MINUTES OF THE JOINT MEETING
OF THE
ASSEMBLY COMMITTEE ON CORRECTIONS, PAROLE, AND PROBATION
AND THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Ninth Session
March 9, 2017

The joint meeting of the Assembly Committee on Corrections, Parole, and Probation and the Assembly Committee on Judiciary was called to order by Chairman Steve Yeager at 8:05 a.m. on Thursday, March 9, 2017, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/79th2017.

COMMITTEE MEMBERS PRESENT:

Assemblyman Steve Yeager, Chairman
Assemblyman James Ohrenschall, Chairman
Assemblyman Elliot T. Anderson
Assemblywoman Lesley E. Cohen
Assemblyman Ozzie Fumo
Assemblyman Ira Hansen
Assemblywoman Sandra Jauregui
Assemblywoman Lisa Krasner
Assemblywoman Brittney Miller
Assemblyman Keith Pickard
Assemblyman Tyrone Thompson
Assemblywoman Jill Tolles
Assemblyman Justin Watkins
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblywoman Daniele Monroe-Moreno, Assembly District No. 1

STAFF MEMBERS PRESENT:

Diane C. Thornton, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Devon Isbell, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

James M. Wright, Director, Department of Public Safety
Natalie Wood, Chief, Division of Parole and Probation, Department of Public Safety
Michael E. Buckley, Chair, Real Property Law Section, State Bar of Nevada
Benjamin Orzeske, Chief Counsel, Uniform Law Commission

Chairman Yeager:
[Roll was taken and Committee protocol was explained.] Today we have a joint meeting of the Assembly Committee on Corrections, Parole, and Probation and the Assembly Committee on Judiciary. We have a few things on our agenda today; as you can see we have a presentation as well as two bills. We have a presentation from the Department of Public Safety so, at this point, I will invite our presenters up to the table.

James M. Wright, Director, Department of Public Safety:
Thank you for the opportunity to come back before your Committee to make this presentation. Natalie Wood, the chief of the Division of Parole and Probation, is also with me today. We were originally scheduled to present an overview of the Department of Public Safety (DPS). I would like to quickly go over the department as a whole for the new members, but I would also like to expand into and have a more in-depth discussion of the Division of Parole and Probation (P&P). As I said, we did not get the chance to make our presentation earlier in the session. Since that time, there have been a lot of comments made, and a lot of misunderstanding and misinformation about the Division. Because of this, we felt that we needed the opportunity to come forth and add some clarity and understanding of some of the terms we use and how we use them.

I hope that you have a copy of our presentation (Exhibit C) that gives the basic details of DPS—I wanted to express to you that we are a fairly young department. We were established in 2001 by legislative action when public safety was pulled out of the Department of Motor Vehicles (DMV). We are a multidiscipline, total force organization. When I mention total force, I mean that everyone in the Department of Public Safety, from the sworn officers to the civilian staff, has a role in preserving public safety. No matter what their job or their responsibility is, all of our work goes towards supporting public safety.

The Department consists of eight divisions [page 4, (Exhibit C)]. The Nevada Highway Patrol is probably our most noticeable to all of you out there in the motoring public. The other divisions are the Division of Parole and Probation, the Investigation Division, the State

Fire Marshal Division, the Capitol Police Division, General Services Division, the Training Division, and the Division of Emergency Management and Homeland Security. We also have three offices within the Department: the Office of Traffic Safety, the Office of Criminal Justice Assistance, and the Office of Professional Responsibility—which is basically our internal affairs office. We have 1,475 employees (page 3); 843 are sworn and 632 are civilian staff.

I am honored to lead such a great department, and I am proud of the dedicated and hard-working employees who embrace the Department's mission and do their very best every day to make our great state safe and secure. I am also proud of our reputation of being a trusted and dependable department that is always ready and able to respond and take care of business anywhere and anytime, and we prove this on a regular basis.

As I mentioned, what I would like to do now is provide you some focused information about our Division of Parole and Probation (P&P). We need to do this because I am concerned about comments being made and information being discussed in hearings, most recently in your hearing on Tuesday, March 7, 2017. I feel the comments being made and the incorrect information being discussed are likely because of old beliefs, perceptions, possibly bad experiences someone experienced in the past, and a misunderstanding of the roles and responsibilities of P&P. I just want to provide you a better understanding of what we do and how we do it and some of the difficulties we have had to work hard to overcome.

Currently we have just over 500 P&P staff who have the responsibility of supervising approximately 19,500 offenders. I want you to know we have a new and improved P&P, and we are very excited about the future. We are also excited about the plans we have to refocus our efforts so that we can become a key player in our desired reforms and, for those individuals involved in our justice system, improve their reentry into our communities.

As I entered the director's office a few years ago, I paid attention to and recognized that the writing was on the wall. There was a strong desire to fix the corrections and parole problems that were becoming a big problem for our state. I researched our part of the problem, and I determined several issues that were out there. There was a culture change within P&P in the early years of being a part of the newly formed DPS, which made it more law enforcement-focused. We went into a recession period, which caused budget cuts and staffing shortages, resulting in high case workloads and associated performance issues. As a director, my direction to P&P was to research and develop a new way of doing our business before someone else showed up to do it for us. Under Chief Wood's leadership, the Division researched evidence-based performance programs and determined how they could be implemented within the Division. The Division has also developed a strategic plan to serve as a roadmap for P&P's new direction.

The Division's mission statement is, "Enhance public trust and community safety, and provide assistance to the courts and the State Board of Parole Commissioners by providing professional supervision of offenders to promote their successful reintegration into society."

We took our new plan to the administration, and we are excited that our initiatives were supported and several budget enhancements were included in the Governor's recommended budget. We will be presenting this budget next week. Some of the highlights I would like to share with you include funding for the following: reentry specialists to be embedded within the Department of Corrections (NDOC) institutions to help with parole plan development; increased indigent and transitional housing funding; state-funded house arrest; independent reporting facilities—these are day reporting centers, one for the north and one for the south; increased staffing; improved caseload ratios; Effective Practices in Community Supervision training—this is training we will be giving our officers so they may better interact with offenders and help them reintegrate into the communities; and development of a new Nevada risk assessment tool to help in the assessment of offenders as well as to help with their case supervisions. We hope that the Legislature supports our budget and the enhancements we mentioned; these will provide us with the necessary tools to make major improvements in offenders' reentry successes.

I want to address a couple of other items before I turn it over to Chief Wood. First, I would like to address the continuing question of where P&P should reside. A comment was made in your meeting on March 7, 2017, that Nevada is the only state to house P&P under a department of public safety. North Carolina houses parole and probation under their department of public safety—they have corrections under the DPS as well. There are other organizational combinations out there nationally; we need to remember that we do not need to be exactly like everyone else. If you think about it, I would argue that having P&P with DPS provides for good checks and balances and ensures that our community public safety needs are met. The Division of Parole and Probation can be the neutral party in its interactions with the State Board of Parole Commissioners as well as between the courts and the parolees. It is my professional opinion that P&P needs to remain separate from NDOC, and not part of an organization that can control both the front and back doors of institutions.

If we look at success rates, DPS and P&P currently have an 80 percent success rate for parolees compared to the national average of 61.6 percent. This is with our current capabilities. I can only imagine it will increase if our new programs are funded and implemented. The Division of Parole and Probation also has a combined parole and probation success rate of 71 percent, versus a national average of 61.5 percent, which is not bad.

The second item I would like to address is the law enforcement element of our job. Our P&P officers do a tremendous job, and they do it wearing two hats: one is as a law enforcement officer and the other is as a social needs coordinator. Keep in mind there are still some very bad individuals out there who are in our communities who require intense supervision and enforcement actions. We cannot forget this—this is reality. Bad people are out there, and that is why we are there—to provide that service and maintain public safety in the communities. There are also many people who need the guidance, encouragement, and assistance from our officers in order to be successful in their reentry into society.

I am excited about the interest we are getting from young individuals who want to become P&P officers. During our last two academies, I had the opportunity to talk to some new cadets, and they told us they were drawn to P&P because they heard about the new direction in which we are going. We reach out to colleges with criminal justice programs. These new cadets are coming to us with degrees in psychology and other related studies, but they are coming to us because they have heard about the new direction we are going and they want to be a part of it. They want to help people in their communities. When we accomplish this, we will ultimately achieve safer communities.

The shift has happened. The Department and Division are very excited about the new direction, and we want to make it known that we are on this path. With that, I would like now to turn it over to Chief Wood so she can discuss with you, as I had mentioned before, what technical violations are and the differences in discharges, and then we will stand ready for any questions that the Committee may have.

Chairman Yeager:
Thank you for your comments, Director Wright. Chief Wood, we will have you present, and then I know I will have some questions from the Committee.

Natalie Wood, Chief, Division of Parole and Probation, Department of Public Safety:
As the Director said, several questions have come up over the past few weeks with regard to people's perceptions of what technical violations are in parole and probation discharges. I was hoping I could use a few minutes of your time to clarify this.

The Division of Parole and Probation has changed. It would be nice to be allowed to come out from underneath the cloud, and I am sure that once our budget is presented you will see that we have done a lot of work in the last three years to move forward. The law enforcement side of the house is definitely there—it is something I am not going to shy away from—it is an important aspect of what we do. We need to have checks and balances. The Department of Health and Human Services is definitely at the forefront, as it needs to be, because of the way the prison population is, as well as the fact that these individuals are coming back out into the community. It would be much more beneficial for offenders to reenter the community with usable skills and the knowledge that their parole officer is not just there to arrest them; they are there to work with offenders and help them through the system.

In regard to technical violations, I think there is a perception that we take people back for supervision fees and residence violations. I want to clarify this. When we submit a violation report, there are three standard things that are included: residence, employment, and reporting. These have to be present in the violation report before we can even do anything. It is a system of checks and balances for the officer. Our officers cannot just bring someone back because they have not paid their supervision fees or because they are not paying their restitution. If an offender gets new charges, that information is included in the violation report. Obviously, if an offender has failed counseling, that is included, but very rarely will

you see a violation that comes through—in my time anyway—that is solely based on residence violations, unless the person has moved multiple times, left substance abuse housing, and other situations like that.

If you have a person on parole or probation for driving under the influence (DUI) manslaughter and they have obviously been drinking when they come in to the office, some attorneys would view that situation as a technical violation. What the attorney is not telling you is that this individual has tested positive numerous times, that we have put them in a treatment program and that they failed the treatment program, and that we now have an individual in the community who is at risk because they are drinking and they are on parole for DUI manslaughter. It is the same scenario with sexual offenses. Some people would argue that failing to register as a sex offender is a technical violation. When you have worked with an offender numerous times and he or she has continually failed to register, or he or she has shown up intoxicated for the seventh time at the Division, this becomes a challenge.

