MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Eightieth Session
March 27, 2019

The Committee on Judiciary was called to order by Chairman Steve Yeager at 8:04 a.m. on Wednesday, March 27, 2019, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/80th2019.

COMMITTEE MEMBERS PRESENT:

Assemblyman Steve Yeager, Chairman
Assemblywoman Lesley E. Cohen, Vice Chairwoman
Assemblywoman Shea Backus
Assemblyman Skip Daly
Assemblyman Chris Edwards
Assemblyman Ozzie Fumo
Assemblywoman Alexis Hansen
Assemblywoman Lisa Krasner
Assemblywoman Brittney Miller
Assemblywoman Rochelle T. Nguyen
Assemblywoman Sarah Peters
Assemblyman Tom Roberts
Assemblywoman Jill Tolles
Assemblywoman Selena Torres
Assemblyman Howard Watts

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Diane C. Thornton, Committee Policy Analyst
Bradley A. Wilkinson, Committee Counsel
Lucas Glanzmann, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

Alison Brasier, representing Nevada Justice Association
Graham Galloway, representing Nevada Justice Association
George T. Bochanis, representing Nevada Justice Association
David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada
Dane A. Littlefield, President, Association of Defense Counsel of Nevada
Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction
John Tatro, Senior Judge; and representing Nevada Judges of Limited Jurisdiction
Richard Glasson, Judge, Tahoe Justice Court; and representing Nevada Judges of Limited Jurisdiction
Ann E. Zimmerman, Judge, Las Vegas Township Justice Court; and representing Nevada Judges of Limited Jurisdiction
Paul C. Deyhle, General Counsel and Executive Director, Commission on Judicial Discipline
Jerome M. Polaha, Judge, Second Judicial District Court
John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office
Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office
John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing Nevada District Attorneys Association

Chairman Yeager:
[Roll was taken. Committee protocol was explained.] Today, we have three bills on the agenda. I will now open the hearing on Assembly Bill 285.

Assembly Bill 285: Enacts provisions relating to a mental or physical examination of certain persons in a civil action. (BDR 4-1027)

Alison Brasier, representing Nevada Justice Association:
What I would like to do is explain what these examinations are in their current form. They are unique to personal injury litigation. I want to lay the foundation for what these examinations are and then turn it over to my colleagues in Carson City to explain more about the history of how we got here and what this bill proposes to do.

What we are talking about in this bill is commonly referred to as a "Rule 35" examination. They are very unique to personal injury cases because these examinations happen when someone is alleging injury. When a person alleges an injury, he or she can be forced to appear at an examination by an expert witness who is hired by the insurance company and to whom that claimant has no relationship. Under the current state of our rules, that claimant—the victim—has no right to have an observer present. They do not have a right to record what happens. What we have seen is, if there is a dispute in what happens in the examination, most of the time deference is given to the person who is being presented to the judge or jury as an expert witness rather than the victim or plaintiff who was forced to present at that examination. That is the current state of the law. The reason I used the word "unique" at the beginning of my testimony is because the way it currently stands in these forced examinations, the claimant has no rights as part of that examination.

When we look at it in different contexts, we would never expect people to submit to an examination under this current set of conditions. Outside of litigation, if you have an important medical examination, it would be commonplace for you to bring a friend or family member with you, maybe to ease anxiety and to make sure you are capturing all the important information. If you went to a doctor who said, "No, you do not have any right to have someone present with you during this examination," you would have the choice to pursue another doctor if you did not feel comfortable in that scenario. Under the current rules for these Rule 35 examinations, that is not the situation for personal injury victims.

Also, this is very unique to Nevada personal injury cases. Washington, California, and Arizona—all of our neighboring states—currently allow what this bill proposes. They allow an observer to be present during the examination and they also allow a recording to happen. Nevada is really an outlier with our western neighbors as far as not providing these protections for the injured party during the examination.

Additionally, in the workers' compensation context in Nevada, observers are allowed to be present during workers' compensation examinations. Again, this is really an outlier for Nevada personal injury cases where we do not already have these protections afforded to the claimants. I will turn it over to my colleagues to explain why that is important and how we got here.

Graham Galloway, representing Nevada Justice Association:
The origins of this bill flow from a committee formed by the Supreme Court of Nevada two years ago to review, revise, and update our *Nevada Rules of Civil Procedure* (NRCP)—the rules that govern all civil cases. The committee was made up of two Nevada Supreme Court justices, various district court judges from throughout the state, a number of attorneys who represent the various fields of practice in the civil side of litigation, and a member of the Legislative Counsel Bureau. The committee was broken down into subcommittees, and I chaired the subcommittee that handled this Rule 35 medical examination issue. Our subcommittee recommended substantial changes to the rule. Mr. Bochanis was a member of the committee. We voted 7-to-1 to make substantial changes, the changes that are set forth or embodied in the bill before you, Assembly Bill 285. Unfortunately, when our

recommendations went to the full Supreme Court of Nevada, they rejected our changes for reasons we are still not clear on. At that point, we reassessed our position.

Contrary to the opponents of this bill who want to say this is a procedural matter, this is not a procedural matter; it is a substantive right. It is the right to protect and control your own body. The scenario we often see in this situation is that our clients are going through a green light or sitting at a stop sign, and somebody blasts through the light and clocks them, injuring them. They are then required to go to an examination by an expert who is hired by the defense. These are experts that are trained, sophisticated, and weaponized. They put our clients through an examination and, in the process, the clients are interrogated. Our clients have to go through this without any representation.

This is not a criminal situation, but in the criminal field, you often hear the terms "right to counsel," "right of cross examination," and "due process." Those terms do not necessarily transfer over into the civil arena. In the civil arena, we have what is called "fundamental fairness." Is it fundamentally fair that an injured person is required to go to a hired expert—an expert whose sole goal is to further the defense side of the litigation—have their body inspected, have their body examined, and then be interrogated without there being a lawyer present to represent that individual? There is nothing in the law in any arena where that occurs except for the personal injury field. That is what A.B. 285 is designed to do: bring some fundamental fairness to the process and to level the playing field. It is not a procedural rule. That is how it is being characterized by the opponents of this bill. It is a fundamental right that you should have representation in such an important situation. I will turn it over to my colleague who will explain the nuts and bolts of the bill.

George T. Bochanis, representing Nevada Justice Association:
This bill is very important to individuals who are being subjected to these insurance company examinations. The reason we are before you today is because this bill protects substantive rights. This is not a procedural rule, which you would usually find within our NRCP. Our *Nevada Rules of Civil Procedure* involve things such as how many years someone has to file a lawsuit and how many days someone has to file a motion or an opposition to a motion. This bill does not involve those types of issues but, instead, involves a substantive right of a person during an examination by a doctor whom he did not choose, does not know, and has no relationship with whatsoever, a doctor who was chosen by an insurance defense attorney. This is a doctor who is going to handle this patient. It is not really a patient because there is no doctor-patient relationship. This examinee is going to be touched and handled by this doctor with whom he has zero relationship. It is being forced upon him as part of this examination. That is why this is a substantive right, and this is why we are before you here today.

What I would like to discuss with you are the two components of this bill. The first is that we are requesting that an observer be present during these types of insurance company evaluator examinations. That observer can be anyone; it can be a spouse, parent, friend, or it could be the person's attorney or a person from that attorney's staff. Really, when you look at the current rule, the attorney/observer portion of it is really the only difference between the

current rule and what we are asking for as part of this bill. I am surprised there is any opposition to the attorney/observer portion of this bill. As Ms. Brasier said, this is already allowed by every other state that surrounds Nevada. California, Utah, and Arizona already allow attorney observers.

I can tell you from representing clients in workers' compensation cases in Nevada for more than 30 years, we already attend doctor examinations in workers' compensation cases—"we" being attorneys or our staff. It happens on every permanent partial disability evaluation. An attorney is present. To me, the reason is very obvious; you want openness during this process. You already have an agent of the insurance company, the doctor, present. This bill levels the playing field by having an attorney or attorney staff member present. Is an attorney going to attend every one of these examination? No, probably not. How about an attorney's staff member? Probably. A family member? Yes. These are options that a person who is being subjected to this type of examination should have. All we are seeking is a level playing field where during these examinations you have an agent of the insurance company—the doctor—present, along with an observer who could be an attorney or someone from the attorney's office.

The language in the proposed bill is very clear: the observer is just an observer. They cannot participate. They cannot interrupt. If anything like that happens, the doctor can terminate the examination, and you can go to court to work out your problems or differences. I can tell you that in attending workers' compensation permanent partial disability evaluations, I have never had a doctor terminate an exam during the hundreds of exams I have attended over 30 years. Never once have we ever had a problem with the doctor. Do the doctor and I get along at all times in these evaluations? No, probably not. However, we are able to keep it civil. We are able to keep it professional, and there is no reason an attorney observer being at the exams in this context is going to be any different. That is the observer component of this bill.

I should also mention that having an observer prevents abuse during these examinations as well, because it keeps everything open and transparent. Think about it in a practical sense. We have had doctors who have had some issues during these exams, and we felt as though we should not need to have a hearing for every examination to show that a doctor is having problems with taking advantage of people during some of these examinations. Fortunately, it is a minority of doctors with whom we have had these issues. This observer keeps it open.

The second portion of the bill is audio recording. It is not video recording. This can be done as simply as using a cellphone, or it can be done as complicatedly as bringing in a court reporter. In practicality, how many times is a court reporter going to be brought in even though this language allows it? Probably 1 percent of the time, if at all. There are so many other means of communication whereby you are able to record. Again, this promotes openness and transparency during these examinations. The beauty of the language of this bill is that the doctor can also record it. You have a recorded version by the doctor, you have a recorded version by the patient or observer, and you know what happened. There is none of this "he said, she said." I cannot tell you how many cases I have had to litigate over an issue

where an examinee goes to one of these exams, we receive the report back, and there are things in it that are totally unfamiliar to me. I ask the client and she says to me, "I never told him that." Now we have this dispute over what was said during the exam. Now it is in the report by a doctor who will be testifying to that during trial. Again, audio recording by both the patient or observer and the doctor prevents this from happening. It keeps us out of court, and it keeps these cases moving.

In fact, before she was appointed to the Nevada Court of Appeals, the discovery commissioner in the Eighth Judicial District Court in Clark County already allowed audio recording on all cases. The problem with the current language in the current rule is that audio recording is only allowed for good cause. Now, what "for good cause" means is uncertain. Every time there is an examination where audio recording is requested, we are going to have litigation of these cases. It is going to cause delays. It is going to cause additional costs. It is going to cause clients' access to justice to be delayed on these types of cases. That is why this bill before you today does not provide or require this "for good cause" standard on audio recordings. As I stated before, the discovery commissioner had already allowed this type of audio recording without a showing of good cause. Again, we want to keep these examinations open and transparent, and we want these clients of ours to be able to move on with their cases without having to litigate every single issue because this examination is being requested by the insurance defense attorney.

These are the two elements, and these are the differences between what the existing rule says and what this bill says. Again, we are before you today because an examination by a doctor who is not of this person's choosing involves a substantive right. It is something that should be within a statute and not a procedural rule.

Chairman Yeager:
I want to make sure we have the record clear in terms of the process that got us here. The Supreme Court of Nevada was looking to make substantial changes to the NRCP, and those changes went into effect March 1, 2019. We are talking about Rule 35. It sounds as though there was a subcommittee that I believe Mr. Galloway chaired.

Graham Galloway:
That is correct.

Chairman Yeager:
So there were eight members of that subcommittee, and there was a 7-to-1 vote in favor of advancing what appears in A.B. 285. That was the recommendation, 7-to-1, out of the subcommittee to the entire Supreme Court of Nevada. Do I have that right?

George Bochanis:
There were some changes made such as the observer only being a person who was not the attorney and not associated with the attorney's staff. For the audio recording, there was nothing about the "for good cause" requirement being involved.

Chairman Yeager:
Essentially, the recommended language that came out 7-to-1 was not adopted by the Supreme Court. We do not know why, but it simply was not adopted.

Graham Galloway:
That is correct.

Chairman Yeager:
I just wanted to make sure we had that clear on the record.

