

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**WAYNE:** Welcome. Welcome. Welcome. Welcome. Welcome. Thank you. Thank you. Thank you. Good afternoon and welcome to the Judiciary Committee. My name is Senator Justin Wayne, and I represent Legislative District 13, which is north Omaha and northeast Douglas County. And I serve as the Chair of Judiciary. We'll start off today by having committee members and staff do self-introductions, starting with my right, Senator McKinney.

**McKINNEY:** Good afternoon. Senator Terrell McKinney, District 11, north Omaha.

**ANGENITA PIERRE-LOUIS:** Angenita Pierre-Louis, committee clerk.

**DeBOER:** I'm Wendy DeBoer. I represent District 10 in northwest Omaha.

**BLOOD:** Good afternoon. Senator Carol Blood, representing District 3, which is western Bellevue and eastern Papillion, Nebraska.

**HOLDCROFT:** Rick Holdcroft, District 36, west and south Sarpy County.

**DeKAY:** Good afternoon. Barry DeKay, representing District 40. Those counties include Holt, Knox, Cedar, Antelope, northern part of Pierce and most of Dixon County.

**WAYNE:** Also assisting us is our committee pages, Laura Bartek [SIC]-- Brtek from Norfolk, who is a political science major and criminology major at UNL; and Isabel Kolb from Omaha, who is a political science and pre-law major. This afternoon we'll be hearing seven bills on, on a Friday and we will be taking them up in the order listed outside of the room. On the tables in the side of the room up here or right up here to the right of me, your left, are blue testifier sheets. If you are planning to testify today, please fill out a blue one and hand it to the page so we can make sure we keep accurate records. If you don't wish to testify and want to record your presence, please fill out a gold sheet and we will record your presence for the record. Also, I'll note that it's the Legislature's policy that all letters of record must be received by the committee, noon prior to-- the day prior to the hearing. If you have handouts, please have 10 of them. If you don't, please give them to my-- to our pages ahead of time, before you come up, so we can get 10 copies for the committee. Testimony for each bill will begin with the introducer's statements, followed by opening statements. You will hear from supporters of the bill, then those in opposition of the bill, bill, followed by those speaking in neutral

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

capacity. The introducer of the bill will be given the opportunity to make closing statements. Because it's Friday today, it's no question Friday, so you won't get any questions from the committee member. I'm kidding. We'll ask you-- kid-- we'll ask you plenty of questions. Before I-- you testify, please state your first and last name and spell them for the record. We will be using the three-minute light system. When you begin, the light will be green. At the yellow, it will be one-minute warning. Red, we ask you to wrap up your final thoughts. And I'd like to remind everyone, including senators, to please turn off or silence your cell phones. And with that, we will start with Senator DeBoer, LB799. Welcome.

**DeBOER:** Thank you Senator Wayne. Members of the Judiciary Committee, I'm Senator Wendy DeBoer, W-e-n-d-y D-e-B-o-e-r. I represent the 10th Legislative District in northwest Omaha. I'm here today to introduce LB799. LB799 is a bill that reflects a piece of the biennial budgeting process addressing state salaries for the court system's judges. As currently structured, all Nebraska judges are paid using a statutory formula, based on the salary of the Chief, Chief Justice. LB799 then proposes an increase to the Chief's salary that will result in a commensurate increase in the salaries for the Justices of the Court of Appeals, district court judges, county court judges and judges of the separate juvenile courts. I am passing around or you already have AM761, which is an amendment that adjusts the salary to reflect a 7 percent increase for Nebraska's judges in a year one of the biennium, and a 6 percent increase in year two. The amendment reflects a negotiated agreement between the judges and the administration with respect to the budgeting process. And I understand that this committee has says that the shorter the testimony that follows me, the more likely that is to happen. There are a number of testifiers behind me who intend to provide you some additional information in Nebraska's judge's salary structure, the need to offer salaries that ensure that we have qualified candidates applying for judgeships in Nebraska and the history of judicial salaries in Nebraska. Considering where this bill fits in the context of the budget process, I'm hopeful that the committee will consider this bill and advance it from committee soon. Thank you. And I'm happy to answer any questions that you might have.

**WAYNE:** Any questions from the committee? Seeing none, thank you for-- Senator-- for real? Senator McKinney, Senator McKinney.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**McKINNEY:** Are these increases coming from the General Fund or cash reserves or anything?

**WAYNE:** General.

**DeBOER:** General Fund.

**McKINNEY:** OK. Thank you.

**WAYNE:** I was supposed to introduce this bill, but I was in court that day and judges got a little worried and gave it to DeBoer. All right. First proponent, Chief Justice Heavican. Welcome.