My officers are very aware that, for the last three years, we have been traveling across the state and communicating with our officers that they cannot just bring individuals back into the system for minor violations; it is why we are where we are today. Our officers are working on that—it is a culture change—they need to be allowed to make that culture change and not constantly be held accountable for what one officer may or may not have done years ago. There are good attorneys out there; there are attorneys that are not so good. It is no different in the Division. You have extremely capable officers and you have some challenging ones, but for the most part I have a squared-away office and my officers are doing an outstanding job.

The other thing I want to mention is discharges. This subject was brought up in the hearing on Assembly Bill 181 on March 7, 2017, and I want to shed some light on what honorable and dishonorable discharges are. I do not have a stance on that bill by the way: I am neutral on it. I completely understand that we want to give an individual that has changed their life an opportunity, and it is important to know that honorable discharges show that the offender is making an effort; that he or she is reintegrating into society and has done what was needed to make the victim whole, because there are victims associated with some of these cases.

I believe you are correct that 30 or 40 percent of dishonorable discharges happen at the court level due to negotiations. These negotiations come about when we have brought an individual back seeking a revocation because they might have minor criminal charges—misdemeanors—in conjunction with some other violation of probation. In these situations, we have agreed it would probably be in everybody's best interest for a dishonorable discharge rather than to revoke probation. In these situations, I do not think it is fair to hold the Division accountable for that at a later date, after we have given the offender the benefit. We can certainly appreciate our role and participation in this, and we do, but I also think that judging the Division and putting that back on the Division is not quite fair.

In 2005, a law came out that allowed offenders with dishonorable discharges to come back and seek a reversal if they were behind in their supervision fees or restitution fees. That law, however, sunsetted. It may surprise the Committee to know that, for the many years that the law was out there, very few offenders came back to change their discharge from dishonorable to honorable because the law stated that the violation could not be for anything other than restitution or supervision fees. I did want to make that clear.

There was also a Supreme Court decision pertaining to this, and I can provide that information later on if need be. Out of the Division's 71 percent combined success rate, honorable discharges currently account for 73 percent and dishonorable discharges account for 27 percent. I think follow-through and accountability are important, and I think that, regardless of how the laws go and how they are passed, there needs to be some consideration of that accountability.

With that said, I would be happy to answer any questions in regard to my budget or other programs that we are working on. I feel that it is extremely important to address some of the things that keep coming up from individuals or family members who were involved with P&P in the past. We just never seem to be able to get out from underneath the cloud. Thank you.

Chairman Yeager:
Thank you, Chief Wood, and I certainly do not want to reopen the hearing on A.B. 181. If the bill moves forward, the Division of Parole and Probation will have an opportunity, perhaps on the Senate side, to make some comments. I think the issue that Director Wright acknowledged here today is that there has been a cultural change at P&P. When we look at restoration of rights, we look at people who have had previous dishonorable discharges. The question A.B. 181 seeks to address is not so much what we do going forward, but what we do with those people who had violations in the past that we could all agree would not be dishonorable discharges by today's standard. I just wanted to make that clear. I understand where the Division is going, but I think A.B. 181 seeks to look backwards at what happened in the past.

I would also note for the record that we have a really odd system right now where you can essentially go to prison, never get probation, get discharged, and potentially seal your records. However, if you get probation and get a dishonorable discharge but you are not bad enough to go to prison, then you cannot seal your records. Those are some issues to keep in mind going forward. I am certainly not putting the onus on the Division—I think the Division has to do what it has to do—but in making policy decisions, that is the kind of thing we are looking at. Why would we give someone who has to go straight to prison a chance, but not someone who is not bad enough to get revoked and go to prison? I just want to put that on the record.

Additionally, Chief Wood, nobody disputes the two examples you brought up: that of a sex offender not registering and a DUI manslaughter drinking. I do not think anyone here

would view those as technical violations. I think, historically, there were instances where violations were curfew-related and things like that. I just want to make that clear. I know that technical violations mean different things to different people, but those two examples you brought up, I certainly would not consider those a technical violation.

I have some questions from the Committee, and we will start with Assemblywoman Cohen.

Assemblywoman Cohen:
Thank you for your presentation. You mentioned your success rate statistics. Can you tell me where those come from?

Natalie Wood:
We did an executive summary where we looked at the Bureau of Justice Statistics data that was published. I have that information available for you if need be.

Assemblywoman Cohen:
Does that include, for instance, someone who is dishonorably discharged for a technical violation but does not reoffend? Would that person be included as a success or not?

Natalie Wood:
The Division does not currently track recidivism, which seemed strange to me when I took over as chief of the Division. This is primarily a software issue; we have a new software program coming out in July that will actively track recidivism. We define recidivism as a person who comes back into the system within three years of being discharged. We currently judge discharge—whether honorable or dishonorable—as a success because that individual was not revoked and did not go to prison.

Assemblywoman Cohen:
So even if you are dishonorably discharged, if you are not revoked, is it considered a success under the statistics?

Natalie Wood:
Absolutely. This is the same nationally, too, because the person is remaining free and out of custody.

Assemblywoman Cohen:
All right, but will the new software coming on line in July flesh this out more? Is that what you are saying?

Natalie Wood:
The new software coming out in July will allow us to statistically track recidivism, which we currently do not do. We just track our success rates.

Assemblywoman Cohen:
Do you find that employers understand the difference between parole and probation in general, and dishonorable and honorable discharges for your clients?

Natalie Wood:
Quite frankly, honorable and dishonorable discharges do not really come up in conversation in the community. A discharge is a discharge, from an employer's standpoint. Some employers who hire ex-felons get a federal kickback for doing so. There are some reimbursements involved with hiring ex-felons. I have never had an employer ask me whether a discharge was honorable or dishonorable. The impact of a dishonorable discharge is felt when the person comes back into the system on a new charge. When that offender goes back before the court prior to sentencing, that is oftentimes a factor in the negotiations between the public defender, the district attorney, and the sentencing judge as to whether they are going to grant that person another opportunity at community supervision. Dishonorable discharges can impact offenders in that way.

Chairman Yeager:
Let me ask a follow-up question. Suppose you have a circumstance where a probationer is brought before the court for a revocation proceeding because he or she has picked up a new charge. Prior to the revocation proceeding, there are negotiations on the new charge, and as a part of the negotiations, the offender is offered a dishonorable discharge for his or her old charges in lieu of serving time in prison for the new charges. Maybe this scenario is not realistic—just tell me if that is the case—but if the offender decided to take the dishonorable discharge instead of prison, would that be considered a success under the metrics P&P currently uses?

Natalie Wood:
That would be a very particular and unique case. What typically happens is that the offender will come in on the new charge, they will stick to revocation on the underlying charge, and sometimes the new charges go away. That is another option. Under the scenario you gave me I would say yes. The dishonorable discharge is considered a success, but I would have to see how the officer had input that information because I would not personally see that situation as a success.

Chairman Yeager:
Thank you for saying that. I do not think anyone on the Committee would view that scenario as a success either.

I do not know if you have this data, but I think it would be really helpful for the Committee to know, in terms of the success rate, how many of those included in your calculation are dishonorable discharges? We have a scenario here where the Division is saying in its reporting that if you are dishonorably discharged, that is a success. We just heard that, under current law, you cannot get your rights restored or your records sealed with a dishonorable discharge, and I think that is a disconnect in terms of reporting. If possible,

I think you should take dishonorable discharges out of the equation and define the success rate on probation or parole for the other individuals who are actually honorably discharged.

Natalie Wood:
As I previously stated, approximately 73 percent of the combined 71 percent are honorable discharges. The other 27 percent are dishonorable. The important factor in determining success is prison: if an offender is discharged—and dishonorable discharges occur for a variety of reasons—the offender is not being incarcerated and their probation is not revoked. Yes, I consider that a success because that person is not going into the prison system.

Chairman Yeager:
I understand that part of it, but again I note that if you go to prison, you can get your records sealed and you can get your rights restored. If you are on probation and you are not bad enough to go to prison—but you are dishonorably discharged—the Division views it as a success, but you cannot get your rights restored and you cannot get your records sealed. I am not putting that on you, Ms. Wood, but that is the way the law exists today. That seems to be very inconsistent when we talk about making the law work, at least in my mind. I do not know how other members of the Committee feel, but I think these issues need to be aligned in some way. That, however, is a discussion for another day, and I do not want to take all the time here.

Assemblyman Fumo
First of all, I want to compliment you, Mr. Wright, for actually showing up as a department head and for being here to make your own presentation. That is admirable, and we do not see that often. I heard you say that you are accountable, you are new and improved, you are refocusing your efforts, and you have corrected some of the problems. Can you identify what, exactly, the problems were that you corrected? What did you see as problems and what did you do to correct them?

James Wright:
This has been evolving over several years and, as I mentioned, when I became the director there was a lot of focus and a lot of interest from the Legislature to make changes in DPS. If I may be honest with you, I do not have a background in parole and probation experience. When I became the director, I looked at the problem with fresh, separate eyes. As I determined how we were doing business, I quickly saw the writing on the wall. We needed to change the way we were doing business here for the future so that we could move forward. Most of my concern was the law enforcement-centric culture: we were operating with the focus of rolling people up and putting them back in the joint. Did that help anything? No. It created a problem that has been developing. We asked what we could do differently. One, we needed to change our culture. As we said earlier, the law enforcement element is still very important to our jobs, but it cannot be the sole, primary function that we perform in the community. We have to look and see how we can help individuals coming out of the institution integrate back into society and back into our communities so we can make them

successful, law-abiding, productive citizens. We began looking at different programs in existence. We looked at the Pew-MacArthur Results First Initiative studies that were presented to the Legislature—the evidence-based programs—and we decided to go down this road. It was at this point that we made the shift in our culture. The Division then put our strategic plan together and was very excited about this. There were hurdles. We went through a terrible recession period where we did not have funding, we had staffing vacancies we had to deal with, and our officers were dealing with caseloads of up to 150 clients per officer—that is terrible to deal with because our officers could not focus on any individuals. Our officers were doing great when they could maintain contact with clients in an adequate fashion.

We looked at improving our caseload ratios. We realized that we could cause harm to low-risk offenders by increased scrutiny and oversight, and we do not want to do that. We want instead to focus that intense supervision on those who need it—and there are plenty who need it. Why create a problem for lower risk people, putting them back into doing bad things because of the intense scrutiny on them? We are there to help those offenders.

Assemblyman Fumo:
Are you training your officers differently? Are you hiring different officers? For example, rather than people with law enforcement background, are you hiring people with social work backgrounds? What exactly are you doing?

James Wright:
Yes, this change is part of our officers' training. As I mentioned before, I was so excited in our last two academy classes to see cadets coming out of college with psychology degrees and criminal justice degrees, looking to be part of our division because of the direction in which we are going. These are the people we need for the future. My vision, and where I would ultimately like to see us go, is to possibly add counselor positions within the Division. I have talked to the Division about how our officers wear two hats. I think we would be much improved by adding counselor positions within the Division to work as a task force with our officers, to inspire our officers to go out and work with offenders, help bolster those responsibilities, and produce a better product. In the future, I see our budget requests adding different positions like that to give us a better-rounded service.