Assemblywoman Backus:
I noticed you were both on the subcommittee, and I just read our new NRCP. When looking at the separate branches of government, the court can implement court rules consistent with Nevada law. I was trying to put these two together, and I am thinking about how the language is presented in section 1, subsection 1 of A.B. 285 where it says "An observer may attend," for example. The current Rule 35 is almost on par with that rule. I am not sure if that was your intent. It does not sound as though it was.

I also just want to clarify how an independent medical examination works. It is either by stipulation or by order. It looks as though this new rule keeps it by order. What will end up happening? When I was reading the very lengthy comments to the rule, it seemed as though the court and committee spent a lot of time working on that. Someone could raise the issue of having an observer being present, and likewise with the audio. That could be agreed to, or it could be put into the opposition if they are challenging a request for the examination. When I was looking at Rule 35 and A.B. 285 this morning, I could almost read them in sync. The only thing that was glaring to me was the issue of the attorney. I have to admit, I kept asking my friends who are attorneys if they really want to be present for this. That was the only thing I thought was agreed upon by all three amendments that were sent over to the Nevada Supreme Court with the petition. It seemed as though each of them excluded the attorney. That was the one thing I noticed. If you could clarify that for me, that would be great.

Graham Galloway:
You are correct that the language is similar, but it is distinct. From a practical standpoint, you are also correct that most of these examinations are done by stipulation. You work out the details ahead of time. With some attorneys, you can hash out the details. With other attorneys, you cannot. We have made changes that are not very dramatic, but they are substantial. Instead of having to show good cause, if you cannot agree with the other side as to the parameters of the examination, and you have to go the motion route, the rule provides that this can be done by motion or agreement. Most of the time it is by agreement. Under the existing rule, if you can agree, you have to show good cause for an observer. The big change we are proposing here is that you do not have to show that good cause; you automatically have the right to have an observer present, whether he or she be an attorney, an attorney's staff member, or a family member or friend.

The other point you raised about the differences between the current rule and our bill is that this would allow for an attorney observer. In reality, I do not foresee myself going to any of these examinations. I really have no interest in doing that. I think I could use my time better elsewhere. It would be a staff member or a family member. Currently, what I do—which, perhaps, is not necessarily authorized by the rule—is have all my clients take a family member. No one has ever objected to that. That, in practicality, is what is going to happen in most cases. There are certain experts who are marked for special treatment because they have been proven to be extremely biased. Those individuals may end up having a staff member from the law firm attending their examinations. Again, I think in the run-of-the-mill case, you are sending a family member or a friend.

George Bochanis:
As far as the mechanics of the examinations we have experienced in my office, we get a letter from the insurance defense attorney where the attorney says, "We want to examine your client on this date at this time. Bye." Of course, it does not work that way. We call them and say, "Sure, pursuant to these conditions." Or, under the rules, we can file a motion. My experience has been that we were able to agree less than half the time on these conditions. Since this rule has gone into effect on March 1, we have received three letters requesting clients to submit to examinations, and we have not been able to agree to the conditions once. That is because of the "for good cause" showing on the audio recording portion. We disagree as to what that means, and this was our concern when the current rule came out. When you allow that type of vagueness over this type of examination, there is just not agreement on it. This rule has been in effect for 27 days. We have received three letters in 27 days requesting these exams. We have not been able to agree to one of them. That is because of this audio recording "for good cause" requirement as well as the observer issue. I have told attorneys I should be able to send a staff member to one of these, and their objection is that it is not what the rule says. The rule says it has to be a family member. On some of these more complicated examination-type cases, we want a staff member there. This law we have proposed provides and allows for that. I think these are important distinctions.

Again, this is a substantive right. The procedural part of Rule 35 is, how do you get there? You agree to it or you file a motion. That stays with NRCP 35. The mechanics of the actual examination is a whole other issue. That is a person being handled and touched by a doctor who is not chosen by them but selected by an insurance defense attorney. That is why that is a substantive right. That is why we have proposed A.B. 285. This is something we thought about after the NRCP committee. We said to ourselves, You know, this really is not a procedural rule. I hope that helped.

Assemblywoman Backus:
It did. I was just trying to correlate what we have now as our rule and what the law is going to provide for. We all know as practitioners that we are going to continue experiencing the court reading of this law if it gets implemented along with Rule 35. I think we will have to deal with it through offers of judgment, as well as certain interpleader actions depending on what remains in our statutory provisions. Just so I am clear, it looked as though everyone had originally agreed that attorneys would not be present. The type of work I do sometimes

is more product liability. When an attorney shows up, I show up. It seems as though on a personal injury case, the goal is now to basically eliminate this from the rule and allow attorneys or someone from their office to be present. Another thing that looked as though it came out of nowhere was the whole examination of neuropsychological, psychological, or psychiatric examinations wherein an observer was going to be completely eliminated. I take it that through the proposal of A.B. 285, it would negate that provision as well.

George Bochanis:
The carve-out for psychological examinations completely took us by surprise. It was never discussed. No exceptions were ever allowed for psychologists under this bill. I have to be honest with you; I do not know who is more vulnerable and who more requires an observer with them during these examinations than a person with a traumatic brain injury. That came to us as a complete surprise. That was something that was never discussed during the NRCP committee and was never provided as being a carve-out for this type of specialty area.

As a result of that occurring, we have provided to the Committee as exhibits some documents we think support our view that there should not be some special exception for psychologists on these examinations [pages 51-76, (Exhibit C)]. A few psychologists appeared at the Supreme Court of Nevada hearing on this rule, and they testified that what they do is secret—the tests and the way they grade their tests are trademarked, secret items so they cannot be disclosed—and as a result of that, you cannot have an observer present. Well, that is not so. I have submitted to you 74 websites that contain copies of these exams and how they are graded and how they are evaluated [pages 51-59, (Exhibit C)]. So much for the proprietary or secret nature of these examinations.

These psychologists also testified that an observer being present during a psychological evaluation destroys the entire evaluation because if somebody is present, the examinee is not going to be as open. We have also submitted an affidavit from a psychologist with 20 years of experience who states that the mere fact this psychological exam is conducted by someone this person did not select, really puts the examinees in a position where they are not going to be entirely forthcoming [pages 60-76, (Exhibit C)]. They are going to hold things back because it is an examination that has been forced on them. Simply having somebody present is not going to change the nature of the examination at all. In fact, an observer being present during this examination is more required than any other type of examination because certain distractions—the inflection of the voice of this psychologist examiner and other things like that—could have a huge impact on the findings of the examination. Not having an observer present affects that. We have submitted these items, the affidavit and the 74 websites, as further evidence that there should not be a carve-out for psychologists.

Assemblywoman Nguyen:
You have mentioned workers' compensation. It is my understanding that those provisions that are similar to those which are contained here are also statutory as a part of *Nevada Revised Statutes* (NRS) 616C.490. In addition to the workers' compensation, are there any other provisions that are statutory as well? Obviously, there is some precedent here, so I was wondering if you are aware of anything else.

George Bochanis:
I am sure there are; I just cannot think of any right now. I can tell you that in our survey of looking at other states where an observer is allowed to be present, it is a mix between procedural rules and statutes. Other states have considered it to be a statutory right. It is a good point. There are a lot of other statutes and a lot of other things within our NRS that are partially statutory and are partially procedural, which are covered by NRCP. It does occur commonly.

Assemblywoman Nguyen:
As far as how workers' compensation works, do you not have the same concerns that you do under these current rules as they have been implemented in March?

George Bochanis:
We have found in workers' compensation cases that we have had zero problems with attorney observers being present. Although it is true that I certainly am not there at 100 percent of these permanent partial disability examinations, 99 percent of the time my staff is. It is not a family member. That is because there are certain mechanics of how these examinations on workers' compensation cases are supposed to be performed. If they are not performed in a certain way, it invalidates the exam. So we always have a staff member present at these. We have never had a doctor terminate an examination. I have never received a call from a doctor saying my staff member did something inappropriate, or from the insurance adjuster or defense attorney for the workers' compensation case objecting to something we did. An observer is an observer. That is our intention on this bill, and that is what occurs in workers' compensation cases now.

Assemblywoman Krasner:
In looking at some of the opposition cases, they say this is an attempt to narrow the pool of doctors willing to conduct these Rule 35 examinations. Can you please address that?

Graham Galloway:
Of all the other states that allow attorney observation and allow audio or video recording, there has never been an issue about the availability of defense experts. If you read the comments presented by the opposition, it is a fear, but there is no actual evidence. This, unfortunately, is a lucrative area of practice. There are going to be experts who will participate in this arena. There is no evidence—absolutely none—that this prevents the defense from hiring somebody. In the workers' compensation arena, there is never an issue. When I read that argument, I start seeing smoke. I see nothing else. From the experience of our neighboring sister states, there is absolutely no evidence that occurs.

Alison Brasier:
I think this idea that it is going to narrow the pool of doctors is kind of just a scare tactic—a red herring—to distract from the actual issues. In my view, I do not see why this would narrow the pool. It provides protection for the doctors so there is an objective record of what happened during the examination. If there is a dispute, everyone has a record of what happened. It is a protection for the claimant, but also for the doctor. I think this idea that it

will narrow the pool of doctors because we are going to create an objective record really has no basis in fact.

Chairman Yeager:
Can you give the Committee a sense of how much these examinations typically cost? I know they are paid by the defense, but is there a range in terms of what a physician would charge to do an examination such as this?

George Bochanis:
We have provided as an exhibit testimony from a doctor, Derek Duke, where the district court conducted 15 days of hearings on the appropriateness of this specific doctor conducting Rule 35 examinations [pages 9-43, (Exhibit C)]. This doctor testified that over the course of a year, he earned more than $1 million performing just these examinations. We have seen doctors charge anywhere from $1,000 to $10,000 for these examinations. That includes the review of medical records and the examination of the injured person.

Chairman Yeager:
The reason I ask that—I am not trying to drag anyone through the mud—is because I wanted to dovetail off Assemblywoman Krasner's question about the availability of doctors. It does sound as though it can be lucrative, so I do not know that it would come to pass if we were to enact this bill. We have heard some bills in this Committee in the criminal context about the importance of recording confessions. We have also had body camera bills. Some of the reasoning there is just what Ms. Brasier said: if you have to go into court later and have a dispute about what was said or what happened, it is obviously very helpful to have a video recording. I know in this circumstance we are not talking about video, because it is a medical examination. We are talking about audio. Is part of the reason you brought this bill forward to try to eliminate some of the litigation costs that happen after these examinations in front of the court?

Graham Galloway:
Exactly. That is the intent, or at least a major component of the intent of this bill: to eliminate the squabbling, the fighting, the extra unnecessary litigation, and the expense involved in that. That is part of the intent of the bill.

Chairman Yeager:
At this time, I will open it up for testimony in support.

David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada:
I have seen some of the issues brought up in dispute of this particular bill. There is a clear understanding among the defense bar, the plaintiffs' bar, and in the insurance industry, of the importance of operating in the sunlight. When an insurance company learns of an incident—whether it is someone falling somewhere, a car crash, or whatever else goes on—one of the very first things they try to do is get a recorded statement. It is always important to them that they have a tape recording or some kind of digital record of what the individual has to say about what took place and what their injuries are. I have never once heard of an insurance

adjuster doing a statement of someone who has been injured and not making a record of that. So they understand and appreciate the importance of operating in the sunlight and making sure we have a record. Every time a deposition is taken, we have a record that is made. That is not just pursuant to the rules. It is important to understand and have a court reporter write down everything that goes on. More and more nowadays, we have a large percentage of depositions taking place with a video recording because it is important that we catch not only what is said, but inflections in voice, facial features, body language, et cetera. The defense bar, the plaintiffs' bar, and the insurance industry clearly understand it is important to have a clear, accurate record of what goes on. Whenever there are written questions submitted—they are called interrogatories in legal proceedings and discovery—they wisely always insist that those be signed under oath, verified, and notarized so we have a clear depiction of what the individual said and what took place when these different things happen.