**MIKE HEAVICAN:** Thank you very much. My name is Mike Heavican, that's M-i-k-e, and Heavican is H-e-a-v-i-c-a-n, and I am the Chief Justice of the Nebraska Supreme Court. Senator Wayne, members of the Judiciary Committee, thank you again, for your attention to today's judicial bills, especially the judge's salary bill, LB799. LB799 currently schedules, as noted, a 7 percent raise for judges in fiscal year '23-24 and another 6 percent raise for judges in fiscal year '24-25, and as also noted, the Governor's Office has agreed to these increases. LB799 changes Section 24-201.01 of the Revised Statutes, which triggers salary increases for all Nebraska judges, including the Court of Appeals, district court, county court and so forth. This request is based on the need to attract and retain good lawyers for Nebraska's judiciary. We need to have judicial salaries remain competitive, not only in comparison to the salaries of other public employees, but also in comparison to private practice incomes, so that we can attract diverse and qualified individuals to serve on Nebraska's bench. Candidates for judicial, judicial office must typically make career and life-changing decisions at a critical point in their professional lives. If a lawyer chooses to become a judge and is so appointed, he or she, for all practical purposes, forgoes the opportunity to build a lucrative private practice or to resume a leadership career track in another public sector position. Our judges solve legal problems and disputes, both large and small and do so with patience and grace. Every case is important to someone and every case is important to our judges. There is no better investment you can make in the future of state government than investing in competitive salaries for the judiciary. Our judiciary will likely be in place long after most of us in this room have left public life and is key to many critical issues facing Nebraska and Nebraskans. On at least four occasions in the last decade, not enough qualified lawyers, that means

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

a minimum of two, applied for an open judgeship for the Governor to make an appointment for a judicial vacancy. While several factors have contributed to this previously unheard of occurrence, the need for competitive salaries is definitely one of those factors. I recommend the passage of LB799 and I would be happy to answer any questions.

**WAYNE:** Any questions from the committee? Senator McKinney followed by Senator Geist.

**McKINNEY:** Thank you, Senator Wayne. And thank you, Chief Justice. What do you think is the judiciary's role in our fight to address the issues within our criminal justice system?

**MIKE HEAVICAN:** Well, obviously, judges do all of the individual cases. They have to hear all of the criminal cases that come in front of them. Every, every one of them is in front of a judge. So judges obviously have a big part of that. Now, you probably are talking about broader kinds of issues. We have an access to justice committee that works on all kinds of issues to better serve the, the people of Nebraska. And we have a number of issues in regard to things like that. We have a robust education system for our judges and other employees in the judicial branch. So we try to help our judges understand and think about things like diversity and that sort of thing. So, I think, obviously, we're important in each individual case and, and we have a role as part of government to do our best job we can for all Nebraskans.

**McKINNEY:** OK. Well, we served on the task force looking at the, the criminal justice system a year or two ago. And one of the things that came out was the discretionary use of consecutive sentences by judges. And because of that, we have, really, a logjam in our state prisons because the length of stays have increased. Is that a-- is there a reason for that?

**MIKE HEAVICAN:** Well, judges sentence in really, in the sentencing range that this body gives. So I-- each of those cases, individually, a judge has to decide. And if they have the option to sentence consecutively or concurrently and sometimes they don't have the option, but if they do, that is up to an individual judge in an individual kind of case.

**McKINNEY:** Yeah. No, I understand that. It's just-- in the numbers that were shown to us, it, it was told to us in a report that a lot of the

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

increase in consecutive sentence was discretionary and that judges were doing it. It wasn't just because it was statutorily required. And I, I just wanted to ask that, because one of the biggest issues with, with getting changes in the system is that we have so many people consecutively sentenced or over-sentenced or sentenced for long-term sentences. And although admissions are decreasing, we just have so many people in the system. And I, I just was curious about that. And then my, my last thing is how do, how do we increase diversity in judges in the state of Nebraska?

**MIKE HEAVICAN:** That really is a, is a long-range kind of thing. I think you have the Nebraska Bar Association in cooperation with the two law colleges in the state. And we are, as I said, we have an Access to Justice Commission. We work on those kinds of issues. And the Supreme Court, for example, we go out to high schools and we hope that when we do that, that students will see a little bit of what the judiciary is about and what the law is about. And we hope to attract young people to become lawyers so that they can-- one of their options then, is to become judges. Ultimately, the system in Nebraska for selection of judges gives a lot of power to the Governor. It gives power to local bar associations. The Legislature has no specific role in the appointment of individual judges. It all goes through the committees and so forth. And the-- for example, I can't call up and lobby for a particular judge. That's forbidden by statutes. But I can encourage and have encouraged, for example, lawyers of diverse groups, to apply. And if that's really our, our role in the more immediate kind of situation-- in the long run, this is something we have to attract young people to become lawyers-- young people with a diverse back-- background to become lawyers and get involved in the system and we try to do a lot of that.