Assemblyman Fumo:
Page 15 (Exhibit C) addresses reintegration into society while protecting the community. What exact programs do you offer, or how do you train your officers to assist offenders with reintegration?

Natalie Wood:
As I said earlier, the caliber of the officers that we are hiring is improving: the majority of them have college degrees in English, history, psychology and sociology. Everything in our budget—I wish so many times I had had an opportunity to present our budget before we had all these other committee meetings—is focused on reentry and reinvestment. We need to be

working with the offender. When an offender comes in with a positive drug test, it is a valid issue, but we need to focus on the root cause of the problem. We should be asking them, "What happened in the morning? What led up to you using, because you know it is going to cost you and cause you problems with your child custody issues. Talk to me about that because I noticed you missed your job appointment this morning." We need to not just focus on the bad act; we need to focus on what led up to it.

There is a lot of coaching and mentoring in the in-service training that says an officer cannot simply violate an offender on one or two positive tests. Instead, the officer should focus on treatment and rehabilitation. This would reduce our officers' caseloads because the majority of individuals show up and test positive on their first day—whether they have come in from prison or from the court. Working with offenders on house arrest is a challenge. Years ago, we had state-funded house arrest but the funding was not significant enough to make an impact as an intermediate sanction. If somebody continued to test positive or failed their substance abuse counseling, we could add house arrest and lock offenders down during certain hours so they could not go out and interfere in the community or be with friends they should not be hanging out with. We are moving towards this, and when my sergeants see a violation report come through, they have been instructed to take a look at that violation report. Our officers must determine whether we have exhausted all appropriate intermediate sanctions before we take the person back, unless it is a community safety issue. If the offender poses a glaring community safety issue or is a risk to their health and welfare, then we still need to do and act appropriately.

Assemblywoman Miller:
My question follows up on Assemblywoman Cohen's. I am really fascinated and also concerned by the fact that we do not have a legitimate tracking system for recidivism. With this new system, will we be tracking recidivism? You mentioned statistics. I want to know about individuals, and about tracking individuals and their individual successes.

Also, we know in Nevada our culture is highly transient. Oftentimes, even people offending and going through the criminal justice system here do not actually live or come from Nevada. When we track recidivism, are we including people who return to their home states? What happens when these offenders get back to their home states?

Natalie Wood:
Part of the reason why it is difficult to track recidivism nationally is because individual states have not been able to agree on what the definition of recidivism is. Some states look at it as an individual reentering the system within five years of release. Some federal authorities define recidivism as reentering the system within three years. The Division decided that we needed to be tracking recidivism. Our new Offender Issue Tracking System that is rolling out in July will track offenders individually. We will be able to track former offenders who, after leaving our system for two years and six months, come back into our system. We will be able to view that situation as a negative statistic. Our new software will also allow us to

look at time frames; we will be able to measure whether the time it takes to recidivate is becoming longer or shorter.

Assemblywoman Miller:
If the states cannot determine what the definition of recidivism is, should we follow the U.S. Department of Justice and their definition of recidivism? When you refer to offenders coming back into our system, are you saying that an offender who goes back to Utah and commits a crime in Utah would still be clean in Nevada because that offender did not commit a crime in Nevada's system? In my opinion, an offender who commits a crime and reenters the system—an offender who is convicted again and reenters the system in any other state—that person has recidivated. I do not think we should focus only on individuals who reoffend in Nevada. Can you clarify whether, when you say "our," you mean Nevada or if you mean the criminal justice system as a whole?

Natalie Wood:
When I said "our" I meant Nevada, and there is a very good reason for that. Every state throughout the nation has a different system, a different risk management module, and a different dispatch, for that matter. Some states are behind on entering information into the National Crime Information Center . If a person lived in California and continued to violate in California, Nevada would not necessarily know about it unless we ran that person's criminal history. We will be tracking individuals who recidivate within Nevada. We will only be tracking people who reenter Nevada's system within three years. Different states use many different software programs, and it would be virtually impossible to track one individual in every other state where he or she may or may not commit a new crime.

Assemblywoman Miller:
If we are placing the accountability for this problem on the software, then we are not actually getting whole data. If we are only assuming, then we are not getting accurate data. If we are making this a software issue and we are going to say recidivism is only based on offenders who reenter Nevada's system, then somewhere the issue is bigger than the software because we will never be dealing with actual statistics and data.

Natalie Wood:
You are absolutely right.

Assemblywoman Miller:
So tell me, what can we do about this?

Chairman Yeager:
We are going to move on from that question, but I think this is a widespread frustration. I certainly understand where Assemblywoman Miller is coming from, and I think all of us are a bit frustrated that we do not do a great job communicating within our state, let alone across other states. I hope this is something we can work on. I am not going to put the burden on

the Division of Parole and Probation because P&P certainly does not have the resources to be able to do that kind of work at this point.

Assemblyman Wheeler:
I am not going to ask you about discharges because there is another problem I see that may rear its ugly head in the next few years. I have received letters from some organizations saying that there are between 300 and 600 individuals who are still in prison, who have actually been paroled. Apparently, they have nowhere to go. Obviously, we want to get those people back out and integrated back into society. What plans do we have, and what are we doing to get the people who have been paroled out of prison? Are we still holding them in prison because they have no family to go to or no home to go to?

Natalie Wood:
I want to let you know that Chairwoman Bisbee is here too, in case I do not provide the answer that you want. The parole eligibility date (PED) list is composed of inmates who have gone before the Parole Board and have been granted parole, but they have not been released for a variety of reasons. One reason could be that the Division may or may not have received the inmate's parole application from the prison until after they have already gone to the Parole Board. In fact, we receive applications for people on the PED list who have already been granted parole 28 percent of the time. When this happens, time ticks away and the inmate sits in prison while we go out and investigate their plan for reentry into the community. I agree with you: that is not acceptable. The Division's primary goal—and we have asked for this in our budget—is for indigent funding for transitional housing. We have asked for state-funded house arrest so that we can focus on the individuals on the PED list who are eligible and expedite their release. That is another reason why we want specialists in Nevada's main prisons who can focus on a reentry plan six months before release; we do not have to wait for inmates to go before the Parole Board and then play catch-up later.

There are some individuals on the PED list, unfortunately, who have refused their parole. These inmates would rather expire their sentence than be supervised by one of my officers. There are also individuals who have immigration holds or outside holds from the state. There are not as many inmates in this category, as opposed to those individuals who have not submitted viable release plans or situations where we received the applications late. We track this diligently, every month, and the PED list—you are right, it used to be up around 600—is substantially reduced now. We work on reducing these numbers every day.

Assemblyman Wheeler:
You mentioned that you have budget requests this session designed to help with this. If you get your budget requests granted, what kind of timeline are you looking at to try to clear this up to an acceptable level?

Natalie Wood:
If my budget is approved, I would like to be proactive in the hiring process. I am going to need additional officers to take on the additional parolees that we anticipate coming out into

the community on house arrest. I would like to start hiring ahead of time so that, if the budget is passed, we are ready to go. Realistically we are going to need some time, at least until October if not into the new year, so that we can effectively roll out this plan rather than just pulling it together. I currently have my staff working on operational plans in anticipation that the budget will be approved, so that we can make exponential progress on reducing the list. Personally, I would like to reduce the PED list immediately, but I know it is going to take time.

Assemblywoman Tolles:
There has been a lot of discussion around the criminal justice system, and I appreciate your responsiveness to the questions that have been brought forward. I want to clarify a couple of things that I heard and then ask a question about the deterrent nature of some of these aspects. Am I correct that you said 27 percent are dishonorably discharged? I heard you say that a dishonorable discharge does not impact an offender's hireability but that there is an impact on having their records being sealed. We also discussed, on Tuesday, whether offenders could have their voting rights restored. Are any other rights affected when offenders are dishonorably discharged? Are there any other penalties for being dishonorably discharged?

Natalie Wood:
When offenders are dishonorably discharged, it affects their ability to vote, their right to bear arms, and it will impact them if they come back into the criminal justice system. If an offender picks up a new charge, dishonorable discharge will be a factor that is considered in regard to granting the offender another opportunity at community supervision.

From an employer's standpoint, I think that most employers who take on ex-felons view the fact that offenders are discharged and in the community as being more important than the type of discharge. That is my personal experience, but you should speak with Assemblyman Hansen, as I believe he hires ex-felons. He could probably speak to whether an honorable or dishonorable discharge is pertinent to him in his hiring process.

Assemblywoman Tolles:
Is this ever brought into the discussion between the parole officer and the parolee as a deterrent, or as part of an encouragement to stick with the program so that the offender does not lose those rights? Is that part of that discussion with the parolee, to motivate the individual not to violate or do anything that would lead to a dishonorable discharge?

Natalie Wood:
I am glad you brought that question up because I did not address that when I was discussing discharges. Typically, when we know that somebody is coming up for a discharge in the next 90 days, we start working more intensely with that offender and tell him or her, "Look, you can change. You are about to get a dishonorable discharge. You can change that to an honorable discharge if you bring yourself up to speed on your fees." We also believe that, as long as offenders are making a conscientious effort and working within their means

to satisfy their fines, they deserve an honorable discharge. We believe that an individual who is on welfare, has children to support, and is required to pay $100 in restitution but can only afford $20 a month has made a concerted effort to pay. In the Division's eyes, they have worked within their means to do so and that person deserves an honorable discharge.

Assemblywoman Tolles:
I just want to clarify: is the difference between an honorable versus a dishonorable discharge, and the effects these have on individual rights clearly communicated to the parolee at some point in the process?

Natalie Wood:
It absolutely is. If the parolee meets with us in person, we also give them a copy of their discharge. Parolees are told in advance that they are coming up for discharge and parolees are told what they need to do to change a dishonorable to an honorable if they have not been making the effort they should be. Parolees are also given a copy of the statute that explains their rights.

Assemblyman Hansen:
I asked the Legislative Counsel Bureau (LCB) to ask the Division of Parole and Probation several questions. I received the response 15 minutes ago, and it is extremely illuminating. With your permission, I would like to share the information with the rest of the Committee. Is that okay with you, Ms. Wood?

Natalie Wood:
Absolutely.

Assemblyman Hansen:
Wonderful, because it is really interesting.