Then, miraculously, when we turn to these Rule 35 examinations and when it comes time to take one of my clients and put him or her in a room with a highly paid expert from the defense and shut the door, all of a sudden, the insurance industry and the defense bar—and I would imagine any other opponents to this particular bill—do not want any record made. They want the conversation to have no witnesses, no transcript, no recording, and no idea as to what went on other than the proverbial "he said, she said." As Ms. Brasier mentioned, when you have a "he said, she said" situation come down to a layperson who did nothing wrong but was sitting at a stoplight when someone came through and hit him from behind with their car, and the person on the other side is a doctor who has been practicing in Nevada for 20 years, there is a tendency of jurors—no matter who is right, who is wrong, or what the truth is—to side with the defendant's expert and say whatever they are saying took place must actually be what happened. It is extremely unfair. I have seen, personally, on multiple occasions, the defense come back from the examining doctor with a report that contains information my client says is not true. If you review the order regarding Dr. Duke, there were multiple times when Dr. Duke said things took place in the examination that actually could not be true.

I would like to share two quick examples. When I was a very young attorney, in 1999 and 2000, I was involved in a case where my client was sitting in a lawn chair one evening in his driveway when a drunk driver drove across the road, up over the curb, across part of the lawn, and into the driveway, hit my client who was sitting in the lawn chair, and hit the house he was sitting in front of. My client was asked to attend an examination because his leg was shattered. He had $60,000 in medical bills as a result of his first night in the emergency room. They had the defense and the insurance company for the drunk driver hire a doctor to examine my client. When that report came out, I was astonished to read the doctor's report which said my client indicated he was walking in what the defense attorney later argued was the road when he was hit by this car. Of course, I went to my client as a young attorney not realizing what was going on—I even wanted to give deference to the doctor—and asked him why he told the doctor he was walking in the road when we had eyewitnesses and knew he was sitting in a chair in his driveway. Of course, my client was very insistent that was not what he said. We had to have this "he said, she said" dispute between the doctor saying, "Oh no, Mr. Johnson told me he was walking in the road," and my client saying, "No, I told the

doctor I was sitting in a chair." We had to get into this big mess with additional eyewitnesses who, thankfully, were there to say, "No, he was sitting in a chair and not trying to walk." In my opinion, they are trying to manufacture an issue that, first of all, has nothing to do with medical treatment. Why the doctor would even be talking about whether you were walking in the road or sitting in a chair is beyond me. It shines a light on the issues. It would have been nice, in that case, to have a record or an observer to say, "No, I was there. I heard exactly what Mr. Johnson said, and he said he was sitting in a chair as he said every other time he has talked about what happened in this horrific incident."

I had a situation recently in a case that I had where another doctor who had examined my client came out and said my client had misrepresented to me facts about a magnetic resonance imaging scan she had. My client said that was not what took place. I have seen it a number of times. I know Mr. Galloway had mentioned the experts are weaponized. I am not going to comment on whether that is the case or not, but I would like you to consider this: in 20 years of practice I have had hundreds of clients go and have an examination by a doctor who was hired and retained by the defense and the insurance company. Out of all of those cases, I can remember one time where the doctor examined my client and said these injuries that this individual sustained were due to this particular crash. In every other case I can recall, the doctors have invariably said the injuries were either not caused by this crash or they were not to the extent that the treating doctor had claimed.

The arguments related to the chilling effect simply do not hold. We see in our neighboring states that it is not the case. I would ask you to please consider this: I have had both male and female clients call me in tears from the doctor's office saying they were subject to being yelled at—what they considered to be abuse—and they did not know what to do. Please have these examinations take place in the sunlight and allow the citizens of Nevada to have the same rights as our sister states to be protected and to have an accurate depiction of what takes place in these examinations.

Chairman Yeager:
Is there additional testimony in support? [There was none.] Is there anyone opposed to A.B. 285?

Dane A. Littlefield, President, Association of Defense Counsel of Nevada:
I will stick mostly to my prepared statement (Exhibit D), but I do have additional comments that I will work into that. In support of my testimony today, I have provided the Committee with a copy of the current version of Rule 35 (Exhibit E), the former version of Rule 35 (Exhibit F), the Supreme Court of Nevada administrative order enacting the amendments to NRCP (Exhibit G), and various statements in opposition to the bill by members of the Association of Defense Counsel (Exhibit H). I have also provided a Supreme Court of Nevada case addressing the separation of powers issue that is implicated by this bill (Exhibit I).

One of the things we heard earlier was an attempt to characterize Rule 35 as affecting a substantive right and distinguish it from a procedural rule. That is simply not the case.

The *Nevada Rules of Civil Procedure* are made to address civil litigation through all phases, including the discovery phase, whether that is dealing with a Rule 35 examination or interrogatories as was addressed by the supporters of the bill.

The first issue is that A.B. 285 appears to be an attempt to reduce the pool of doctors willing to conduct Rule 35 examinations and create an unfair advantage, which has already been addressed by the Supreme Court of Nevada and the committee assigned to revise NRCP. This bill would allow the observer of a Rule 35 examination to be the plaintiff's attorney or a representative of the attorney, as you are aware. This could lead to unnecessary confrontations with doctors and unnecessary motion practice. Assembly Bill 285 only allows the plaintiff's attorney to attend a Rule 35 examination. There is no provision for the defendant's attorney or an observer representative of the attorney to be present. This creates a situation in which the plaintiff's attorney has an unfair, and perhaps unethical, opportunity to engage in direct communications with the doctor selected by defense counsel without defense counsel being present. The solution to that would be to simply not allow attorneys in the room. Under the current rule, there is a provision to allow recording by audio means for a showing of good cause. I would submit that good cause could be if a plaintiff's attorney has concerns about a doctor who has been retained by the defense who—I will remind the Committee—is already subject to the Hippocratic oath. A doctor is not an insurance company hitman.

The bill would allow the plaintiff's attorney to make a stenographic recording of the examination as an alternative to audio recording. This contemplates the presence of a court reporter. It is my understanding that many doctors would decline to participate in Rule 35 examinations where a lawyer and a court reporter would be present in the examination room. This would create an atmosphere in which many doctors would no longer be willing to participate in the examinations, and this would create an unfair advantage for the plaintiff's personal injury bar by substantially reducing or, perhaps, eliminating the defense bar's ability to retain them.

The bill allows audio or stenographic recording and limits the audio or stenographic recording to "any words spoken to or by the examinee during the examination." This suggestion is unworkable and would require the recorder or stenographer to stop recording anytime a word is spoken to anyone else in attendance at the examination. Additionally, A.B. 285 contemplates that the examination might need to be suspended for misconduct by the doctor or the attorney observer, with potential court review. However, because an audio or stenographic recording cannot include anything the lawyer said to the doctor or the other way around, there would be no record of the alleged misconduct and no way for a court to decide a "he said, she said" dispute. These concerns are already addressed by the current Rule 35.

Assembly Bill 285 allows the plaintiff's attorney to suspend the exam if the lawyer decides that the doctor was "abusive" or exceeded the scope of the exam. However, the plaintiffs' bar is concerned with eliminating motion practice caused by differences in opinion of what occurred at the examination. Something we would likely have differences of opinion on is

the definition of "abusive." To what extent do actions and/or words within the examination room become "abusive"? This is a highly subjective and highly prejudicial rule and provides no clear standard for the lawyer to make the highly disruptive decision on whether to suspend the examination. Moreover, the defendant is burdened with the cost of an examination that may abruptly be suspended for no real reason other than the plaintiff's attorney's subjective determination.

Further, section 1, subsection 6 of A.B. 285 states that if the exam is suspended by the lawyer or the doctor, only the plaintiff may move for a protective order. There is no reciprocal provision that allows the defendant to move for a protective order or a motion to compel to prevent abuse by the plaintiff's attorney during the exam or to seek sanctions against the offending attorney. Allowing one side in a lawsuit to seek relief while denying the availability of such relief to the other side would be grossly unfair and, most likely, a violation of due process.

In addition, A.B. 285 invites a clear and direct violation of constitutional separation of powers. This is why the plaintiffs' bar is trying to cast this proposed statute as affecting a substantive right rather than a procedural one; it is the only way they can try to get away from the Supreme Court's independent ability to draft and promulgate their own procedural rules. The Supreme Court of Nevada has enacted a comprehensive set of rules dealing with discovery, the NRCP, which includes Rule 35. The Court consistently holds that the Legislature violates separation of powers by enacting procedural statutes which conflict with preexisting procedural rules or which interfere with the judiciary's authority to manage litigation. If it were to become law, this new statute would directly and inappropriately contradict important parts of the newly amended NRCP and therefore violate the separation of powers doctrine.

Finally, the Supreme Court of Nevada's Nevada Rules of Civil Procedure Committee, in its drafters note to the new version of Rule 35, explicitly and directly rejected that an attorney or an attorney representative should be present at Rule 35 examinations in Nevada. That issue has already been considered duly and rejected in turn.

Assemblywoman Backus:
While you were speaking, I was trying to take a look at Rule 35 of the *Federal Rules of Civil Procedure*. It starts off looking similar to our new Rule 35 of NRCP. Are there any federal statutory provisions that address independent medical examinations to your knowledge?

Dane Littlefield:
Not to my knowledge, but I have not researched that topic.

Assemblyman Edwards:
I have a question about something you said about it being unfair to have one side represented in the room and not the other side. However, if you do have a representative of the plaintiff, the doctor is actually serving as a representative of the defendant. Is that correct?

Dane Littlefield:
That is correct. However, there would not be a defense attorney present in the room.

Assemblyman Edwards:
However, you do have representation, and you have trained representation that can actually take care of the defendant's side of the story.

Dane Littlefield:
Well, that assumes the expert witness who has been retained has a knowledge of what the scope of the procedural discovery rules are and what they can and cannot say. The fact that the bill as it stands does not allow for the recording of any statements that are not made directly to or from the plaintiff would mean there is no record for what is said in the room. It would become another "he said, she said" dispute.

Assemblyman Edwards:
How would an audio tape stop recording something that is being said in the room?

Dane Littlefield:
That seems to be the problem. That would be an issue where the audio recording would record everything, but to submit that to the court with a protective order or a motion, the plaintiffs' bar could make an argument that we would have to redact anything in a transcript that would be derived from that audio record and remove anything that could actually be back and forth between the doctor and the attorney.

Assemblyman Edwards:
If this goes through, that does not happen, right? If this bill is approved, the redaction does not take place. You have the full story there from both sides, correct?

Dane Littlefield:
Not the way the bill is written. The way the bill is written directly minimizes what can be recorded by stenographic or audio means to only the statements to or from the plaintiff. Under the current rule, audio recording can be done for good cause, and I do not believe it limits statements that are made. I would direct the Committee to the current Rule 35(a)(3) of the NRCP, which addresses audio recording of an examination.

Assemblyman Edwards:
I do not see where you are saying that anything is redacted or eliminated in the audio tape.

Dane Littlefield:
In the bill it would be section 1, subsection 3. It says, "Such a recording must be limited to any words spoken to or by the examinee during the examination."

Assemblyman Edwards:
So if that is between the examiner and the examinee, should that not give you the story of what is going on?

Dane Littlefield:
Not if there is a third party in the room. This would only be the examiner and the examinee. It would exclude any statements between the doctor and the observer, whether that is an attorney, an attorney representative, or a family member.

Chairman Yeager:
We can have the sponsors address that when they come back up. The way I read it was that it would not allow the attorney or representative to just start making arguments on the audio recording, but I believe the intent was to make sure whatever was said in the room is available for the judge. We can let the sponsors address the intent of that provision when they come back up.

I have a question. I understand where you are coming from. However, at the same time, to the extent there are disputes about what happened in the room and what was said, would it not be helpful to have at least an audio recording to be able to present to the discovery commissioner in helping to decide that? Do you just believe that would make it more difficult? The way I see it, it would be more helpful for the judge in making a decision to have a recording of what happened.

Dane Littlefield:
I do not necessarily disagree with that. A recording can be appropriate in certain circumstances, and the current rule actually provides for an audio recording for good cause. I think that is the intent of the Nevada Supreme Court and of its committee. I would submit that good cause would be if a plaintiff's attorney does have a concern that an expert witness who has been chosen by the defense may be problematic. Whether that is well-founded or not, that can be established via motion practice if the parties cannot stipulate to an audio recording. At that point, it would go before a judge who would be neutral and determine whether there is good cause to believe that an audio recording would be necessary to protect any party's rights.

Chairman Yeager:
I know we are just about three weeks into the new civil rules, but are you aware of any judges actually finding good cause in allowing an audio recording of an independent medical examination?