**McKINNEY:** Thank you.

**MIKE HEAVICAN:** Yeah.

**WAYNE:** Senator Geist.

**GEIST:** I'm curious how we're doing state-to-state on salaries for our judiciary.

**MIKE HEAVICAN:** Right.

**GEIST:** Are we competitive in our, in our surrounding area?

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**MIKE HEAVICAN:** We are competitive and I would thank, thank this body and, and the recent governors. You have been good to us and we are competitive with our neighbors as-- at this moment, as you know, this is legislative season. Every state's judges and-- every, every state is going through the same process. We are. And I can guarantee you they are all asking for very large raises for a lot of reasons, one being in-- there's been a lot of inflation in the last year or so. And in most states, have a little more money than they, they normally would. So we are in a very good place competitively right now and we want to make sure we maintain that position.

**GEIST:** OK. Good. Thank you.

**MIKE HEAVICAN:** Thank you.

**WAYNE:** Any other questions from the committee? Seeing none, thank you for being here, Your Honor.

**MIKE HEAVICAN:** Thank you.

**WAYNE:** Next proponent. The other reason why I didn't take this bill is the, the Governor's Office has never tested positive [INAUDIBLE]. So I'm going to keep the tradition going.

**DAVE LOPEZ:** Making history.

**WAYNE:** Welcome, sir.

**DAVE LOPEZ:** Good afternoon, Chairman Wayne and members of the Judiciary Committee. My name is Dave Lopez, D-a-v-e L-o-p-e-z. I have the privilege to serve as chief of staff for Governor Jim Pillen and Lieutenant Governor Joe Kelly. I'm here to testify on behalf of the Governor in support of LB799 as amended, with the amendment described by Senator DeBoer, which reflects an increase in judicial salaries by 7 percent in the first year of the biennium and 6 percent in the second year. I'm particularly pleased to testify in support of this amendment because it, because it is the product of a very positive agreement between Senator DeBoer, Senator DeBoer and the executive and judicial branches, hopefully soon, to include the full Legislature. Maintaining competitive compensation for judges is, as the Chief Justice described, critical to ensure not only that Nebraska benefits from as broad a pool of applicants for judicial vacancies as possible, but also to ensure that we benefit from the experience of veteran judges throughout their careers. That experience is necessarily a

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

product of longevity on the bench, which is incentivized by competitive pay. The Governor well understands the importance of the judiciary and the challenging work our judges undertake every day. And I can tell you his team does as well. He is therefore pleased to support this compromise amendment, which will maintain Nebraska's status in the upper tier of judicial compensation, relative to our fellow states. Thank you. And I'm happy to answer any questions.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here, sir.

**DAVE LOPEZ:** Have a great weekend.

**WAYNE:** Next proponent. Welcome, sir.

**COREY STEEL:** Thank you, Chairman Wayne, members of the Judiciary Committee. I am Corey Steel, C-o-r-e-y S-t-e-e-l, and I'm the Nebraska State Court administrator. What is getting handed out to you is some data to back the need for judicial salaries. My office, obviously, is in full support of the amendment. And thank you to Senator DeBoer and others and the Governor's Office for working with us over the past few weeks to months on this compensation package. A few things I want to highlight in the information that's been given to you. This is a ten-year look back at judicial applicants for the state of Nebraska and the number of applicants that have come into the office for different positions, based on the years, both public attorneys and then also, private attorneys that then have become judges, as we continue to see the decline in the amount of public judges or, or excuse me, private judges or private attorneys that become judges. That's an issue for the bench. One of the things we talk about is the health of a, of a good judiciary is a robust, diverse group of judges that come from all practices of the law. So we have civil attorneys. We have attorneys that do probate work, that do divorce work, we also-- the, the domestic docket. We have judges that come from the County Attorney's Office and do criminal and we also like to see attorneys that come in that-- from the public defender or defense counsel. That makes a robust judiciary, so we don't have one group of judged that have practiced in one area throughout their time. The next page shows you the average number of applicants. We have seen a dramatic decrease in the number of applicants for an open judgeship. As you can see, we were averaging 7-8, up to 10 judges or individuals that applied for those open judgeships. We were down to 4.5, on average, in 2022. And the first judgeship in 2023 had three applicants

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

here in Lancaster County, Nebraska. The last thing I want to wrap up with is average pay for attorneys that are partners in law firms, which judges that have been attorneys for a long time would be a partner in that point in time. They're averaging just below \$260,000 a year, which is significantly less than what our judiciary makes, between \$50,000-70,000 less a year than a judge would make. So, again, it's important to have a diverse bench. It's important to pay our judges what they would come close to, not saying we have to match, but close to in the private sector. Otherwise we will see a continued decline, if you can make more money by being a private attorney out in, out in the community than, than applying for these judgeships. I'll wrap up there and answer any questions that anybody may have.