I hired my first ex-felon in 1995. He had a saying that pertains to Assemblyman Wheeler's question. He said, "Ira, what you do not understand is that for some people it is kind of a way of life. We have the saying 'three hots and a cot.'" Basically, some of these people—the 300 to 600 inmates—do not mind being in prison. When you deal with people who are basically being recycled through the system, who get a dishonorable discharge or are revoked, how often do you run into that sort of a scenario where prison is a way of life? I found that conversation with my employee interesting. My idea of prison is that it is so horrible, that if I had to go through that experience I would never want to go back. Apparently, however, there are a percentage of people like the 300 to 600 that Assemblyman Wheeler mentioned who do not feel that way. Is that situation common, or are most people really quite anxious to get out of prison?

Natalie Wood:
I do not want to paint people with a broad brush. I think we are able to really engage, help, and assist the majority of offenders. Most of them know that they do not want to be in

prison. Prison has become a way of life for some of the hard-core offenders who have gang affiliations and whose criminal histories are a little bit more extensive—prison is the culture they experienced growing up. The new prisons director has done a wonderful job introducing some new programs that will give offenders new, viable skills when they hit the streets. You are correct. Some of the hardcore offenders have the mentality of "three hots and a cot," but the majority of the population that I deal with wants to refrain from going in. Lower-offending parolees tend to feel quite nervous when they know they are going back to prison.

Assemblyman Hansen:
I have hired dozens and dozens of ex-felons since 1995 and, as I have told everybody, I work with a felon every day. I have for years. I have found that most people want to get reintegrated after they go through the system, and it seems to me that P&P has done a wonderful job. The statistics the Division provided are extremely illuminating, so I will share them with the Committee.

The only last, little thing that I am confused on is this: you spoke at length about people who receive dishonorable discharges. What I did not realize, and maybe you can illuminate this a little bit more for me, is that dishonorable discharges often occur because the only other option is a full-out revocation and a return to prison. Is it correct that these negotiated settlements that result in dishonorable discharges are done on behalf of offenders to keep them out of prison?

Natalie Wood:
That is absolutely correct. These deals are negotiated at the court level, many times in lieu of a revocation, and they can be done for a variety of reasons.

Assemblyman Hansen:
Thank you so much, and with your permission, I will share all of that information with the Committee.

Assemblyman Thompson:
These questions are for you, Director Wright. You made some statements about your new mission, and I wish we had it on the slide so that I could properly quote it. You talked about wanting to enhance the public's trust, and later on in your testimony, you talked about looking towards the future. That being said, I have a two-part question. Can you tell us, roughly, the racial and ethnic makeup of your caseloads in P&P?

James Wright:
I will have to defer that to Chief Wood, who has that information within her division.

Natalie Wood:
Right now, I could look to double-check to make sure that I am being accurate.

Assemblyman Thompson:
A rough estimate, please.

Natalie Wood:
We do not actually keep track of people's ethnicity in our database. Obviously, information about ethnicity is in the system, but we do not specifically have a report we could pull based on someone's ethnicity. I am not quite sure that we have a standard way to pull a report on gender. That question has come up in previous sessions, and I will double-check and get back to you later to make sure I am not providing you with inaccurate information.

Assemblyman Thompson:
I want to look at page 5 (Exhibit C). Yesterday was "A Day Without a Woman" and I want to applaud you because you have a great representation of women on your executive management team. That is great, but what are your plans, if any, to increase the racial and ethnic diversity in your leadership team? I say this because enhancing the public's trust is very subjective, especially if you do not have people who look like the majority of your clients. Most likely, you have people of color that are in your caseload—you will not say it but that is who you have in your caseload. I look at page 5 (Exhibit C) and I see that women are well represented. I am very pleased with that, but I want to know what your plans are, if any, to make sure that when we see this page in the future there is more ethnic and racial diversity. I know that sometimes people feel uncomfortable talking about this, but this is reality. Could you please share your plan with us? Because the Division should not want to have a homogenous group of same-minded thinkers. The Division needs to have diverse thinking if it is truly looking to enhance the public's trust, have a new look, et cetera.

James Wright:
Thank you for mentioning that. I am very proud of the diversity that we have in our management team. I have been in this business for four years and I have been through a lot of changes. I see the value in having diversity, not only at the top, but also throughout our organization. As far as the makeup of individuals on the management teams, I can assure you that they were not chosen just because they were female; they were chosen to fill those roles because they were capable.

Assemblyman Thompson:
No, I am fine with that. I applaud you for that. I was talking about the other diversity.

James Wright:
We strive to do the best we can. I will start addressing ethnic diversity as we bring people into the organization. We go out and seek individuals from all over—all communities— to come in to our organization. We take every opportunity to reach out to underprivileged communities in an effort to draw people out and invite them to be a part of our organization.

As I look at each academy class, diversity is one of the first things that I notice. I notice the individuals who make up the diversity in the class. We have had Pacific Islanders, African

Americans, and Hispanics in our academy. I am really pleased whenever I visit an academy class and see the mixture of our cadets once they get out of the academy and into their division, which is where diversity counts. Once we bring diverse candidates into the Division, we can foster them, bring them up through the organization, and spread diversity throughout the levels of the organization.

Assemblyman Thompson:
I hear what you are saying as far as entry-level positions, but I am talking about at the top. There is talent in our communities that is ready to go and that does not have to work their way up the ranks. I would like, if possible, to meet with you offline because I am really concerned and I want to help.

James Wright:
I appreciate that.

Chairman Yeager:
I have one follow-up question. In your budget request, you asked for additional positions, which would allow P&P officers to actually work in the prisons and help with planning for parole. I could be wrong about this, but I seem to recall that there was a similar request a few sessions ago to get P&P officers into the prisons to help with release plans. Am I wrong about that, or was that a program that you wanted to enact previously but which ran into barriers?

James Wright:
You are absolutely right. I believe that in the last session or two we received authorization for a couple of positions to start dealing with reentry. These positions were based out of our headquarters, but we moved them to our Southern Command. We created a pilot program with our partners at the Department of Corrections utilizing the Casa Grande Transitional Housing facility, and we are using those additional positions to address that backlog of individuals who were in our facilities and could not get out because they had nowhere to go. The Department of Corrections provided us nearly 100 beds at Casa Grande. We went in and selected the offenders who would be most successful in a transitional setting, brought them out of prison, and allowed our reentry specialists to work with them there.

As far as the additional positions we are requesting, we asked that several be placed in the majority of the major facilities. These individuals will also be responsible for providing services in the outlying conservation camps as well. We found that investigations of parole plans were a major hindrance to the release process. The Department of Corrections tried to backfill with case workers who had been working with inmates in the facilities, but corrections officers do not necessarily have the right knowledge and skills to create parole plans. They are filling the void, however. We could do a better job if we could get those additional positions back, embed the staff in correctional facilities, and have them work hand in hand preparing parole plans. I think we will be approved for a limited amount to show

that is a benefit. My hope is to be able to go back and say that we have so much business and we are so productive that we need to request additional positions to meet the demand.

Chairman Yeager:
I believe our hope would be that those new positions would help ease the bottleneck occurring with parole as well. I want to thank you, Director Wright and Chief Wood, for being here this morning and for taking the time out of your schedule to come answer questions—it was extremely valuable to the Committee. We appreciate your time, and I am sure we will be hearing from you in the future on other matters.

[A memorandum addressing questions raised in the March 7, 2017, Assembly Committee on Corrections, Parole, and Probation hearing concerning Assembly Bill 181 was submitted by Natalie Wood, Chief, Division of Parole and Probation, Department of Public Safety (Exhibit D).]

We are going to move on to the next part of the agenda, and as you can see, we have two bills today. We are going to start with Assembly Bill 235, which enacts the Uniform Commercial Real Estate Receivership Act. I want to note that we have some supporting documentation exhibits that can be found on Nevada Electronic Legislative Information System (NELIS). Assemblywoman Monroe-Moreno and Chairman Ohrenschall are here to present this bill today.

Assembly Bill 235: Enacts the Uniform Commercial Real Estate Receivership Act. (BDR 3-714)

Assemblywoman Daniele Monroe-Moreno, Assembly District No. 1:
Good morning Chairman Yeager and members of the Assembly Committee on Judiciary. I am Daniele Monroe-Moreno, and I am the Assemblywoman for District No. 1 in southern Nevada. I am here as a primary sponsor for Assembly Bill 235, regarding The Uniform Commercial Real Estate Receivership Act. Thank you very much for hearing A. B. 235.

Assembly Bill 235 is a uniform act, which has been promulgated by the National Conference of Commissioners on Uniform State Laws, also called the Uniform Law Commission (ULC). The Uniform Law Commission is a national organization that includes state legislators, attorneys, judges, and law professors from all over the United States. The Uniform Law Commissioners strive for uniformity in state laws where it is felt that uniformity will be of aid to citizens in various states.

Assemblyman James Ohrenschall is here with me today to help present this bill; he also serves as a commissioner for Nevada on the Uniform Law Commission. Nevada attorney Michael Buckley from the law firm of Fennemore Craig, who also serves as the chairperson of the State Bar of Nevada's Real Property Law Section, is here as well. Benjamin Orzeske, who is sitting behind me, serves as chief counsel of the Uniform Law Commission. I will

now turn this over to Assemblyman Ohrenschall, as I may need to return to my morning committee meeting. Thank you, again, for hearing this important legislation.

Chairman Yeager:
Thank you for being here this morning and bringing this bill to us. We appreciate it.

Assemblyman James Ohrenschall, Assembly District No. 12:
I will keep this brief, and I want to thank Assemblywoman Monroe-Moreno for helping to bring forth this act. Recently, former state Senator Care left his position as liaison for the uniform law commissioners for Nevada, and he asked me to take over. One of the jobs I had to do was try to find sponsors for some of these uniform acts. I have been very lucky that Assemblywoman Monroe-Moreno, Assemblywoman Miller, Assemblyman Watkins, Assemblywoman Bilbray-Axelrod, Chairman Yeager, and Chairman Segerblom in the Senate have been kind enough to find homes for many of the different uniform acts we hope the Legislature will consider this session.

The Uniform Commercial Real Estate Receivership Act is an act that I believe will aid commercial landlords as well as tenants. I do not practice in this area, nor do I claim to have expertise in this area, but I am very fortunate today that I have Mr. Michael Buckley here, who is a tremendous resource in areas that affect real property and homeowners' associations. He is a partner at the law firm Fennemore Craig, and as Assemblywoman Monroe-Moreno said, he is Chairman of the Real Property Section of the State Bar of Nevada. With your permission, Mr. Chairman, I would like to turn it over to Mr. Buckley. We also have Mr. Orzeske from the Uniform Law Commission with us today. He flew in from Chicago to try to help answer any questions that the Committee members may have.

Michael E. Buckley, Chair, Real Property Law Section, State Bar of Nevada:
I am Michael Buckley from Fennemore Craig. I am actually here on behalf of the executive committee of the State Bar of Nevada, Real Property Section, in support of A. B. 235. We have been following this bill for some time; it has been in the works since about 2011, it has gone through numerous drafts, and we have had the opportunity to comment on the drafts.