Dane Littlefield:
I have not been personally involved in any decisions of that nature.

Chairman Yeager:
I know it might be too early for this to work its way through the system, but I just wanted to ask that.

Assemblywoman Krasner:
Going back to the statement about this allowing for confrontations with only a plaintiff's attorney being in the room with the doctor and not the defense counsel being present,

obviously, the doctor is not an attorney. I have to agree with you there. Is it your position that if the defense were allowed to have an attorney or representative present as well, you would be okay with this bill?

Dane Littlefield:
Not necessarily. I think the issue with that is, I cannot imagine any plaintiff's attorney ever agreeing to have a defense attorney in the room during a medical examination that could become very private. That is why the most clear-cut solution is to not allow any attorneys or their representatives in the room. Of course, if a plaintiff and the plaintiff's attorney were amenable to something like that, it would be worth considering from a defense perspective.

Assemblywoman Torres:
I have some concerns about not allowing for another person to be in the room. I think back to my own father whose first language is not English. Sometimes, he has difficulty expressing himself. Although my mom would not get involved in the middle of a doctor's appointment, I think having her present allows him to feel more at ease because it is a setting where he does not feel comfortable and her being in the room would provide for an additional level of comfort. Additionally, my father is not the most reliable witness because he does not necessarily understand all the medical jargon that is being thrown around. I think it benefits both sides. It would benefit the plaintiffs and the defendants in that it allows for both of them to have a reliable story of what occurred if either another individual is present or if that encounter is recorded.

Dane Littlefield:
I agree with you. The rules currently do allow for an independent observer in the room; it just provides that the observer will not be an attorney or an attorney's representative. Family members are currently allowed in the room.

Assemblywoman Torres:
Are they allowed to record currently, or only with the judge's permission?

Dane Littlefield:
It would be with a showing of good cause. In a situation such as that where there is an issue with a language barrier, that could be grounds to assert good cause and have the judge rule on that or the parties stipulate to that.

Assemblywoman Torres:
In how many cases have they shown good cause for the mere fact of translation or additional assistance over the last year?

Dane Littlefield:
At this point, I do not have that information. However, I do not know if there is actually a data tracking capability for that. I would be happy to look into it to see if there is precedent for that. I just believe the language barrier issue would be a strong argument from the plaintiff's side.

Assemblywoman Cohen:
Continuing with Assemblywoman Torres' father as an example, say he is in the Eighth Judicial District Court. We have heard from the judges of the Eighth Judicial District Court and the other district courts throughout the state that their dockets are full, they need more judges, and there is too much going on. Can you tell us how long it would take if a plaintiff's attorney filed a motion saying they have good cause to have someone else in the room? How long would that process take in the Eighth Judicial District Court?

Dane Littlefield:
My practice area is pretty restricted to the Second Judicial District Court and some other northern Nevada courts. I cannot speak to the Eighth Judicial District Court particularly. I can offer that if there is good cause, at least up here in northern Nevada, we, as defense attorneys, are amenable to stipulating to reasonable requests. We may be portrayed as sticks in the mud who are not willing to compromise, but that is not the case. We are willing to work with people when there is a showing of good cause. If a motion to compel or a motion for a protective order requiring audio recording—a family observer is already allowed without a court order—is requested, I do not imagine it would be a very long process. It would go to a discovery commissioner, and the commissioner can work on that relatively expediently. My experience in the Second Judicial District Court is that we are fortunate to have a discovery commissioner who is extremely expeditious and very quick. Unfortunately, I cannot speak to the Eighth Judicial District Court.

Assemblywoman Cohen:
Once a motion would be filed in front of a discovery commissioner, how long would that take before it is heard?

Dane Littlefield:
As a former law clerk, I know internal rules of the court are, generally, they try to have a turnaround within 60 days. It is not guaranteed; it is just a general target goal. When matters get sent to the discovery commissioner, it can be anywhere between a week and 60 days. Generally, my experience is that it is much quicker than the 60-day rule of thumb.

Assemblywoman Cohen:
As attorneys, we are not supposed to file pleadings right away. We are supposed to work with each other. The discovery commissioner is going to want to know what the plaintiff's attorney did to try to work this out, so there would be phone calls, letters, and emails going back and forth beforehand for a few weeks on top of this. Is that correct?

Dane Littlefield:
That is correct. I would submit that the rules already provide a mechanism to remedy that. If an attorney is engaging in bad faith and if the discovery commissioner determines that any objections were not made from a good-faith basis, it opens that attorney up to discovery sanctions that can be levied against him. If it is found that the attorney is needlessly wasting the court or the other party's time, that would be a route the plaintiffs could go down.

Assemblywoman Cohen:
So we could go around 90 days before we have this resolved. Also, I think you can talk to any attorney who practices in this state, and that attorney would tell you that opposing counsel has acted inappropriately and that attorney could not get results from the court.

Chairman Yeager:
I will open it up for additional opposition testimony for A.B. 285. [There was none.] Is there anyone neutral? [There was no one.] I will invite our presenters to come forward to address Assemblyman Edwards' question and make any concluding remarks.

Alison Brasier:
Going to section 1, subsection 3, about allowing recording, I think we would be open to working on the language of that section. The intent was to capture exactly what happens in the room. That would include any dialogue with the observer. I think we would be open to dialogue about changing that section to alleviate any concerns. I was sitting and thinking about why this needs to be codified in NRS and we cannot just take care of it through the current rules. Something that has not been talked about before was that there are certain examinations that take place called "underinsured or uninsured motorist coverage" in which a person's own insurance company is, under contract, allowed to have them submit to one of these types of examinations prior to litigation being filed. Going along with the substantive rights we have been talking about and this right to control your body—even outside the litigation context—when you are dealing with an examination being compelled by an insurance company, I think it is important that we have those protections codified in our NRS.

George Bochanis:
It was our intention that the audio recording captures everything from the moment the person walks into the examination room to the second that person leaves the examination room. What you are hearing from the opposition is a very narrow interpretation. It certainly was not supposed to be so diced up. We want everything that is being said by everyone during these examinations to be part of the record. That, again, goes along with the whole concept of keeping this out in the open. It should not be some secret proceeding.

The other thing I wanted to comment on was Assemblywoman Cohen's remarks about the time element. An objection to this type of examination and having to litigate it is going to involve a meet and confer or a telephonic call first between both attorneys, which is going to take several weeks to arrange. It is going to require a motion before the discovery commissioner which adds 30 to 60 days. If one of the attorneys does not like the results of the discovery commissioner report recommendations—that report sometimes takes a month because there are objections to the language—it then goes to district court. Add another 30 to 60 days. If you are going to allow litigation on every examination request for good cause showing on audio recordings, you should give the Eighth Judicial District Court every new judge they want because you are going to need them. It is really going to cause an issue of access to justice for these types of cases.

Graham Galloway:
The argument that somehow this bill will lead to the suppression of the availability of experts for the defense side is still unsupported. I did not hear and I have not seen any evidence that will occur. What I did hear is one expert down south is making $1 million per year doing this kind of work. It is a lucrative business. There will be experts available.

Chairman Yeager:
I will now close the hearing on A.B. 285. [(Exhibit J) was submitted but not discussed and will become part of the record.]

I will now open the hearing on Assembly Bill 20.

Assembly Bill 20: Revises provisions governing judicial discipline. (BDR 1-494)

Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction:
We have offered an amended version of the bill (Exhibit K), and that is what I will be discussing this morning. The preamble to Assembly Bill 20 declares, "It is in the best interest of the citizens of the State of Nevada to have a competent, fair and impartial judiciary to administer justice in a manner necessary to provide basic due process, openness and transparency." Just as we work every day to ensure everyone who appears in our courts are treated fairly and given due process of law, the judiciary should enjoy the same treatment and guarantees of law if they are subject to review or discipline by the Nevada Commission on Judicial Discipline.

Section 1 of Assembly Bill 20 amends *Nevada Revised Statutes* (NRS) 1.440, which already provides for the appointment of two justices of the peace or two municipal court judges to sit on these judicial discipline proceedings once they go to hearing, and merely adds that the Supreme Court of Nevada will consider the advice of our association when making those appointments. We are only asking that the association offer who they think would be a good member to sit on that commission. Of course, the Supreme Court is free to appoint anybody it wants. We have no veto power or anything other than offering advice as to who we think would be an appropriate member.

Section 2 of the bill amends NRS 1.462, subsection 2 to provide that the *Nevada Rules of Civil Procedure* (NRCP) apply to all proceedings after the filing of formal charges. When the Commission receives a complaint from the public, it may choose to investigate, it may choose to ask the judge to respond, and it may file formal charges. Only after the filing of formal charges would this amendment apply. The *Nevada Rules of Civil Procedure* set forth pretrial procedures for discovery, interrogatories, requests for admission, and would also establish rules for pretrial motions. There are no such rules now. Many boards and commissions are subject to NRS Chapter 622A. Those are the NRS Title 54 boards. The Nevada Commission on Judicial Discipline is not a Title 54 board. For those boards it applies to, the rules for pretrial discovery, admission, and motions are set forth in statute.

Section 1, subsection 3 would adopt a procedure followed by many professional regulatory boards in Nevada that the investigative and prosecutorial functions are separated so the board members who decide whether to investigate and file a formal complaint are not the same members who decide whether a judge has violated the judicial canons of the *Revised Nevada Code of Judicial Conduct* and should be disciplined. This is important because, oftentimes, the evidence that is considered in the investigative phase is not the evidence that is introduced in the adjudicative phase, but the board members are aware of it and it is unclear how they disregard it when making a judicial decision. Simply put, the police and prosecutors should not be serving as the judge and jury. Due process requires that discipline decisions be made only on evidence introduced at the hearing, not evidence considered in closed, secret sessions before the public hearing. This is the procedure followed by many boards and commissions. I will draw the Committee's attention to the procedure followed by the Board of Medical Examiners in NRS 630.352: any member who sits on the investigative committee that makes a decision on whether or not a formal complaint should be filed cannot sit on the hearing panel to decide whether the physician should be disciplined.

Section 2 of the bill sets forth some specific due process protections. Section 2, subsection 4, paragraph (a) provides that the venue for a hearing will be in the county where the judge resides. Right now, frequently, northern judges' hearings are held in southern Nevada, and southern judge's hearings are held in northern Nevada. The judges, their attorneys, and their witnesses have to travel to the far end of the state to have their cases heard. This would just provide that the venue resides where the judge is.

Section 2(4)(b) provides that there would not be any interrogatories until after the formal statement of the charges. Just like a regular civil case, interrogatories and requests for admission are not appropriate until a complaint is filed and the person understands what the actual complaint is. Right now, the practice is to ask judges to respond to interrogatories and requests for admissions before the filing of formal charges, before the judge knows what they are actually going to be charged with, and judges are required to testify against themselves before they know what they are being charged with. This would just require them to wait until the formal filing of charges. There are pending cases, even a Nevada Supreme Court case, where judges object to these interrogatories. With a failure to answer them, they are deemed admitted, and you are also subject to additional discipline for failing to cooperate with the investigative process.

Section 2(4)(c) would provide that the Commission would provide all parties with the reports and investigative materials appropriate to the case once a complaint is filed, and no later than ten days before the hearing, including any exculpatory materials. There is no such requirement now that the Commission provide exculpatory materials. Discovery to requests, which are subject to ongoing litigation, have been denied by the Commission in the past. I think it is simply fair that any evidence that is going to be used or relied on by the Commission at the time of the hearing be presented to the judge and their attorney before the hearing. There is ongoing litigation about prehearing motions. Section 2(4)(d) provides that those motions be heard in an open preceding in the county where the hearing is set unless the parties agree to submit it.

Section 2(4)(e) would require that the prehearing motions be decided ten days before the hearing. These motions are commonly motions to dismiss or motions to limit the charges or discovery motions. Currently, it is the practice of the Commission to not hear those until the full Commission hearing. The defense of the judge may be contingent upon how some of those pretrial motions are heard—whether some of those charges are dismissed or not considered or are not violations of the canons of judicial discipline. Having to wait until an actual hearing to have the pretrial motions considered means the attorney providing the judge their defense really does not know what defense they will be able to provide until the time of the hearing.

