11 through 14 of page 4. Can you please describe to us what is going on now? I am trying to ascertain the identity of these persons and how you would see it changing if this does pass into law.

Michael Buckley:
There is an argument that, as written, section 5.5, subsection 6, paragraph (f) already excludes what we have added here. Prior to 2013, if the person pursuing the nonjudicial foreclosure sale did not have the note, they needed to go to court and establish ownership of the note.

There is a process set out in the Uniform Commercial Code, in NRS 104.3309, to establish ownership of the note. The 2013 change was to actually require the determination by the court rather than simply doing it by affidavit. The 2013 change actually contemplated a judicial action under NRS 104.3309. I participated in the Attorney General's work group on the affidavit that resulted in the changes in 2013, and the bankers that were there testified about what they did. They would go to court and prove ownership of the note, and it was a fairly simple proceeding. It is my understanding that is what is going on. They go to court, and the court issues an order about who owns the note. This change was just to make it clear that the lawsuit was not in violation of the one action rule.

Assemblyman Gardner:
My reading of the language in section 8 says that just filing the complaint without any further motion would qualify as an application. I am concerned about that. I think you need to file a separate motion, and I think we need to clean that language up. Where in subsection 4 does it say a separate motion would need to be filed?

Michael Buckley:
I do not disagree with your point. We need to make it clear that a motion must be made within the lawsuit to make it clear. We have no objection to that. If there is a lawsuit that is filed against a guarantor, right now the statute already says, in NRS 40.495 that the court has to take into account the fair market value of the property. One thing that concerned us was the forms

of these actions tend to get more specific than they need to. If you file a lawsuit against the guarantor and you are seeking a deficiency judgment, the statute requires that the court find the value of the property. If the foreclosure occurs in the middle of that lawsuit, you would need to bring that to the attention of the court. I am not sure what more you would need to do within that lawsuit since you are already suing the guarantor and you are trying to get a judgment against them. You are factoring in the fair market value or the value of the foreclosure sale.

I am open to cleaning up the language. Our intent is to make the substance of the action really the heart of what goes on, rather than have parties play games with what you call something or do legal maneuvers. We want to make it clear and simple so everyone knows what to do.

Assemblyman Elliot T. Anderson:
I think I understand what Assemblyman Gardner is saying. I think he is concerned with notice. The idea is that it is not just any motion that is filed between the parties. Maybe if the language stated plainly that it has to say application for a deficiency judgment on the pleading. You could put that in the initial complaint, and I think that is how it is actually done with a lot of the judicial foreclosures. Parties may put it in at the beginning to ensure that they do not violate the one action rule. If we were to state in the definition of an application that it specifically has to say that, then you would not have a concern of being caught off guard. If I am correct, it is a notice issue.

Assemblyman Ohrenschall:
I am looking at section 5.5 regarding the enforcement action for lost or destroyed instrument under NRS 104.3309. This would not be applicable if that instrument was held by a successor bank due to a Federal Deposit Insurance Corporation (FDIC) takeover. Federal law would apply and these provisions would not. Can you clarify this?

Michael Buckley:
To the extent that federal law is in conflict with the Uniform Commercial Code, certainly federal law would apply. I am not aware of any federal law that deals with figuring out who owns the note. We had a court case yesterday that came out dealing with preemption involving the FDIC, but that really dealt with a different issue. This is just Uniform Commercial Code rules, which govern the note itself. I do not think there would be a federal preemption. To the extent there was a conflict with the federal law, the federal law would certainly apply.

Chairman Hansen:
Since you are actually the bill presenter, do you have anyone else that you would like to testify?

Michael Buckley:
No, I do not.

Chairman Hansen:
Is there anyone who would like to testify in favor of S.B. 453 (R1)? [There was no one.] Is there anyone in opposition? [There was no one.] Is there anyone who is in the neutral position? [There was no one.] We will close the hearing on S.B. 453 (R1). We will now open it up to public comment. [There was none.] Is there any Committee business? [There was none.] The meeting of the Judiciary Committee is adjourned [at 9:24 a.m.].

RESPECTFULLY SUBMITTED:

_____
Janet Jones
Committee Secretary

APPROVED BY:

_____
Assemblyman Ira Hansen, Chairman

DATE: _____

EXHIBITS

Committee Name: Assembly Committee on Judiciary

Date: May 1, 2015 **Time of Meeting: 8 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 37	C	Diane Thornton, Committee Policy Analyst	Work Session Document
S.B. 40 (R1)	D	Diane Thornton, Committee Policy Analyst	Work Session Document
S.B. 40 (R1)	E	Diane Thornton, Committee Policy Analyst	Proposed Amendment from State Gaming Control Board
S.B. 55	F	Diane Thornton, Committee Policy Analyst	Work Session Document
S.B. 449	G	Diane Thornton, Committee Policy Analyst	Work Session Document
S.B. 225 (R1)	H	Senator Patricia Farley	Testimony
S.B. 225 (R1)	I	Michael Hackett, Nevada Tobacco Prevention Coalition	Proposed Amendment
S.B. 53 (R1)	J	Brett Kandt, Special Assistant Attorney General, Office of the Attorney General	Testimony
S.B. 453 (R1)	K	Michael Buckley, State Bar of Nevada	Testimony