I would like to give you some background on receivership (Exhibit E), and then I can walk you through the basic concepts of the statute. Receivership is not a right one can have, except in certain circumstances. Basically, the court has an inherent power to appoint a receiver to take care of property that is the subject of a lawsuit. In the case of A.B. 235, we are talking about commercial real estate. Assembly Bill 235 is really designed to address cases of mortgage foreclosure. In these situations, a lender will seek to have a court-appointed receiver take care of a property pending the completion of the foreclosure. The lender will typically suggest who they would like to act as receiver in these proceedings, but it is actually the court that makes that determination. The receiver is an officer of the court and must respond to the court rather than any particular party.

Assembly Bill 235 deals with commercial real estate receivership only, but one of the great things about this bill is that it really puts some flesh and bones on receiverships. The list of Nevada statutes that address receiverships can be counted on one hand. There is *Nevada Revised Statutes* (NRS) Chapter 32, enacted in 1911; there is also NRS 107.100, enacted in 1965. Both of those provisions say that a lender in a foreclosure can have a receiver appointed after default.

In 2007, the Legislature enacted the Uniform Assignment of Rents Act, also known as NRS Chapter 107A, and this settled a question that had been in the courts for a long time. That question was whether a lender is actually entitled to the assignment of rents following a default. This law makes it clear that every mortgage includes an assignment of rent. Assembly Bill 235 is the natural progression to the Uniform Assignment of Rents Act.

The current statutes in Nevada say that a lender can get a receiver, but the laws do not say what the receiver's powers are, and they do not say what the bond is. The current laws do not express the type of notice that has to be given. This bill explains how a receiver is appointed as well as the powers that the receiver has.

I brought two items with me today for the Committee. One is a copy of the prefatory note from the uniform law itself (Exhibit F) which walks you through and explains the actual uniform law. I also put together a table that compares A.B. 235 to the uniform law, and does so section-by-section [pages 3-12, (Exhibit E)]. The Nevada version of the law follows the uniform law pretty much word for word; there are some language changes but nothing significant. There is no effective date listed so I think it would be effective on October 1, 2017.

The first 25 sections of A.B. 235 are definitions [pages 3-4, (Exhibit E)]. Some of the definitions are self-explanatory but there are a few that I would like to point out. One important definition is the concept of an executory contract (page 3). An executory contract is a contract that still has a performance on either side that must be done, such as a service contract. I would like to note that a lot of the concepts addressed in this law are actually found in bankruptcy cases as well. The term "mortgage," which includes deed of trust, is used in this law as well, as are "mortgagee" and "mortgagor." The basic definition of a receiver is, "A person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage, and, if authorized by [the act] or court order, transfer, sell, lease, license, exchange, collect, or otherwise dispose of receivership property."

One question that has come up in recent years is whether a receiver can sell the property. In the case of a business where a receiver is covering everything that an owner owns, the receiver would sell things. In the case of a mortgaged property, there have been positions taken on both sides whether a receiver can actually sell the property outside of having a foreclosure. In *U.S. Bank National Association v. Palmilla Development Co., Inc.,* 131 Nev. Adv. Op. 9, 343 P.3d 603 (2015) the particular issue of whether a receiver could sell the property was not at issue before the Nevada Supreme Court, but the court did say that

a receiver sale was essentially a foreclosure sale. This law basically follows up on that and covers it as well.

The definition of "rents" is important as well [page 4, (Exhibit E)]. Rents are things that come from the real estate and the definition of rents, in this law, is the same as the definition of rents in the Uniform Assignment of Rents Act.

Section 26 deals with notice and hearing. Principles of due process and fairness require notice and hearing, but A.B. 235 allows the court to decide when a hearing is necessary or, perhaps, when notice to everybody is not necessary. For example, if nobody objects to something, then a hearing may not be necessary. As I said before, the court has a lot of discretion and the decision about notice and hearing is up to the court.

Section 27 defines the type of property that can be covered against commercial real estate [page 5, (Exhibit E)]. Assembly Bill 235 does not cover residential real estate unless it is being used for commercial purposes. The law also does not apply to a receivership authorized by a special act. For example, the insurance division can have a receivership over an insurance company; this law would not apply in this case. This act does, however, provide many procedures that may be beneficial in those circumstances.

Section 28 deals with the power of the courts. Assembly Bill 235 states that the court where the receiver is appointed is the court that has exclusive jurisdiction over the receivership. For the members of the Committee who are lawyers, a receivership is an in rem proceeding, meaning that the court has this property and is in control of this property.

The appointment of a receiver, covered in section 29, tracks existing law in NRS Chapter 32, NRS 107.100, and NRS 107A.260, and allows for the appointment of a receiver to collect rents [page 5, (Exhibit E)]. A receiver can also be appointed if the property is in danger of being wasted, damaged, or lost, or if the property may not be sufficient to discharge the loan. Additionally, if the owner fails to turn over property that belongs to or is subject to the lender's lien, a receiver can be appointed.

Section 30 deals with disqualification [page 6, (Exhibit E)]. One of the important things this law does is that it requires the receiver to declare, under penalty of perjury, that they do not have an interest in the property or have a relationship with the party. A receiver who is acting as a receiver in another act or proceeding is not a disqualified receiver even though it might involve the same lender.

Section 31 says that the receiver must have a bond or alternate security. This also describes when claims against the receiver must be appointed or made.

Section 32 is called the "Status of Receiver as Lien Creditor" [page 6, (Exhibit E)]. When a receiver is appointed—this is comparable to bankruptcy law—the receiver takes that property free of unrecorded or unperfected liens. If there are claims against the property

which are not properly perfected or filed under the Uniform Commercial Code (UCC), the receiver would take the property free of the claims.

Section 34 [page 7, (Exhibit E)] requires the owner to deliver property to the receiver and also makes the owner subject to examination of the property.

Section 35 deals with the powers and duties of a receiver, which boil down to two different types of actions: one is dealing in the ordinary course of business, and one is not in the ordinary course of business [page 7, (Exhibit E)]. The receiver has a lot of freedom to deal with property in the ordinary course of business. In a case where a receiver wants to sell the property and the property is the only asset of the receivership, that is not in the ordinary course of business and that would require court approval. The section also states that the receiver has to keep records, account for the receivership property, and states that the powers and duties of a receiver may be expanded, modified, or limited by court order. The receivership order must be recorded. I noticed that Clark County has submitted an amendment (Exhibit G) to change the word from "file" to "record," which makes sense. My own suggestion is that it also be recorded in the county in which the receivership action is pending or where any receivership real property is located.

Section 37 [page 7, (Exhibit E)] says that the commencement of receivership acts as a stay against suits filed against the receivership property. Just as in bankruptcy, once a receivership is filed, the property is subject to the district court's jurisdiction, and any proceedings against the property require prior relief from the district court. The court is empowered to grant injunctions, but the court also can lift the stay for cause.

Section 38 [page 8, (Exhibit E)] allows the receiver to employ and compensate professionals.

Section 39 [page 8, (Exhibit E)] can be thought of as a fill-in-the-blanks part of A.B 235. This section deals with a use or transfer of receivership property not in the ordinary course of business. One of the interesting things about the receivership sale of property—and one of the great things about a uniform act—is that there are comments to every section that explain the intent, as well as give examples of how the law works in practice. One of the points made in section 39 with regard to a sale of receivership property is that a receivership sale is different from a foreclosure. A foreclosure is a forced sale, a distressed sale, and usually the only person bidding on a big loan foreclosure is the creditor because someone has to come up with cash at the time of the sale. If the court decides that a receivership sale can occur, the receiver is actually in a position to be able to market the property and to solicit bids for the property, and there is an opportunity to obtain a higher price for the property through a receivership sale than a foreclosure. This would be to the obvious benefit of everybody.

Section 40 [page 9, (Exhibit E)] deals with executory contracts. This section states that the receiver can reject contracts that are burdensome to the receivership property. For example, this could be a service contract for the property or it could be a property management contract. Many times developers may have an affiliated company that acts as the property

manager. The receiver would be able to reject that contract and enter into a new arms-length contract. The receiver cannot, however, terminate a lease with somebody who is in possession of the property or timeshare interest.

Section 41 [page 11, (Exhibit E)] addresses the defenses and immunities of a receiver. Since a receiver is a court officer, the receiver is subject to the same immunities as would be any judicial officer. A suit against the receiver can only proceed with the permission of the court.

Section 42 requires interim reports of the receiver if required by the court.

Section 43 (page 11) deals with notice of appointment and provides a time when claims have to be made. If claims are not made in a timely manner, they would not be upheld.

Section 44 deals with the fees and expenses of the receiver. This section describes what happens if somebody has improperly sought a receiver or sought a receiver in bad faith. Section 44 states that there is the opportunity for the court to make that person pay for the costs of the receiver.

Section 45 concerns the removal of the receiver, and section 46 deals with a requirement that a receiver submit a final report.

If there is a receivership in another state, section 47 [page 12, (Exhibit E)] says that a Nevada court would be able to facilitate property that is under that out-of-state court, and the Nevada court can facilitate the other court's acts in Nevada.

Section 48 is important because in Nevada we have a "one-action rule." This section uses the same language that is in the Uniform Assignment of Rents Act and states that seeking a receiver is not a violation of the one-action rule because the receiver is not collecting the debt; the receiver is just protecting the property. Section 48 also says that because a receivership would basically be the same as a foreclosure, once the property is sold in receivership the debtor is entitled to the same protections of the anti-deficiency laws as if there had been a foreclosure. This is actually the holding of the *Palmilla* case in 2015 by the Nevada Supreme Court.

Section 49 (page 12) says that Assembly Bill 235 is a uniform act that needs to be uniformly interpreted.

Section 50 deals with electronic signatures, and section 51 says that the law would only apply to receiverships where the receiver is appointed after the effective date of this act, which would be October 1, 2017. Again, this law offers, even for existing receiverships, a set of ground rules that the courts can look on as being an agreed-upon set of things that have been fleshed out and make sense.

Chairman Yeager:
Thank you for your presentation, Mr. Buckley. I wanted to let the Committee members know that we do have the amendment that was referenced up on NELIS (Exhibit G). It is an amendment from Michael Buckley and Alex Ortiz. It looks to be a fairly technical amendment. Can you briefly explain, again, what was it that you were trying to achieve with that amendment?

Michael Buckley:
The uniform law says that the receivership order has to be filed with the recorder. Clark County pointed out that we "record" with the recorder, not file, so we changed the word "file" to "record." My amendment said that we should specify where the receivership is filed, or where the receiver has real property.

Assemblyman Ohrenschall:
I just wanted to let the Committee know that those are both friendly amendments.

Chairman Yeager:
Mr. Buckley, I believe you testified that there is very little in the way of statutory law in Nevada on receivership. You also, however, referenced a recent Nevada Supreme Court opinion concerning this topic. Does this uniform act in any way contradict anything that is in current Nevada statute or case law, or is this bill just an expansion or amplification of what we have already?