Section 2(4)(f) would require that every party be entitled to provide all evidence necessary and relevant to support the case and be given time to do so, and that time limits not be placed upon the presentation of the defense. It has been the practice of the Commission to ask the prosecutor how long he needs to present, and then the defense is given the same amount of time and told they cannot exceed that. It is practice in court that defense has all the time it needs to present its defense; it is not limited by artificial rules. It would have to be necessary and relevant evidence, of course. Section 2(4)(g) provides that if any commission rule conflicts with the NRCP, the NRCP will take precedence.

The additional sections clarify some of the evidentiary standards that are used in making these decisions. Section 3 would reword NRS 1.4655(3)(e) to provide that a decision to authorize the filing of a formal statement of the charges would be made when there is a reasonable probability, based upon clear and convincing evidence, to establish grounds, so there is an evidentiary standard now provided in the statute. Section 4 removes the phrase that investigations would only be conducted pursuant to the Commission's own procedural rules. Section 5 rewords NRS 1.4667(1) so the decision to file a formal complaint is based on "whether there is a reasonable probability, supported by clear and convincing evidence, to establish grounds for disciplinary action," which just rewords the current language of the statute.

Section 6 amends NRS 1.467 so that a judge has an opportunity to respond to the initial complaint made to the Commission, but is not required to do so. Now, when the complaint from the public comes in, the judge is asked to respond to that. However, that could be premature based upon the filing of a later formal complaint. If a judge wants to respond, he can, but he is not required to make statements or admissions until he knows what the actual charges against him are, after which the Commission can decide, based on clear and convincing evidence, whether to file a formal complaint.

Section 7 amends NRS 1.468(2) to clarify that the evidentiary standard to determine whether to enter into an agreement to defer discipline is based on whether there is clear and convincing evidence to establish grounds. Section 8 sets forth the provisions on how the amendments apply prospectively into existing cases, and section 9 makes the act effective on passage and approval.

The judges in the state are expected to apply due process rights and give everybody a fair and open hearing. I think it is reasonable to expect that if we are subject to discipline, we enjoy the same due process rights as anybody who appears in front of us. There is a legal maxim that is a question in Roman law about "Who watches the watchers?" Who decides whether the police are doing a good job? Who keeps track of that? The Commission on Judicial Discipline is an independent commission. They report to no one. They are not supervised in any way, and the only way to resolve a dispute is to appeal a matter directly to the Supreme Court of Nevada. I am sure we are more than willing to hear from the Commission and have a discussion with them about possible amendments to this bill, but I do not think it is unfair to expect that due process rights apply when judges are brought before the Commission.

John Tatro, Senior Judge; and representing Nevada Judges of Limited Jurisdiction:
I do not want to understate the issue and the importance of it. I have an understanding of how the judges feel and of issues that have come up over the years. I was president of the Nevada Judges of Limited Jurisdiction (NJLJ) twice. None of us want bad judges. It reflects on all of us because when you read about a bad judge, it is as though they group us together, and we certainly do not want that. We want a remedy for finding out bad judges and people who violate ethics rules or other rules. I think the Commission is a very important thing, and I think the work they do is admirable and good. However, this discussion has been at the top of the NJLJ's agenda for over 24 years. I am not talking about war stories about the Commission; it is just this unknown. Why can we not have the same due process rights that litigants have in court on the civil side? We think it is extremely important.

You all received a letter from former Justice of the Supreme Court of Nevada Nancy Saitta (Exhibit L). In the second paragraph, she says we "must not ignore the most basic notion of fair and equal treatment under the law." We are judges, but we should be afforded that same treatment. When something is brought before us, we should have the same rights as everyone else does. I think Justice Saitta's statement sums it up.

Richard Glasson, Judge, Tahoe Justice Court; and representing Nevada Judges of Limited Jurisdiction:
I have been involved with NJLJ for the last 19 years. I am a former president and member of the board. Our mission with NJLJ is education, especially ethics education. We know and can assist the Supreme Court of Nevada in nominating these judges who will sit in judgement of other judges rather than getting that telephone call saying, "I do not know what I am doing. How do I respond to the Supreme Court? How do I sit?" We know who is capable, we know who is able, and we would like to be able to make those nominations to the Supreme Court rather than the same names over and over again being pulled out of a hat.

Ann E. Zimmerman, Judge, Las Vegas Township Justice Court; and representing Nevada Judges of Limited Jurisdiction:
I want to point out to the Committee that in *Mosley v. Nevada Com'n on Judicial Discipline* 117 Nev. 371 (2001), the Supreme Court of Nevada recognized that judges in Nevada have a protected liberty and property interest in the continued expectation of judicial office, especially where they are elected and serve designated terms. We believe that under the

current system we are being denied the basic rights of due process enjoyed by all civil litigants. It is kind of ironic that when you take your judicial oath of office, you swear to uphold the *Constitution of the State of Nevada* and the *Constitution of the United States*, but we do not enjoy those same rights before the Commission on Judicial Discipline.

Assemblywoman Backus:
With the new proposed bill, when would a complaint of charges become public? My understanding right now is that the pre-investigation is not a public proceeding. Is that correct?

Judge Higgins:
That is correct. Our bill does not change that at all. The pre-formal complaint process stays the same. Sometimes, it is confusing because the complaint comes in from the public, saying "Judge Higgins did XYZ." Then, after the process—the Commission makes a decision about whether to investigate, then a decision about whether I should respond, and then eventually presents a decision to file their formal complaint—the formal public complaint is filed by a Commission prosecutor. There are two complaints, but we do not change anything from how the Commission considers that complaint from the public now. Once the formal written complaint is there, NRCP would apply after that point.

Assemblywoman Backus:
That was my understanding. I am a licensed attorney, and I know that if someone sends a letter to the State Bar of Nevada they may not do any pre-investigation work. I get a letter shipped off to me saying, "You are in violation," but if someone took a look at the order, my name is not even in it. So it behooves me to easily just respond, and no formal complaint is filed. I was concerned that now imposing NRCP clear and convincing evidence standards may not just easily dispose of this, and there will end up being more backlog and maybe even more publicity for judges who run for office and who may not want this known. I was just trying to rectify this in my head.

Judge Higgins:
I do not think it changes that part. A judge can make a decision whether to respond. I think if somebody said, "Judge Higgins called me a jerk on the stand," I could say, "No, I did not. Here is the videotape. I asked him to sit down because he was making a scene." That would be quickly resolved, I would hope, by my responding to that public complaint. If the public complaint is that someone violated the canons and violated the criminal law and is subject to criminal prosecution—for some judges, that has been the case—I think, until the filing of the formal charges, judges have to make a decision about whether to give up those rights before they respond or are forced to respond. If you do not know what the formal charges are, it is hard to respond in those more complicated cases.

Assemblywoman Peters:
Would this pertain only to judicial duty disciplines, or does it extend to a situation in which a judge is taken into court for other issues?

Judge Higgins:
It would pertain to the workings of the Commission. It would not pertain to judges going into court for other issues.

Assemblywoman Peters:
Is a judge taken to the Commission only for actions done under the judicial office, or for any action that has consequences under the judicial system?

Judge Glasson:
A judge is a judge 24/7. What we do off the bench is subject to discipline, just as what we do on the bench. Judges must be patient, dignified, and courteous and must follow the "Boy Scout code" throughout their life. Oftentimes, a judge is brought up on a complaint and then perhaps a formal statement of charges on things that were totally unrelated to his or her duties on the bench. The old idiom is "sober as a judge." Well, if they are not, they should not be a judge anymore.

Assemblywoman Hansen:
I am a layperson. I know the law can get complicated, so this makes sense to me. You mentioned getting this fixed has been at the top of the list for several years. I was just curious about the history. Has this come before this body before? I am curious how we got here.

Judge Tatro:
No, we have not brought this bill forward. It has been talked about and talked about. This was the time when we decided to bring it forward. It has not come forward in the past.

Judge Zimmerman:
I think the reason why the bill has been proposed at this time is because judges have started to have lengthy conversations amongst themselves about the lack of due process before the Commission. Experiences have been compared, and many people are concerned about this. That is why we decided the time was right to bring this bill forward.

Assemblywoman Tolles:
It seems to me that what has been in place is an administrative process. When we start to move into language such as "clear and convincing evidence" and "due process," if there is criminal activity, it would go into court and that would have all of those applied. If it is an administrative process, it seems appropriate that it would stay at the current level to be dealt with as an administrative personnel issue. Can you speak to that?

Judge Higgins:
Both activities can come before the Commission. There was a judge in Las Vegas who was removed from the bench and was accused of mortgage fraud and was prosecuted for that. I think he went to prison. He still could be disciplined. If you are appearing in front of the Commission and have potential criminal liability for your conduct, I would assume the person would want some of it to be done before the other so you would not have to make

admissions. Both kinds of activities can come before the Commission. Judges have been disciplined for having a DUI, and that comes before the Commission. They have been dealt with and served their DUI sentence, but they still are disciplined following the criminal case.

Assemblywoman Tolles:
By asking that question, I meant putting clear and convincing evidence standards for administrative types of disciplinary action. I think that is more where my question is coming from.

Judge Higgins:
Several sections currently refer to "clearly convincing evidence." It has just been reworded to "clear and convincing" to make it clear that is the evidentiary standard. It currently refers to that. In some of the other sections it is added. That is true. I am sure there will be opposition to that, but we were trying to make it clear what the evidentiary standard is at each point of the proceeding.

Judge Zimmerman:
I think when you are talking about possibly disciplining judges or removing judges from office, their due process rights should be in place and not kick in at the level where you are appealing to the Supreme Court of Nevada. Due process should apply from the moment the formal statement of charges is filed. I want to caution or instruct that a complaint comes from an individual; it can be a citizen, it can be a lawyer, and it can be anybody that can file a complaint before the Commission. Once the Commission votes to proceed with a matter with the judge, they file what is called a "formal statement of charges." The formal statement of charges is when the matter becomes public and when the judge is formally charged. I wanted to make that important distinction.

Assemblyman Watts:
I see the current language speaks of a "reasonable probability . . . could clearly and convincingly," and this is changing it to "supported by clear and convincing evidence." Again, I am still learning about the variety of evidentiary standards in the law. It seems to me a little bit contradictory to have a reasonable probability supported by clear and convincing evidence. I have seen some things that indicate those are two separate standards. I am wondering why, in your proposal, you did not just eliminate "reasonable probability" and say "based on a finding that there is clear and convincing evidence."

Judge Higgins:
Well, there is a story about the elephant designed by a committee, right? A committee worked on this bill together, so it does not satisfy everybody's drafting needs. I think the intent was not that they use the same level of evidence at the investigative phase that they would at the conviction stage. That is where reasonable probability comes in, but whatever evidence they rely on is clear and convincing. If you are using a scale, "preponderance of the evidence" is just slightly tipped. "Beyond a reasonable doubt" would be tipped all the way; I cannot have any doubt in my mind. "Clear and convincing" is between that; it is more than just slight evidence, but it does not have to be beyond a reasonable doubt. There is case law

that explains what "clear and convincing" is. If there was a question, a judge could go to a Supreme Court of Nevada decision that explains what clear and convincing is if they were going to appeal it. I think that was the intent, to have an evidentiary standard but not force them to have the same decision level at the investigative phase and the conviction phase.

Assemblywoman Torres:
I have a two-part question. To clarify for my own understanding, if a judge were to commit a criminal act, he or she would go through the normal court process and also go through the Commission, correct?

Judge Higgins:
Correct.

Assemblywoman Torres:
I am wondering how this piece of legislation would compare with how other employees of the state have to go through their own employer. For example, as an educator, if I have a DUI, I get reprimanded through my occupation as well. I am wondering how this piece of legislation compares to our expectations of other employees of the state.

Judge Higgins:
I think it would bring it more in line with how it is applied. *Nevada Revised Statutes* Chapter 622A applies to all Title 54 boards. That includes almost everybody except a few commissions. That sets forth these procedures. It would be more parallel and similar to what happens to everybody else. If you are convicted of a crime by proof beyond a reasonable doubt, it is pretty much a given that you are going to be disciplined because boards' and commissions' standards are not as high. They can use the evidence of your conviction. Essentially, you do not have much defense to the discipline at that point because you have already been proven guilty. My experience is that most judges who have had a DUI, for example, just admit they had a DUI and throw themselves at the mercy of the Commission and hopefully have mended their ways. I think it brings it closer to how everybody else is treated.