Michael Buckley:
In my opinion, A.B 235 does not conflict with current statute or case law. In many respects it picks up on existing provisions because our present statutes basically tell us when a receiver can be appointed, but not how the process works. Assembly Bill 235 tells us how the process works. The Supreme Court case was *U.S. Bank National Association v. Palmilla Development Co., Inc.*, from March 2015. If A.B. 235 had been in effect at the time, this case would have been unnecessary. In *Palmilla* the lender argued that they were not bound by deficiency rules because the sale was not a foreclosure. The Supreme Court opined that a receivership sale is the same as a foreclosure and, therefore, the lender was bound by the deficiency rules. This bill is consistent with current statute, and I believe the Legislature passed a bill that cleaned up some of those definitions during the 78th Session.

Assemblyman Elliot T. Anderson:
I have a few questions; do we have time for them?

Chairman Yeager:
Yes.

Assemblyman Elliot T. Anderson:
Thank you. I wanted to start with some general questions and then move to the more specific, based upon provisions in the bill. Obviously, this is a uniform act and I noticed you included a map of its adoption across the country [page 2, (Exhibit H)]. Why have only four or five states introduced it this year? I do not see any enacted states. Can you explain why this is?

Michael Buckley:
I think it is simply because it is a new law. We at the State Bar were hoping to get it enacted in 2015, but the act was not finally approved until the summer of 2015. Perhaps the representative from the Uniform Law Commission can address that, but I believe it is just because the act is brand new.

Assemblyman Elliot T. Anderson
Fair enough. You do not need to go further because that makes sense. I wanted to ask you another question on a more general basis. How many stakeholders in commercial real estate receivership are concerned about this issue? Were there any major dissenting voices or people who did not get on board when the Uniform Law Commission formerly adopted this act?

Michael Buckley:
I do not have the answer to that question.

Assemblyman Ohrenschall:
As a uniform law commissioner, I have had the privilege of serving on committees that studied whether an act was needed. I had the opportunity to reach out to the stakeholders and look at the advisability of recommending that an act go to the next step, which is a drafting committee. As the commissioner for Nevada, I have never served on a drafting committee. My colleague, Assemblywoman Cohen, has served on a drafting committee, but I do not believe that either of us served on either the study committee or drafting committee for this act. I would like to defer to Benjamin Orzeske from the Uniform Law Commission, who flew in from Chicago. He is the Chief Counsel for the Uniform Law Commission.

Benjamin Orzeske, Chief Counsel, Uniform Law Commission:
The drafting process included representatives from all of the major groups on both sides of the issue: commercial lenders, mortgage holders, and receivership courts. This final act is the product of consensus to the greatest extent that is possible. Not everybody got everything they wanted, but nobody is opposing the final version.

Assemblyman Elliot T. Anderson:
That is good information. Thank you very much. I would like to get to some more specific sections. You talked about notice and hearing, and due process provisions. I am glad that those are included in the act, but what is the theory behind allowing the court to not hold a hearing? At the very least, it is probably good to hold a hearing and check on service and make the attorneys come in and ensure that the parties are properly served. Am I correct?

Michael Buckley:
I am not a litigator, but I know of circumstances where one party seeks ex parte relief from the court. My sense is that there could be a situation where a property is in danger of being lost and emergency relief is needed. Again, this would be up to the court. As I read the bill, section 26, subsection 2(c) says that notice must be given, but the court can decide or determine that there may be circumstances where a notice or hearing is not required. I think, as is the case in many situations, individuals are dependent on the judiciary to make those decisions, and they are bound by due process in any event.

Assemblyman Elliot T. Anderson:
Fair enough. This strikes me as a trustee-type relationship for the purposes of commercial real estate. I think this is also very similar to a Chapter 13 bankruptcy or a Chapter 7 trustee who would manage real estate—which is pretty common in Nevada—or a Chapter 11 bankruptcy because this is commercial. Why do lenders seek the appointment of a receiver? Why would they allow a receiver to step into their shoes? I understand why a receiver would be appointed when it comes to preserving property—it makes sense to preserve the status quo in the middle of a proceeding—but why would a lender allow a receiver to sell its property without its approval?

Michael Buckley:
Ninety-nine percent of these cases deal with a commercial property where the mortgage is in default. These are situations where the property owner's actions are unknown. In these cases, the lender is concerned that rents are not being maintained, rents are being taken away, perhaps the property is not being maintained, or that the owner may have disappeared. The first priority of the receiver is to preserve that property and, for everybody's benefit, this is usually what a receiver does. The receiver is often a licensed property manager who will make an inventory of the property and the leases, make sure the rents are being collected, and make sure the property is being maintained. I think this concept of selling the property is a very new idea, but I believe it is permitted under federal law.

You are correct, this process is very similar to a debtor in possession or a trustee in a bankruptcy. As far as the concept of a sale, it is actually easier for the lender to just foreclose. Nonjudicial foreclosure is a simple process. In this situation, a lender would have the receiver collect the rents until it is time to foreclose and then they would foreclose. This act does not address what happens when bankruptcy intervenes; if a bankruptcy intervenes, the case would be heard in bankruptcy court.

One of the great aspects about a sale in receivership is that the court would have all the parties before it. Under current law one of the things that frequently happens—especially in homeowners' association foreclosures—is that it is almost impossible to get title insurance on a property. There are often multiple disputes as to who owns the property, whether the lien has been satisfied, et cetera. This act would allow the court to have all the parties in front of it, and the court could make sure that the buyer could get the title as a condition of sale. In a way, this helps marketability. As I said earlier, I think sales through the receivership will be fairly rare as it is just cheaper and simpler to foreclose.

Assemblyman Elliot T. Anderson:
This still seems odd to me. If we are talking about a matter of maintaining the status quo, a receivership makes perfect sense to me. Receivership is a well-favored remedy to maintain property that is subject to litigation and that makes a lot of sense. Granting the receiver the power to abrogate contracts and do a whole number of other things seems somewhat strange when I view receivership as the ability to maintain the status quo.

The other question I had was specifically about status as a lien creditor under section 32 of A.B. 235. Why does the receiver not just step into the shoes of the lender who is seeking the appointment?

Michael Buckley:
The receiver would step into the shoes of the lender seeking the appointment of the receiver.

Assemblyman Elliot T. Anderson:
Why do we need to give them a lien creditor status?

Michael Buckley:
Basically, it is the same as the lender itself. The lender itself has priority over unsecured junior liens or unperfected liens. The receiver is in the same position.

Assemblyman Elliot T. Anderson:
That makes sense. I did not understand why the lenders did not assume their prior liens. It looked to me as if you were trying to give them a new lien on the property through section 32.

Michael Buckley:
I think section 32 allows us to cut off parties who are not properly perfected, which we cannot do under current law.

Assemblyman Elliot T. Anderson:
Okay. I do not have any more questions at this time.

Assemblywoman Cohen:
You began your testimony by mentioning one Nevada Supreme Court case regarding receivership, and you stated that we have very limited statutory law concerning this subject. What hindrances have practitioners and the courts found because of that limited library they have to work with?

Michael Buckley:
I am not a litigator, and I do not practice before the court. I read the briefs in the *Palmilla* case and I think that case highlighted several questions that were not clarified under the law. *Palmilla* asked if a receivership sale is the same as a foreclosure and, if so, if deficiency rules apply. Assembly Bill 235 answers that question. By what must a party file for deficiency? *Palmilla* answered that question—A.B. 235 would not answer that. *Palmilla* asked if one could sue the borrower without reference to deficiency; this law settles that, as did *Palmilla*. My sense in reading the briefs is that there were all kinds of questions asked on both sides of the case, and that each side basically had a free-for-all to make any argument they could because of the lack of statutory authority. Assembly Bill 235 will give us a set of ground rules so that everybody will play by the same set of rules. Because the appointment of a receiver is basically dependent on the equitable power of the courts under current law, every different court has the power to do what they want. I would not say it is a hindrance, but with this bill, we will not have to start at the beginning each time this situation arises. We will have a set of rules to work with, and I think that is the point of A. B. 235.

Assemblywoman Cohen:
Okay, thank you.

Chairman Yeager:
Mr. Orzeske, do you have any additional supportive testimony to give?

Benjamin Orzeske:
I want to thank Mr. Buckley and the Nevada Bar for their careful review and support of this legislation. The reason for uniformity, and the reason that the ULC took on this project in the first place, is that the commercial lending market has become more and more a national market rather than a state one. Lenders like to lend when they know the rules, the rules about what is going to happen upon default. This bill clarifies the rules that used to vary a great deal from state to state and sometimes even from court to court within a state. Assembly Bill 235 sets ground rules so that everybody knows what will happen in the event of the appointment of a receiver. It also allows lenders to be more comfortable, which should benefit Nevada businesses in the long run by opening up a greater number of lenders who will be willing to compete for their business.

Assemblyman Elliot T. Anderson:
I notice that A.B. 235 contains some proposed conflict of interest provisions for receivers. That got me thinking, is there a code of receiver ethics? This could be an important concept to fully vet because receivership is very analogous to the trustee context in bankruptcy, and trustees have a code of ethics that they have to follow under bankruptcy law. Are there any provisions in this bill that will require receivers to act in a similar way?

Benjamin Orzeske:
The issue before this Legislature is that receiverships are a creature of the court. Rules vary widely from one state to another. For instance, there is a California receivership forum that has their own standards, but those are not followed in every other court. We found that receivers were relatively rare in many courts, and therefore there existed only a few people who acted as receivers. We found that, in courts that did work with receivers, the receiver was often somebody who had a relationship with the court, or the judge's brother-in-law was appointed receiver. That sort of favoritism should not exist; the receiver must be a neutral party. The receiver needs to be independent in order for everybody to have confidence in the receiver running the business. We tried to fix this problem in A.B. 235 by defining what "independent" means, and who can be a receiver. Essentially, the receiver has to be an independent party with few exceptions. For example, if the lender is a national bank and the receiver happens to have a personal bank account at that bank, that does not disqualify the receivers. On the other hand, if the receiver is an employee of the bank or a law firm where the bank is their biggest client, then that would disqualify the receiver as they are no longer independent. This is the first attempt to nationalize those standards.

Assemblyman Elliot T. Anderson:
Would it hurt uniformity too much to require the Supreme Court of Nevada to adopt ethics rules that are similar to the trustee context? Would that be too much of a problem nationally?

Benjamin Orzeske:
I do not think so. It obviously depends on what the rules were and whether the rules contained anything contradictory, but I cannot imagine why there would be.

Assemblyman Elliot T. Anderson:
Okay, thank you.

Assemblyman Ohrenschall:
I think that if the court saw fit to adopt something like that, they could do so by court ruling. I do not believe that would affect the uniformity of the act or how it would meld with other acts that, hopefully, will be enacted around the country.