Assemblywoman Torres:
I am not sure I see how that is different than what we do at my profession because if I were to have a DUI and there is a conviction, the district is going to see that. They have access to that. I do not understand what the difference would be.

Judge Higgins:
As a judge, you can be removed from office for habitual intemperance. You would lose your elected position. I would assume, as a teacher, while your employer might discipline you, I am not sure the State Board of Education would. Maybe that is the distinction. Here, the Commission has the authority to order us to go to treatment, suspend us, and even remove us from office. Apparently, habitual intemperance was a problem years ago, and it is written right into all of the proceedings that you can be removed from office. You would lose that

position. I do not believe the State Board of Education would revoke your license for a DUI, but I am not familiar enough with that.

Judge Glasson:
Oftentimes, it proceeds at the same time. I was called once to sit in a case in Clark County with regard to a judge who was accused of battery that constitutes domestic violence. At the very same time, the judge was up on those same charges before the Commission of Judicial Discipline. It is not always the "chicken and the egg." Sometimes it is happening at the same time.

Chairman Yeager:
Going to the amendment in section 2, subsection 4, some of the language says that "Any procedural rules adopted by the Commission . . . must provide due process," and then it says, "including, but not limited to," and provides a few different areas where the due process is specified. I wondered, with the language "including, but not limited to," are there some topic areas you have not enumerated in here where you feel as though there is not due process in the rules that have been promulgated by the Commission? I know sometimes they say "including, but not limited to," because they do not want to miss something in an exhaustive list. Does this list lay out what the current concerns are, or are there others that are not included in the list?

Judge Zimmerman:
These are the most pressing issues of due process the judges feel need to be addressed to make the process fairer. I just want to emphasize that as a judiciary association, we are not asking for more than average citizens receives when they litigate a matter in any court in the state of Nevada; we are asking for the same due process protections. It is problematic that under the current procedural rules of the Commission, they have the sole authority to determine where the venue lies. They decide venue based upon their own convenience and for no other reason. In any other case, venue would be decided based on where the conduct occurred or where the party resided. We believe venue should be the jurisdiction where the judge sits.

Judge Higgins previously went over the issue of never having prehearing motions determined until the minute before the hearing starts. These motions could include excluding witnesses, excluding evidence, adding witnesses, or adding evidence. How do you prepare for trial if you do not know what evidence you will be allowed to present? It would be no burden upon the Commission to hear those motions and issue a decision ten judicial days before the hearing. That would make the process fairer to the judges. I know we like to say "including, but not limited to" in case we forget something, but these are the big issues we think would make the process fairer.

Chairman Yeager:
With respect to venue, is that typically always in Carson City for these proceedings? My understanding is that is where the Commission on Judicial Discipline is housed. I wonder if any of you are aware of a venue being located outside of Carson City for the hearings?

Judge Zimmerman:
Most of the time, the southern judges' hearings are scheduled for Carson City. Most recently, maybe based upon numerous complaints, they have scheduled a couple of hearings in Las Vegas. It is still their decision where to schedule a hearing. It would be important to us to have venue determined by where the judge resides. The short answer is yes, sometimes the hearings occur in Las Vegas and sometimes they occur up north. I do not believe there is any rhyme or reason to how that is determined.

Assemblywoman Hansen:
Just to clarify, for several sections we were talking about the "clearly and convincingly" language, and then "supported by clear and convincing evidence" is the new language. Is it the same evidentiary standard?

Judge Higgins:
Clear and convincing evidence is an evidentiary standard. I think that was intended by the way it was worded. It is not necessarily the same. I think this would give us a reason, if there were a dispute, we could tell the Supreme Court based upon your history of litigating what clear and convincing means, we would have case law one way or another. I think it is the same standard, although I am not sure the opponents of the bill will agree to that. It is just a clearer standard.

Chairman Yeager:
I will open it up for additional testimony in support of A.B. 20. [There was none.] I will now take opposition testimony.

Paul C. Deyhle, General Counsel and Executive Director, Commission on Judicial Discipline:
I have with me today the full Commission, which comprises district court judges appointed by the Supreme Court of Nevada, attorneys appointed by the State Bar of Nevada Board of Governors, and lay members appointed by the Governor of this state. They are all in opposition to this bill. Gary Vause is our chairman. He very much wanted to come today, but his wife had a medical procedure, so he did prepare a letter that was submitted and uploaded to Nevada Electronic Legislative Information System (Exhibit M). In addition to that, I have also submitted the letter I sent to each of the Committee members in January (Exhibit N), as well as two cases and Commission orders that were filed in public cases that discuss the constitutionality of some of the issues that were discussed today.

A picture has been painted today that a certain group of judges in this state do not receive due process. That is simply inaccurate. I am going to do my best to scratch the surface, because underneath the surface of those allegations are the facts.

The current statutes and procedural rules reflect a number of competing interests: the interests of the public, the interests of judges, and many other interests. That is where we are today. Just ten years ago, this Legislature enacted sweeping changes to the Commission's statutes and rules at the recommendation of the Article 6 Commission. The Article 6

Commission was formed by the Supreme Court of Nevada in 2006. The goals of that commission were to increase transparency of the Commission on Judicial Discipline, to improve its effectiveness, the fair treatment of judges—which certainly would include due process issues—and the timeliness of issuing decisions. The participants of this Article 6 Commission were experts from all over the country: law professors, judges, attorneys, and representatives from the Nevada Press Association and the American Civil Liberties Union of Nevada. The Commission on Judicial Discipline at that time fully participated in this effort. This took two years, where our rules and our statutes were under a microscope. As a result of that work, there was a report written. That report formed the basis in the 2009 Session for sweeping changes to both the statutes and the rules. Those were enacted just ten years ago.

I have heard testimony today that none of these issues were addressed. That is not true. All of these issues were addressed just ten years ago. I would respectfully request that if this Committee is seriously considering entertaining any of these requests, they do it the right way like they did ten years ago and convene an Article 6 Commission—which is named Article 6 after the section of the *Nevada Constitution* that deals with the judiciary—and get the input from all of these interests: the public, the judges, the lawyers, et cetera.

This is extremely important because you have only heard one side of the story here today from the proponents of A.B. 20. You have heard there is this rampant violation of their due process rights. That is, as I said, simply not the case. These changes from the 2009 Session reflect the national standards for judicial conduct and are in conformity with the judicial discipline commissions throughout the United States. This is nothing new here in this state. The structures may be different, but the rules and the laws that govern this Commission are followed around the country.

I will briefly go into the analysis of the bill. I know they filed an amendment to the bill. I can tell you, with all due respect, the commissioners unequivocally viewed that amendment as just as unreasonable as the original bill. I will tell you why: it has no regard for the process that has developed over 40 to 50 years, not just in this state, but across the country. It has no regard for the public or the taxpayer. Section 1 of the bill grants advice authority to limited jurisdiction judges only for judicial appointments for the Commission. I believe this is highly questionable on constitutional grounds. The Commission does not really have a dog in that fight. It does not directly affect the Commission, but I would think the Supreme Court of Nevada would have a problem with that because it is the appointing authority under the *Nevada Constitution*. The *Nevada Constitution* makes no mention of anyone having advice authority over their decisions, no more than the Governor or the State Bar of Nevada. I believe the Governor and the Board of Governors of the State Bar of Nevada are more than capable of appointing qualified individuals to these commissions.

This is just one group of judges within this judiciary, which is made up of over 600 judges, and I do not see any representation from the Nevada District Judges Association, the Supreme Court of Nevada, or the Nevada Court of Appeals. It is just one group of judges within Nevada that want to provide advice to the Supreme Court. I do not want to speak on

behalf of the Nevada Supreme Court, but I think they would have a big problem with this. It also sets a bad precedent as other groups will petition the Legislature for advice authority to influence appointing authorities to select members as well—not just this commission, but boards and commissions at every level.

Section 2 of this bill deletes the application of NRS and the procedural rules of the Commission. Now, I know the amendment to this bill took away the deletion of the application of the NRS, but it still deletes the procedural rules of the Commission. What a lot of people, even judges, do not know is that the procedural rules of the Commission were drafted and adopted by the Supreme Court of Nevada. They formed part of the Supreme Court's rules for decades. The Commission did not draft these rules; they are our rules now based upon constitutional amendments over the last two decades. We did not draft the actual rules that are being challenged by the proponents of this bill. The rules that they are attacking were adopted by the Supreme Court. I think we can all agree that the Supreme Court knows a thing or two about constitutionality.

The *Nevada Constitution* specifically and expressly empowers the Commission to adopt its own procedural rules. This is extremely important. We are not a district court. The proponents of this bill try to equate the Commission with any other court in this state. It is not true. We are a court of judicial performance. It is completely unique. It is not a district court. The same rules do not apply. That is why the *Nevada Constitution* itself empowers the Commission to draft its own procedural rules. We adopted those rules after a constitutional amendment in 2003. The same rules exist now, for the most part, in the statute as they existed ten years ago after this two-year effort to review all of these commissions and rules. These issues have been vetted by experts all over the country—by lawyers, judges, the public, and all these organizations. It is not true that these issues are the first time this Committee is hearing them.

The other part of section 2 is that the application of the NRCP applies to all stages. They did change that in the amendment, but as I said, they are requiring the procedural rules be simply negated, which I find constitutionally questionable. Section 2 also requires that the Commission's procedural rules provide due process to judges. This is not necessary. The *Nevada Constitution*, NRS Chapter 1, the procedural rules of the Commission, and Nevada case law already give all judges in this state due process rights. This is not necessary.

Section 3 revises the standard of proof required in judicial discipline proceedings. The current standard of proof is consistent with the standards of proof found in all jurisdictions in this country. Their change to this is a radical departure to what is customary and normal in all jurisdictions in this country. As I indicated in my letter to each of you in January, it does not make sense. To everybody that I speak to about this issue, it is contradictory. It requires the Commission to prove its case before a trial, before examining witnesses, and before conducting a trial on the merits. It just does not make any sense.

It also eliminates the Commission's ability to consider all evidence available for introduction at a formal hearing. They deleted this portion of the statute. All the Commission will be able

to do in this case is focus on the investigation report—nothing else, no other evidence. The investigation report is drafted by one individual. It is an independent contractor hired by the Commission to do an investigation of the facts. We would not be able to look at the transcript. We could not look at other evidence that may come in after the investigation but before the decision is made to file a formal statement of charges. We just have to focus on the investigation report, which could have some issues; for example, if the factual evidence does not support the conclusions in the report or if there is new evidence that comes to the attention of the Commission after the investigation. The Commission has a right to follow up with the judge and ask the judge to respond to that evidence. It really handcuffs the Commission in doing its job, which is to get to the facts. A thorough investigation is what is needed. That actually provides more due process to the judges because we are trying to get it right. We have judges' reputations and livelihoods on the line. We have to get it right. This is an investigation. They are trying to impede and obstruct our investigation. I do not know a lot of judges, other than the proponents of this bill, who are okay with it.

Section 5 of the bill refers to not compelling a judge to respond to a complaint during the investigative phase of a judicial discipline proceeding. Again, I will be standing tall next week in Las Vegas before the en banc Supreme Court on an issue of whether or not the Commission can ask judges written questions during its investigative phase. This change in section 5 does not have anything to do with that particular question. The current statute requires a judge to respond to a complaint. They are looking to change that. They do not want to respond to the complaint; they want an option to respond to the complaint. Again, I have to stress that this is an investigation.

There are only two phases of the Commission process: the investigative phase and the adjudicative stage. The investigative stage starts with the filing of a complaint by a member of the public, and it ends upon the filing of the formal statement of charges. Everything before the formal statement of charges is an investigation. The adjudicative phase of judicial discipline proceedings starts at the filing of the formal statement of charges. This is the complaint the judges are talking about. This is where their adjudicative and due process rights start. This is in accordance with not only the Nevada Supreme Court, but the United States Supreme Court. This is clear and settled law.

This change, again, is a radical departure from what other jurisdictions have done and do across this country. The sole issue on Tuesday is whether we can ask written questions during an investigation. I am not going to belabor that point here, but I am going to say, again, this is an investigation. If investigative bodies cannot ask questions during an investigation, I think we should just pack it all up and go home. I do not know what the purpose of an investigation is if these investigating bodies—not just the Commission, but any investigating body—cannot get to the truth and the facts. That is what I will be arguing on behalf of the Commission next week before the Supreme Court of Nevada. As I indicated before, the Commission's statutes and the procedural rules being challenged by the proponents here are the same that existed in 2009 following the implementation of the Article 6 Commission report.

We have heard a lot of testimony today that the current judicial discipline process does not afford due process for judges. As I indicate in my opposition outline (Exhibit O), judges have more due process rights than any litigant in any court in this country. Eighteen to twenty-four months prior to the filing of a public complaint, there is a review of the complaint and there is an investigation that commences. The Commission holds three meetings. They review the complaint and there is an investigation. They come together again and review the investigation report and all other evidence. Then they vote again for the judge to respond. They have to respond, by law, to the complaint. They have the opportunity to clarify anything they want. They already know what the complaint is. Please do not get confused by the definition of complaint. Complaint is defined by statute as is the formal statement of charges. A complaint is one filed by the public, and the complaint by the Commission is one filed by the Commission. They are more than knowledgeable of the allegations against them early on in the process. If the Commission decides to investigate, they send an investigator out, the judge sees the complaint, participates in an interview, and can provide any documents or arguments to that investigator that the Commission will review and consider. The Commission also goes out and speaks with all other witnesses that are relevant to this allegation—not just the complainant, but everyone else—and considers all of that evidence, not just in the investigation report, but everything else, including videos, court documents, etc. The Commission meets again after they receive the judge's response and answers to questions and they vote again. In the response process, judges can provide legal arguments. They can correct mistakes. They may have misstated something in the interview because they are nervous or they forgot something. They can address new evidence the Commission has received. It is a perfect opportunity for judges to correct the record and reconcile any inconsistencies or ambiguities in witness testimony or even their own testimony. They can even submit legal arguments to the Commission. The Commission will consider all of that, every bit of it, before they decide to file a formal complaint against the judge.

When I hear they do not get any due process rights, it is simply not true. Look at the typical litigant in any court. They do not get advance notice of a complaint being filed almost a year and a half to two years beforehand. They do not have an opportunity to come in and talk to an investigator, have an interview, and submit legal arguments. They do not have an opportunity to petition the Supreme Court of Nevada on perceived due process violations. They do not have any of those rights. Yet a year and a half to two years prior to the decision of the Commission to file a formal complaint, all of this is taking place. The commissioners behind me and I cannot imagine how anybody can argue there is no due process rights for judges. It is simply not true.

With respect to the argument that the Commission blatantly violates due process rights, two years ago, I testified before this Committee on Assembly Bill 28 of the 2017 Session, which specifically expanded due process rights for this particular group of judges: limited jurisdiction judges. I drafted the bill. I testified before the Judicial Council. I worked with the Administrative Office of the Courts prior to the bill being introduced, and I testified before the Assembly and Senate Judiciary Committees. This bill was for their benefit.

It expanded their rights. The Commission is not out to get these judges. That is simply not the case.

As you know, discipline is imposed against all judges. We have 600 judges in this state or more—district court judges, hearing masters, Nevada Court of Appeals judges, and Supreme Court justices. Our decisions are all unanimous decisions. There are seven members on our Commission. There are two judges, two attorneys, and three lay members. Two of their own colleagues have decided, based upon the facts, they have committed misconduct. As far as the discipline that was imposed, these two judges agreed the discipline was appropriate under the circumstances. This is not a case of lay members and attorneys ganging up on the judges. That is not happening. These are unanimous decisions. I think that is very telling. Their own colleagues are finding them to be in violation of the code and the law and disciplining them accordingly. There is simply no consensus regarding the lack of due process protections among the Nevada judiciary.

I attached, as part of one of my documents, a public order for the Commission [pages 24-34, (Exhibit O)]. I am not going to discuss that order, I just want you to know who signed that order. That was Judge Thomas Armstrong. He was appointed by the Nevada Supreme Court. He is an alternate commissioner, and he was the past president of NJLJ, just four months ago. That order debunks all of the constitutional arguments you heard here today. This is from a municipal judge and justice of the peace to his own colleagues. The other order [pages 13-22, (Exhibit O)] addresses the arguments you have heard today that we need more than one keeper of judicial discipline because it is unfair. If you look at the highlighted portions, that is the law. This is settled law by the United States Supreme Court and the Nevada Supreme Court. They have already ruled on these issues. There is absolutely no evidence that a one-tier or a two-tier system is any more or less fair. In fact, the overwhelming majority of jurisdictions in this country have a one-tier system as we have here today. There is no evidence that our system is less fair or doles out less due process protections. There is simply no evidence of it. This was born out by a Stanford study not too long ago that said the same thing. They did a study. It is the only study of its kind. This hypothesis was not proven, but one thing in that study that was proven is that if there is a two-tier system, it is going to cost a lot more money, and you are going to get the same results—more money and more time.

I wanted to counter what was testified toward the end about venue. We do not have a policy of bringing judges up here from Las Vegas or vice versa. Nine times out of ten if it is a southern judge, we go down to Las Vegas. The only time we have brought a judge up here was for a one-day hearing when we could not have the trial within a few months. We have seven commissioners. It is literally like herding cats to try to get them together. It is very difficult. They are all professionals, judges, and attorneys. If it is a one-day trial and we have to wait another three months just to have the trial, I think having these done quickly based upon the public's need for these cases to go forward in a timely and efficient matter overweighs those concerns. There is no law they can point to that says it is a violation of due process because they may have to get on a plane for one day and go back home the next day. There is case law on this by the Supreme Court of Nevada and other jurisdictions.

In conclusion, I would like to stress that if a jurisdiction is to have a judicial system that has the confidence of its citizens, it must have a judicial system that is effective. From myself and all of these commissioners here today, we have utmost respect for judges. They do a noble job for the citizens of this state, and our mission is to protect judges.

Chairman Yeager:
You mentioned a Nevada Supreme Court argument next Tuesday. Is that going to be here in Carson City and do you know what time that will be?

Paul Deyhle:
That is in Las Vegas at 10 a.m.

Chairman Yeager:
Just one thing I wanted to put on the record so we are clear: all the bills from the Judicial Branch come through the Supreme Court of Nevada for submission to the Legislative Counsel Bureau. That is in the rules of the Legislative Counsel Bureau. If you look at A.B. 20, it does say "On behalf of the Nevada Supreme Court." That is the process that is set up in statute. In case anyone was wondering, as we have heard, there is at least one and maybe more cases pending in front of the Supreme Court of Nevada on some of these issues. Because of that, the Supreme Court of Nevada is not able to be here to express opinions on this matter due to ongoing litigation. I just wanted to make that clear for the record; under their rules, they are not going to be able to weigh in on this bill given the pending litigation. I will now open it up to questions from Committee members for Mr. Deyhle.

Assemblywoman Cohen:
Is there anything in the amendment that is acceptable to you?

Paul Deyhle:
No.

Chairman Yeager:
Do we have any additional testimony in opposition to A.B. 20?

Jerome M. Polaha, Judge, Second Judicial District Court:
I have been on the Commission since 2002. I have had a lot of hearings and a lot of experience with the Commission. The question was asked: Is there anything the Commission agrees to in this proposed bill? It is unnecessary. As far as the due process that has been argued here, it is afforded. Think about this: there are seven people on the Commission. We have an investigator. As far as the request for a two-tier system, to be able to make that work, we are going to have to split the panel. However, the law says four constitute a quorum for all reasons except for handing out discipline, for which I need five. Right there we have a problem that has to be addressed. The obvious way to address it is to expand the Commission, spend more money. Consequentially, there will be more delay.

The other aspect of the law which is a big selling point for them is that the investigation be founded on clear and convincing evidence rather than a reasonable possibility that there could be clear and convincing evidence after a complete hearing. Think about that. You have an investigator. That would be like police officers finding proof beyond a reasonable doubt before they took their case to the justice court. The court could say, "Well, there is obviously, by law, a requirement that proof beyond a reasonable doubt has to be established by the investigator. I got an investigation report; there had been proof beyond a reasonable doubt. What am I going to do? Pass it on to district court." Then district court gets it and says, "Why do we need a jury? We already have proof beyond a reasonable doubt, so my job is to punish you." That is the effect of what they are proposing, and it will not work. It is not due process.

Chairman Yeager:
Is there anyone else in opposition? [There was no one.] Is there anyone in neutral? [There was no one.] I will invite our presenters back to the table for any concluding remarks.

Judge Higgins:
Sitting here, I was starting to think I had drawn the short straw by agreeing to come testify today, but I did because I was available and I think this is an important bill. I think I need to disagree with my friend Judge Polaha. I think it is necessary to have some of these due process rights written into the statute because each of these touches a point where, in the past, the Commission has denied these issues. Prehearing motions are not being decided before the hearing. They are not being ruled on soon enough in advance for somebody to craft his or her defense. I think it is only fundamentally fair that the judges get all the evidence that is going to be relied upon by the Commission when they make their decisions and that everybody has a chance to present their side of the case. I have been told of cases in Las Vegas where the prosecution says they only need two hours, so the Commission says the defense only gets two hours even though they have a lot more than that. They are limited, then, by what the prosecution puts on. Each of those is in response to something that has been pending and that we think needs to be resolved.

I was trying to figure out how there are 600 judges in the state. I guess there are a lot of hearing masters and commissioners, but our association represents 95 judges. There are approximately 100 other elected district court judges and court of appeals judges, so I think we represent about one half of the elected judges in this state. Frankly, we do not agree on everything. Getting 95 judges to agree to go to lunch is difficult enough. Some people are big proponents of this bill. To some people, it does not bother them so much. I do not think I am a member of a minority radical group of judges that is seeking to change the rules. Many states have two-tiered systems. It only seems fair to me that whatever body decides what you are going to be disciplined for has not already been in charge of the investigation and decided what questions to ask and where the investigation goes. Those ought to be changed. I do not think we ever said there is rampant violation of every due process right. I think our testimony was that there are some things we think could be improved.

I might have to disagree that having to respond to an investigator's questions or be sanctioned for failure to cooperate with the Commission, I am not quite sure how that is a due process right afforded to the judges. We have to answer those questions or we are disciplined and sanctioned for failure to do so. I had hoped to be able to work on this bill and come to a conclusion. I was actually on the Article 6 Commission and spent hours and hours in hearings on the subcommittee I was on. I am aware there were a lot of things that did not get addressed. I do not think just because something is written one way it means we cannot change it ten years later. I think there is room for improvement. I do not think we are being radical; we are just asking for some basic fundamental fairness. I think we are still willing to sit down and meet with the Commission if they would like to. It does not sound as though there is a comma or a semicolon in this bill they agree with. We are still willing to sit down with them and discuss it if possible.

Judge Tatro:
When I started my testimony, I pointed out that we think the Commission does great work. They need to be there. They are very important. I have never once questioned if they made a right decision. It is just these issues that are our concern. Ten years ago, the Article 6 Commission happened, but things have changed. It is just like the NRCP recently being changed. Everything gets changed because things change. Time goes on, and they have to change.

There was one thing Mr. Deyhle said that I need to respond to. He indicated that Judge Armstrong, when he served on the Commission, signed that order. I am not saying whether he opposes or supports this bill, but when he was president, the way it works is we have a committee and then the whole body of judges decides what bills we are going to take forward to the council, and ultimately to this body. He was the president. It was a unanimous vote to bring this bill forward.

Judge Zimmerman:
I want to clarify and disagree with Mr. Deyhle on some of his remarks. None of the judges are saying that if there is a complaint made against them it should not be investigated and we should not be questioned. Our objection is to answering interrogatories that we have to swear under oath that could be used against us in the future if the Commission chooses to proceed with the formal statement of charges. If you do not answer the interrogatories, they are deemed admitted and you are slapped with an additional charge of failure to cooperate. The purpose of this is not that judges do not want to cooperate in investigations—they certainly should—it is the way the interrogatories are presented before formal statement of charges are filed that we object to.