Assemblyman Elliot T. Anderson:
Mr. Chairman, I will discuss this with the Nevada Supreme Court and see if adding a code of ethics is something that they are willing to do. I believe this would a be good, positive addition to this uniform act.

Chairman Yeager:
Thank you Assemblyman Anderson. Are there any further questions? [There was no response.] Is there anyone who would like to testify in support of A.B. 235, either down in Las Vegas or here in Carson City? [There was no one.] Is there anyone who would like to testify in opposition to A.B 235? [There was no one.] Is there anyone who is neutral on A. B. 235? [There was no one.] Are there any concluding remarks from the presenters on A. B. 235?

Assemblyman Ohrenschall:
Thank you, again, for scheduling both of these uniform acts today. I want to thank Mr. Buckley for flying up from Las Vegas and Mr. Orzeske for flying in from Chicago. I think that this act will provide a much-needed framework in this area of the law, and I hope the Committee will consider processing this bill.

Chairman Yeager:
Thank you for the presentation. We will go ahead and close the hearing on A.B. 235. At this point, we will open the hearing on our next bill on the agenda, Assembly Bill 239, which is also a uniform act that seeks to enact the Revised Uniform Fiduciary Access to Digital Assets Act.

Assembly Bill 239: Enacts the Revised Uniform Fiduciary Access to Digital Assets Act. (BDR 59-687)

For those who were on this Committee in 2015, this bill may sound familiar. I think there was a version of this bill that was introduced and presented in the 78th Session [Assembly Bill 434 of the 78th Session]. Could you give some context as to how this act is different from the version presented during the 78th Session?

Assemblyman James Ohrenschall, Assembly District No. 12:
As I said earlier, I have been privileged to serve as a uniform law commissioner for Nevada and as the liaison for the Uniform Law Commission. As with the last bill, I am a good enough lawyer to know that when I have someone with greater expertise than me, I let him or her handle the bulk of a presentation like this. I want to turn this over to Mr. Orzeske, who is probably our nation's greatest expert on this act.

This act does have a history here in the Nevada Legislature. The former chairman of this Committee, Assemblyman Hansen, was kind enough to hear this bill during the 78th Session. Last session this bill had a different name; it was the Uniform Fiduciary Access to Digital Assets Act. Several digital media companies expressed quite a few concerns during the 78th Session, and former Chairman Hansen was kind enough to open up the "woodshed" to Mr. Orzeske and representatives from Facebook, and Google—among other companies. That was the genesis of Assembly Bill 239, the Revised Uniform Fiduciary Access to Digital Assets Act, as I understand it. This act has been enacted in many jurisdictions across

the country, and I think this version addresses the concerns raised by the digital media companies.

What is this act about? On the first day of the Committee, I mentioned that this Committee really touches our constituents more than any other committee in the building because we deal with life-and-death issues. Assembly Bill 239 addresses life-and-death issues. None of us like to talk about what will happen after we pass away, but we do try to take care of our families, houses, and bank accounts ahead of time. This bill seeks to allow for planning as to what happens to our digital assets, whether family photos in a Gmail account or messages to our children in a Facebook account. That is why this bill is important. This is a bill that affects every generation: it affects Millennials, it affects everyone who is on Snapchat, Twitter, Instagram—everyone who has family treasures and family history on digital platforms. This bill tries to allow individuals to decide what happens to digital materials after they die.

Benjamin Orzeske, Chief Counsel, Uniform Law Commission:
I wanted to preface my remarks by saying thank you to three Uniform Law commissioners who are in the room: Chairman Ohrenschall, Assemblywoman Cohen and Brad Wilkinson. Thank you, on behalf of the Uniform Law Commission (ULC), for the time that you volunteer to the organization to help us draft these laws. We could not do our work without your help. Thank you, also, for scheduling the hearings on these two bills on the same day; the ULC is a nonprofit organization with a limited travel budget.

The Revised Uniform Fiduciary Access to Digital Assets Act is an unwieldy name. I describe the bill as, What happens to your online accounts when you die or when you lose capacity to handle them yourself (Exhibit I)? We have had a system in place for many years to handle our tangible property after we pass. We appoint another person as fiduciary. That person might be called an executor, a trustee, or a personal representative depending on the exact circumstances, but they are subject to a set of fiduciary duties to manage our property for the benefit of the user or the deceased user.

Our current system worked pretty well for a long time, but I am sure the Committee can understand the problem posed by online accounts. There is, oftentimes, password protection; if a person dies without leaving his or her password for anybody, an executor will have a hard time administering the estate. This becomes a big problem for individuals who receive bills, account statements, or bank statements by email, and the executor cannot gain access. An executor will have trouble inventorying the estate and trying to determine what the assets and liabilities of the estate are. In addition to finances, there are also more personal concerns. If the family photos are not in a photo album but they are all on Facebook, the photos could be lost to eternity if the executor does not have access to the Facebook account.

When I was here during the 78th Session, I testified in favor of the first version of this bill, and I was greatly outnumbered by tech lobbyists who were in opposition to it. I am happy to

report that the ULC addressed those concerns and has returned with the revised act that is now supported by the tech industry. It has been enacted so far in 23 states, and there are another 17 states—including Nevada—that have introduced bills so far this year. I expect more than 40 states will have introduced this legislation by the end of this year's legislative sessions. There is a great need for A.B. 239, and it is moving very quickly.

There are three major differences between the original act and this one. First of all, there were privacy concerns in the original version. The tech industry and others pointed out that email is different from paper mail. If the executor of an estate is granted access to paper mail, the executor will obtain mostly junk mail, but also bank statements, account statements, and bills, and the will will have the information they need. If, however, an executor has access to email—because email has an automatic archiving feature—the executor might actually gain access to a ten-year history of personal communications. These were some of the privacy concerns at stake.

The revised version of this act compromises by flipping the default rule for a subset of digital assets: personal communications. Personal communications include email, text messages, and social media posts that go to a select group of friends rather than to the general public—to name a few. In the revised act, the executor will not have access to the content of personal communications unless specifically directed by the deceased. This can be done in a will or by using an online tool, which I will explain in a minute. Under this revised act, the executor will gain access to a list of personal communication messages but not the content. This information will allow the executor to see a bill from this particular utility company or a monthly email from a particular bank, and he or she may then investigate whether those accounts may contain assets. Assembly Bill 239 maintains individual privacy by keeping the content of information private unless access is granted while the deceased is still alive, but it gives the executor sufficient information so he or she can do their job. This compromise is effective and has already been implemented in 23 states.

The second major change allows users to grant access to their accounts through a three-tiered system of priorities. I will demonstrate this by showing you my Gmail account and a new setting Google has provided. Assembly Bill 239 refers to this feature as an "online tool," but it can also be thought of as a beneficiary designation. When a policyholder names a beneficiary in a life insurance policy to claim assets in the event of the policyholder's death, that beneficiary designation overrides the terms of the deceased's will. For example, if I have a general will that says, "I leave all of my assets to my sister," but I also have a bank account that has my brother's name on it, my brother gets the bank account and my sister gets everything else. Beneficiary designations are specific, so for specific assets, these designations take precedence over the general bequest in a will. Google's online tool works exactly the same way.

Google calls their tool the "Inactive Account Manager." They ask users to choose what Google refers to as a "time-out period." On my account, it is three months. If there is no activity in my Gmail account for three months, then Google goes on to the next step.

At this point, a user can tell Google to delete the account or, in my case, I have named my wife as beneficiary. I added her as a trusted contact and allowed Google to contact her, and she could have access to this account. In addition to this, Google owns several different services and they allow users to designate beneficiaries for each of their services. I could, for instance, give my wife access to my email account, allow my business partner to access the documents I stored in Google Drive, and give my brother access to the family videos I uploaded to YouTube. Those are all Google companies and Google services, and Google allows users to be as specific as they want. Conversely, users can direct Google to delete all the accounts and not allow access to anyone after a user's death. In this way, an online tool is just like a beneficiary designation; when offered by a company and utilized by a user, this beneficiary designation is the first priority. Assembly Bill 239 makes this designation legally enforceable. When I die in Illinois, my wife will have access to my account, and Google must give her access, based on this law.

The second tier in this system of priorities is the more traditional way to designate a beneficiary. This tier involves writing out a will, trust, or a power of attorney: some sort of written document that says, "I want my executor to have access to these accounts." The user names these accounts specifically or refers generally to digital assets as well as tangible assets. Assembly Bill 239 makes this legally enforceable as well. Google, Facebook, or whomever you have an account with will have to give access to the beneficiary named in the will.

The third tier concerns "terms of service," which is the click-through contract that nobody reads when they open up an online account. It is the clause that requires a user to say, "I agree to the terms of service." If the terms of service includes language that states what will happen when an account holder dies, that will take precedence and become active only if the account holder has neither taken advantage of an online tool, nor left any written instructions in a will or other document.

That was the second major change, the three-tier system of priority. The original version simply invalidated any portion of the terms of service that would not allow fiduciary access. Tech companies did not support that, but they have agreed, in the revised version, to allow designations made in a will or trust to take precedence over their terms of service. I hope that more and more companies will begin offering these sorts of online tools. The two major companies who currently do are Google and Facebook.

The third change we made concerns anonymous accounts. Under current law, if I open up an email account with Google or Yahoo! I do not necessarily have to give them my real name or any other information about me such as an address or a credit card number. If I have the email address ben123@gmail.com, Google does not necessarily know that that belongs to me, a person named Benjamin Orzeske. Tech companies were rightly concerned about what would happen if a user like me dies and an executor requests access to Benjamin Orzeske's email. Gmail, or another company, may not know who I am. Assembly Bill 239 says that the fiduciary who is requesting access must provide some more specific information such as

the exact email address or account number—whatever information the company issued—for the account the executor is trying to gain access to. If necessary the executor must link the online account to the actual person whose estate they are administering. Otherwise, and without this provision, this access would open up new avenues for potential identity theft. I could pose as a fiduciary in order to gain access to somebody's private email account. The companies who administer online accounts find themselves liable for privacy violations if they released the wrong account information or information for an individual who is not dead to the wrong fiduciary. This bill allows companies more rights to request further information in an attempt to positively identify the account an executor is trying to gain access to. The bill also allows companies to require that executors link anonymous accounts with the actual estate of the person that the fiduciary is representing.

Those are the three main differences between the original act and the revised act. Does the Committee have any questions?

Assemblyman Ohrenschall:
Mr. Orzeske showed me the same online tool he shared with the Committee for the first time today. Facebook and Google offer this tool, and it allows for beneficiary designation in compliance with the Revised Uniform Fiduciary Access to Digital Assets Act. Regardless of if you drew up a will or a trust years ago, prior to opening a Facebook or Gmail account, your beneficiary designation in the online tool would take precedence over whatever is stated in your will or trust. On the other hand, if your wish were to have your online accounts deleted after death, that designation would take precedence over whatever is in the testamentary document.

Assemblywoman Cohen:
I want to make sure I understand this correctly. Does the decedent have to be proactive? Does he or she have to make their will?

Benjamin Orzeske:
That is true only for this subset of digital assets, private communications. If the decedent dies without a will, the executor would still have access to other types of digital assets such as a business webpage or a virtual currency like Bitcoin. "Digital assets" is defined very broadly as, "an electronic record in which a natural person has a right or interest." That is the big universe. In the small universe, a decedent must give permission before access is allowed; this universe contains private electronic communications between private parties.

Assemblywoman Cohen:
How are we protecting the public so that they know that the decedent has passed and that they are not dealing with the decedent anymore?

Benjamin Orzeske:
I am not sure I understand the question. Who is unaware that they are not dealing with the decedent?

Assemblywoman Cohen:
The public. Say, for example, that the decedent—person X—is a Facebook friend. If person X passes and they have given person Y access to their social media accounts, how would person X's Facebook friends know that X has passed?

Benjamin Orzeske:
There are two ways, essentially. Facebook built a "legacy contact" into their product, and this contact has only limited power over the account. Users cannot post new information as the legacy contact. I believe legacy contacts may make one change, such as changing the profile picture and putting up a notice that the account holder is now deceased, but legacy contacts cannot post new material as if they were the account holder. Assembly Bill 239 also specifically references fiduciary duties, which are the same legal duties that are now in force to prevent the executor of your estate from, for instance, selling your property for their own benefit and keeping the proceeds or using your car indefinitely rather than passing it according to the terms of your will. Those same fiduciary duties apply to anybody who is managing a decedent's digital assets. Assembly Bill 239 specifically says that executors have that duty of loyalty, duty of care, and duty of confidentiality, and executors may not impersonate the person whom they are representing.

Assemblywoman Cohen:
I understand fiduciary duty, but I feel like this situation is different. We are talking about the Internet: we are talking about millions of people, and I feel there is a greater chance to encounter bad actors online. I would like more information about the protections that are available to the public as a whole. I used this example when I was talking to my colleague. I rescue greyhounds and I have friends all over the world who do as well. One of these friends jumped out of a plane as part of a fundraiser, and I sent that friend a £5 donation. If she were to pass away, I would have no idea if her husband kept using her Facebook page under her identity. I would still send £5, he could take that money and go on a cruise, and I would have no idea. What protections are out there to stop that from happening within this act? I understand what you said about how Facebook protects the public, but I am also concerned about consumer protections offered by other tech companies as well.

Benjamin Orzeske:
The situation that you describe exists now under current law. If the husband had his wife's password, he could still impersonate her, whether or not he is appointed as executor. Under this act, there are only two ways an individual can become a fiduciary: one way is a voluntary relationship where the decedent has named the person they want to act as fiduciary—presumably, that is a trusted person that the decedent has given responsibility to and a person the decedent wants to have this power over their online assets. The other way is for a fiduciary to be appointed by a court, under court oversight, and given a specific task: to administer the estate in accordance with the court's directions and in accordance with the law. The danger you described is real and it does exist, but this law does not do anything to increase that danger. If anything, I think this law reduces the danger by putting a level of oversight over the fiduciary, and this oversight does not exist now.

Chairman Yeager:
You may have mentioned this in your presentation, but what is the current default setting on Facebook? Unfortunately, the older I get, the more friends I have who pass away. I find that they still appear to be on Facebook, at least in terms of the fact that I still get notifications about their birthdays. It does not look to me like anyone else is controlling the account, but do you know how Facebook currently handles this type of situation? Will these profiles and accounts essentially sit there in perpetuity, or does Facebook have some kind of mechanism where they can essentially delete or clean out accounts after a certain period of time?

Benjamin Orzeske:
I do not want to speak on behalf of Facebook, because they do change their terms of service on occasion. To my knowledge, at least up until the last few months and the last time I checked, Facebook is not proactive in any way, but if they are notified by either a legally-appointed fiduciary or by a member of the family—who can prove some relationship—Facebook will take down the account if they are asked to do so.

Legacy contacts are different. The legacy contact cannot just take down the account but can also maintain the account so friends can continue to post there, offer condolences or memories, or they may set up what is called a memorial status, where that person will not make any more posts but friends can still post to the page and the posts would be visible to anyone who was a friend before death.

Each company handles these situations a little bit differently. You can understand why that might be something that a Facebook user might want to continue, whereas there is really not that same use for a business email account after the person dies, to maintain it in that manner. It differs by company.

Chairman Yeager:
It looked like a number of states have already enacted this act from the map that you provided (Exhibit I), and, as you said, you are aware of a number of states that are considering it this legislative cycle. Were there any states that considered this revised act but decided not to enact it?

Benjamin Orzeske:
No. There have not been so far.

Assemblyman Elliot T. Anderson:
I want to ask one of the same questions I asked during the last bill hearing. Were there any major stakeholder groups that were—I am not saying they were not perfectly happy—who were outright opposed?

Benjamin Orzeske:
No. The two major opponents to the original version were the tech industry and some privacy organizations like the American Civil Liberties Union and the Electronic Frontier Foundation. With the changes that we have made to protect privacy, the tech industry is now on board. We have endorsement letters from Google and Facebook, and other companies have been testifying in favor of bills in other states. The privacy organizations are officially neutral now on this act.

Assemblyman Elliot T. Anderson:
Great.

Assemblywoman Cohen:
You mentioned Bitcoin: Is there any other type of something with actual monetary value that can be involved with this act?

Benjamin Orzeske:
Yes. You can imagine, for instance, a person who was a writer, who died and had unfinished manuscripts that are online. Those could have significant value to the estate. If you have somebody who was a celebrity and there were assets online that they had stored—photographs or films or whatever assets they had—there could potentially be very great monetary value to many different types of digital assets.

Assemblywoman Cohen:
Okay, but nothing that is actual money or the equivalent of money, except for Bitcoin?

Benjamin Orzeske:
The definition of digital included in the bill is written very broadly, and that is on purpose. We want to cover assets like Bitcoin as well as webpages. We also do not know what sort of assets are going to exist in five years, and we do not want to have to rewrite the law every time something new appears. "Digital assets" is defined as an electronic record in which a user has a right or interest. That includes things such as virtual currency. The definition goes on to say that it does not include underlying assets unless that asset is itself an electronic record. It is a convoluted way of saying if you have an online bank account, the dollars in it are not digital assets; those are handled under the same rules that we always have handled them under, but access to the account and releasing the password is a digital asset that would be. The account access would be a digital asset in which the user had a right, and therefore it would be covered by this bill. Bitcoins, because they are also an electronic record, would meet that definition of digital assets as well. Bitcoin and its competitors, as other virtual currencies, are the only thing I could think of off the top of my head that are currencies, if that is what you are saying. You could have other financial accounts, like a securities account, where the stake that is held in that securities account is not a digital asset; it is handled under the current rules rather than under this bill.

Assemblywoman Cohen:
Thank you.

Chairman Yeager:
What about a situation where an individual has gift card balances that have not been used, from a company such as iTunes or Amazon.com? Would this act address this, or would this situation be handled as actual currency under the current act?

Benjamin Orzeske:
Online account balances would be handled under this act. Frequent flier miles through an airline account would also be considered digital assets handled under this act, and the executor would be given the authority to manage the account and cash the miles in if it added value to the estate.

Chairman Yeager:
Are there any other questions from the Committee? [There were none.] Is there anyone who would like to testify in support of A.B. 239? Seeing no one, is there anyone who would like to testify in opposition to this bill? [There was no one.] Is there anyone who would like to testify in the neutral position? [There was no one.] Are there any concluding remarks?

Assemblyman Ohrenschall:
In my opinion, this act, if it passes, will really help our constituents decide what they want to do with their digital assets, and they will not be subject to the vagaries of probate court if it were to go that far.

Benjamin Orzeske:
The only other thing that I will add, if it is not obvious already, is the need for uniformity in this area of the law. Tech companies operate across state lines, and they were initially opposed to a uniform law. They would have preferred a federal law, but probate is a matter of state law so this issue had to be settled at the state level. A uniform law is the next best option, and I think it makes a lot of sense to have Facebook play by the same rules in Nevada as it does in other states. I think we will be very close to achieving uniformity in the United States within the next year or two, as can be seen by the quick adoption of this act in states throughout the country.

Chairman Yeager:
Thank you, Mr. Orzeske, for traveling here today to present this bill, and thank you both for your hard work on this. I am very encouraged that, after last session, you were able to work with the stakeholders and bring something that it seems everyone agrees to. There certainly is a need for this act based on what we have talked about today. Thank you again for being here.

We will go ahead and formally close the hearing on A.B. 239, and we will open up for public comment. Would anyone like to give public comment on any topic? I do not see anyone in

Las Vegas, and I do not see anyone approaching the table here in Carson City. Is there anything else from members of the Committee this morning? [There was no response.] I want to remind everyone that we will be back tomorrow morning at 8 o'clock for a Judiciary Committee. We do have a work session with a few bills, and we will intend to take that first. We are adjourned [at 10:21 a.m.].

RESPECTFULLY SUBMITTED:

_____
Devon Isbell
Committee Secretary

APPROVED BY:

_____
Assemblyman Steve Yeager, Chairman

DATE: _____

_____
Assemblyman James Ohrenschall, Chairman

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a copy of a PowerPoint presentation titled, "Nevada Department of Public Safety: Department Overview," dated February 2017, presented by James M. Wright, Director, Department of Public Safety.

Exhibit D is a memorandum dated March 8, 2017, from Shawn Arruti, Captain, Division of Parole and Probation, Department of Public Safety sent to and submitted by Natalie Wood, Chief, Division of Parole and Probation, Department of Public Safety, regarding Assembly Bill 181.

Exhibit E is a document titled, "Uniform Commercial Real Estate Receivership Act, Assembly Bill 235 (As Introduced)," dated March 9, 2017, presented by Michael E. Buckley, Chair, Real Property Law Section, State Bar of Nevada.

Exhibit F is a document titled, "Uniform Commercial Real Estate Receivership Act: Prefatory Note," dated March 9, 2017, submitted by Michael E. Buckley, Chair, Real Property Law Section, State Bar of Nevada.

Exhibit G is a proposed amendment to Assembly Bill 235, submitted by Michael E. Buckley, Chair, Real Property Law Section, State Bar of Nevada.

Exhibit H is a statement written and presented by Benjamin Orzeske, Chief Counsel, Uniform Law Commission, to the Assembly Judiciary Committee in support of A.B. 235, dated March 9, 2017.

Exhibit I is a statement written and presented by Benjamin Orzeske, Chief Counsel, Uniform Law Commission, to the Assembly Judiciary Committee in support of A. B. 239, dated March 9, 2017.