I thought it was interesting that Mr. Deyhle testified that we have more due process rights than anybody else. However, he failed to address any of our specific concerns about pretrial motions being ruled upon, how much time is allocated to the defense to present their case, interference with the witnesses the defense wants to present, and standing on venue. He glossed over all of those and did not answer anything about those.

I also want to point out that I think it is very important that the investigative and prosecutorial functions are separate. When they are not separate, the outcome has always been predetermined. I am sure, if you reviewed the decisions of the Commission, they are always unanimous because they have been involved in the investigative part and heard that evidence and then hear the trial part. I also thought it was interesting to note that Mr. Deyhle said there are no district court judges here in favor of the bill. Well, there are no district court judges here in opposition either, but I can tell you from my own personal experience working in the Regional Justice Center, I am stopped constantly and encouraged. I have been encouraged by Supreme Court justices. I have been encouraged by district court judges. I have been told repeatedly that this is crazy to bring this bill before the Legislature because now I have made myself a target by the Commission. I do not believe that is true, but I have had that said to me repeatedly. For him to say this is a small minority of judges that want this, I have received encouragement from judges from all over the state in proceeding with this bill, so it is just not true.

Chairman Yeager:
I will now close the hearing on A.B. 20. I will hand this meeting over to Vice Chairwoman Cohen as I am going to present the next bill on the agenda.

[Assemblywoman Cohen assumed the Chair.]

Vice Chairwoman Cohen:
I will open the hearing on Assembly Bill 423.

Assembly Bill 423: Revises provisions relating to certain attempt crimes. (BDR 15-1117)

Assemblyman Steve Yeager, Assembly District No. 9:
It is my honor to present Assembly Bill 423 to you this morning. This bill allows certain people to petition the court for a reduction of charge once they finish their sentence. This bill only applies to crimes known as "wobblers," which is kind of a funny name. A wobbler means that when the person is sentenced for a crime, the judge can either adjudicate the person for a felony or a gross misdemeanor. Essentially, the crime wobbles between a felony and a gross misdemeanor. I think that is where the name came from, but I am not sure. Those are the limited circumstances where this bill would apply. The only crimes that we are talking about where A.B. 423 would apply would be an attempted crime of a category C, D, or E felony. If you plead guilty to or are found guilty of attempting to commit one of those categories, those are the wobbler offenses we are talking about where the judge makes the determination.

The language of the bill itself is pretty straightforward. What it says is that if a judge decides to give the offender a felony at the time of sentencing, the offender would be able to come back to the court after the completion of the sentence and petition the court to modify that felony down to a gross misdemeanor. This would only apply in circumstances where: (1) the

offender has a wobbler offense, and (2) the judge actually gives the offender the felony rather than the gross misdemeanor.

The procedure in the bill is that notice must be given to the prosecuting attorney, and then the prosecuting attorney has 30 days to respond. If the prosecuting attorney either agrees with the request or does not oppose it, a judge would be allowed to simply grant that motion and reduce the charge without a hearing. If the prosecuting attorney opposes the motion, the court must hold a hearing. The court would have total discretion in terms of what evidence to consider at such a hearing. I anticipate that a court would look at how the offender did on probation or in prison, how the offender is doing in life currently when they file the motion—including whether they are employed, whether they are going to school—the offender's complete criminal history, and obviously any input from the victim of the crime and the district attorney about the crime itself, and then make a decision about what to do. If the judge denies the motion, the petitioner cannot appeal, so that would be the last stop.

Even if a judge denies the motion to reduce the charge, the offender would still be eligible to seal his or her records after the waiting period that is in statute. Right now, that is five years for a category D felony and two years for a category E felony. Keep in mind that the record-sealing process, as we have heard, is burdensome and can be expensive. This would be a better procedure where a judge could, on his or her own, reduce it down from a felony to a gross misdemeanor.

In the real world, I anticipate these would only be granted when the petitioner has shown extraordinary success on probation. Honestly, I do not think a judge would reduce a charge after someone was given a prison sentence because that would be a reflection of the seriousness of the crime in the first place. I think we are talking about situations where the offender did really, really well on probation. I trust our judges to use their discretion appropriately when deciding these petitions. We are not talking about a lot of cases, so I do not think this is going to clog the court system.

Finally, under the terms of the bill, this is not retroactive. If we were to enact this legislation, it would only apply to offenses committed on or after October 1, 2019. People who now have felonies on their records as a result of wobblers would not be able to go back now under this bill. That should limit the amount of petitions that would be filed because it would only be on a future basis. With that being said, I am open to any questions.

Assemblywoman Peters:
In this language, we talk about the petition having to go to the original prosecuting attorney. What if that attorney is retired or otherwise unavailable? Who would be a default?

Assemblyman Yeager:
There are a couple components here. In section 1, subsection 3, it talks about petitioning the court of original jurisdiction. Essentially, that means it would have to go back to the same court. Now, judges shuffle around all the time. What would happen is that it stays in the department it started in. If there is a new judge in that department, it would stay there. With

respect to the prosecuting attorney, there may very well be a different prosecuting attorney. That prosecuting attorney may have retired or moved on. I would just expect somebody from the district attorney's office to comment, so it would not necessarily preclude someone from asking if there was a shuffling of the case. The reason we have that language about the original jurisdiction is that we do not want someone to go in front of one judge and get the felony and then try to petition another judge and sort of "forum shop" to get a reduction. It would have to be the same judge who would make the determination unless there was some kind of switch in the departments.

Assemblywoman Peters:
I also wonder about whether there is any victim input in this. My question comes about as a result of Marsy's Law.

Assemblyman Yeager:
It is not specifically listed in here. I would certainly be willing to include that. We left the proceeding pretty open-ended in terms of what evidence a judge would want to hear, but I would think, under Marsy's Law, a victim would have to be noticed and, at least, have an opportunity to come and weigh in. To the extent that is not the case or it is unclear, I would be happy to add that to the language.

Vice Chairwoman Cohen:
I will open it up for testimony in support.

John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office:
There are often times when we take a person to sentencing on a wobbler. Other states do not necessarily have this mechanism, so when we describe to attorneys in other jurisdictions that a person will not necessarily know whether they are getting a felony or a gross misdemeanor prior to sentencing, they think we are kind of crazy in doing that. Cases can certainly be negotiated to allow us the opportunity to argue for a gross misdemeanor. Sometimes we lose that. Then you have a client who goes on to successfully complete probation, do all of these things, and really wants to get a good hold on their life, but there is that felony on their record. This would be a carrot at the end to allow them to apply for a gross misdemeanor at that time.

Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office:
I believe this really helps clarify the wobbler provisions. More importantly, it provides that carrot to ensure our clients are really working toward being successful. It allows them the opportunity to have that felony removed from their record so they are able to become better members of our society.

Vice Chairwoman Cohen:
Is there any more support? [There was none.] We will move on to opposition.

John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing Nevada District Attorneys Association:

We are in opposition to A.B 423 as it is currently written. I do not have an amendment yet, but I did have an opportunity to speak with Chairman Yeager yesterday about our opposition. I appreciate his taking the time to meet with me on such short notice. Generally, a judge loses jurisdiction to modify a sentence once a judgment of conviction is filed unless the defendant can show a material misrepresentation of fact or some sort of clerical error. District attorneys, in general, do not want to set the precedent of opening up judgments of conviction once the sentence has been rendered.

That being said, I think we are open to some changes in this bill that would achieve the same result but do it in a slightly different way. For example, our position is that this would be better done at sentencing. In fact, in Clark County, what often happens on wobbler cases is that the judge will ask the state if we have an objection to allowing for a drop-down to a gross misdemeanor. When I say "drop-down," I mean the judge would adjudicate the defendant of a felony, and if they complete probation, the judge would then vacate the felony conviction and enter a gross misdemeanor at the end. The reason why the district attorney stipulation is important is because that is how we get around the fact that the judge loses jurisdiction to modify the judgment of conviction after the sentence is rendered.

I think it is better done at sentencing for several reasons. First, the victim will have finality at sentence. In cases where it is a wobbler, the victim will know the judge has, at least, given the defendant an opportunity to earn a reduction to a gross misdemeanor and has given the defendant a road map of how to get there. The judge can say, "If you stay out of trouble," or, "If you comply with terms X, Y, and Z, and if you pay restitution, I will allow you to earn a reduction to a gross misdemeanor." The victim will know at sentencing what is going to happen ultimately with the case instead of waiting for a period of time to potentially receive a notice of this new hearing set out in the current version of the bill in which we would have to basically relitigate sentencing and instances where the victim has a problem with the reduction.

Further, this bill should not apply in situations where the parties have stipulated to a particular sentence. In other words, I, as a deputy district attorney, have often offered a negotiation of a wobbler offense to a defendant, but as part of that negotiation, the defendant is required to stipulate to felony treatment. This bill does not speak to those instances. I think the way it is currently read, they could apply or make a motion to ask for a reduction despite the agreement to the contrary.

Finally, this should not apply to people who have prior felony or gross misdemeanor convictions or who have already received the benefit of this bill in the past. I think there is an avenue for us to get to the ultimate goal of allowing judges to do this, but we think it should be at the front end where the victim has had input at sentencing and the judge specifically spells out a road map in the judgment of conviction to how a defendant could earn that gross misdemeanor reduction.

Vice Chairwoman Cohen:
Is there anyone here in neutral? [There was no one.] I will invite Chairman Yeager back for concluding remarks.

Assemblyman Yeager:
I agree with Mr. Jones that the parties would be able to agree in a guilty plea agreement, which is essentially a contractual relationship, about someone getting a felony. I think, if that is important enough, they could put that in there to not have this bill apply. Other than that, I heard there is a willingness to continue working on this. I am committed to continuing to work with Mr. Jones to see if we can find a way to enact this provision which, I think, would apply in a very small number of cases but would be a huge benefit to an offender getting his or her life back on track.

Vice Chairwoman Cohen:
Thank you. [(Exhibit P) was submitted but not mentioned and will become part of the record.] I will close the hearing on A.B. 423.

Is there anyone here for public comment? [There was no one.] This meeting is adjourned [at 10:54 a.m.].

RESPECTFULLY SUBMITTED:

_____
Lucas Glanzmann
Committee Secretary

APPROVED BY:

_____
Assemblyman Steve Yeager, Chairman

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a set of documents in support of Assembly Bill 285, submitted by Kaylyn Kardavani, representing Nevada Justice Association, and presented by George T. Bochanis, representing Nevada Justice Association.

Exhibit D is a written testimony dated March 25, 2019, written and presented by Dane A. Littlefield, President, Association of Defense Counsel of Nevada, in opposition to Assembly Bill 285.

Exhibit E is the current *Nevada Rules of Civil Procedure* Rule 35, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit F is the former *Nevada Rules of Civil Procedure* Rule 35, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit G is a Supreme Court of Nevada order, submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit H is a packet of written statements in opposition to Assembly Bill 285, from various members of the Association of Defense Counsel and submitted by Dane A. Littlefield.

Exhibit I is a copy of a Supreme Court of Nevada case, *Berkson v. LePome*, 126 Nev. 492 (2010), submitted by Dane A. Littlefield, President, Association of Defense Counsel of Nevada.

Exhibit J is a packet of letters in support of Assembly Bill 285.

Exhibit K is a proposed amendment to Assembly Bill 20, submitted by Nevada Judges of Limited Jurisdiction.

Exhibit L is a statement submitted by Justice Nancy M. Saitta, retired, in support of Assembly Bill 20.

Exhibit M is a letter dated March 25, 2019, to Chairman Yeager and members of the Assembly Committee on Judiciary, submitted by Gary Vause, Chairman, Nevada Commission on Judicial Discipline, in opposition to Assembly Bill 20.

Exhibit N is a letter dated January 3, 2019, to Chairman Yeager, submitted by Paul C. Deyhle, General Counsel and Executive Director, Nevada Commission on Judicial Discipline, in opposition to Assembly Bill 20.

Exhibit O is a set of documents in opposition to Assembly Bill 20, submitted by Paul C. Deyhle, General Counsel and Executive Director, Nevada Commission on Judicial Discipline.

Exhibit P is a letter dated March 26, 2019, to members of the Assembly Committee on Judiciary, submitted by Jim Hoffman, Legislative Committee, Nevada Attorneys for Criminal Justice, in support of Assembly Bill 423.