**GEIST:** Thank you for your testimony, Senator DeKay.

**DeKAY:** Thank you, Senator Geist. Thank you, Mr. Steel, for being here. You said there's a decline in applicants for judges coming forward. With that note, the two law schools in the state of Nebraska-- are the number of lawyers coming out of law schools, are they declining, staying same or going up?

**COREY STEEL:** I think we're starting to see that curve come back and an increase of individuals back in the law school after the last few years. There's a lot of recruitment efforts with the law schools, not only to recruit people to come to Nebraska, the University of Nebraska-Lincoln and Creighton, but also within our state. Our law schools, the University of Nebraska-Lincoln has partnered with the-- with three other colleges here in Nebraska, University of Nebraska-Kearney, Wayne State and Chadron State. And they have a program where they call the Legal Opportunities Program and they give scholarships to individuals that come to those three schools, with the incentive to go into law school at University of Nebraska-Lincoln. And so there's a lot of things to assist to try and increase the pool of applicants to the law schools.

**DeKAY:** One more question--

**GEIST:** Sure.

**DeKAY:** --if I can. How long does a lawyer typically, typically practice before they-- if they do have aspirations to be a judge, how long-- is there a criteria they have to meet before they can apply?

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**COREY STEEL:** There is. And it's in state statute. There's a requirement of age and number of years that you've practiced to be a lawyer-- or have practiced to be a lawyer and then, to apply for a judgeship. And off the top of my head, I believe it's five years. Well, here's what I'll do. I'll defer. Judge Strong or Judge Freeman is going to testify after me. And they went through this process, so they'll probably know exactly what that-- so I don't mess that up without looking at that ahead of time. Otherwise, I can get back to you on that exactly.

**DeKAY:** Thank you.

**COREY STEEL:** But it is statutory.

**GEIST:** Any other questions? Yes, Senator McKinney.

**McKINNEY:** Thank you, Senator Geist. Thank you, Corey Steel. I'm curious, what are the what's the demographic breakdown of applicants of those denied, approved to be judges, those that were PDS or county attorneys? Because I've talked to lawyers-- some lawyers and a lot of them are hesitant to apply or don't apply because it feels as though if you're, if you're not a county attorney, you don't become a judge. So how do we change that? And is there a way that we can get the information of, of the applicants, whatever the race, whatever their age? Did they get denied or did they get approved?

**COREY STEEL:** Great question. And because of this study and the data that I've, that I've given you up to this point, those are, those are data points that we don't collect at the time of judicial application, such as race is not collected at that time. We have public or private attorney, right, if they come from the public sector or the private. Again, it could be a county attorney or a public defender or the Attorney General's Office or something like that, if it's, if it's from, from the public sector. But that is one thing that we've really taken a look at, based on doing this study, is we're not gathering enough information at the time of application so that I can produce those types of reports, that say what's, what's the average age, what it-- of the applicant, what is the race and demographics of the applicant, what practice are they in. And so, those are things I think that we're going to work towards so we can collect-- start collecting that data.

**McKINNEY:** All right. Thank you.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**COREY STEEL:** Yes.

**GEIST:** Any other questions from the committee? I do not see any. Thank you for your testimony.

**COREY STEEL:** Thank you.

**GEIST:** Any other proponents? Good afternoon.

**SUSAN STRONG:** Good afternoon. Thank you for allowing me to speak today. I'm Susan Strong, S-t-r-o-n-g. I'm one of the eight district court judges that we have here in Lancaster County. But today, I'm speaking on behalf of the District Court Judges Association. And first, I want to thank Senator DeBoer for introducing this bill and also thank Governor Pillen for agreeing to the amendment. I wanted to talk about the importance of maintaining, maintaining a quality judicial branch and how we go about doing that. Of course, as you heard, one of the essential ways is to get a qualified pool of candidates to apply for these judicial positions. Just recently, as someone mentioned, we had a district court judge position open up in Lancaster County, as a result of the retirement of Judge Ott. Only three lawyers applied for that position. And when I talked to other judges across the state this week, I learned that that is a similar circumstance that is occurring over and over again. In fact, I have been told that only three people applied for recent vacancies in Douglas, Hall and Saline County. And quite often, all the candidates that apply are already in government service. The three people who applied for Judge Ott's position were either state or county employees. So we believe the dwindling number of judicial applicants is directly correlating to our salary issues. The number of candidates from the private law practice are few and far between these days. And trying to convince lawyers to apply, I've been told that it's too big of a pay cut for too much work. And I've heard that, not only from lawyers in Lincoln and Omaha, but from lawyers across the state. District court judges handle criminal, civil and domestic cases. Our criminal docket is crucial to the safety and welfare of your constituents. But even if you think the general public will never come in contact with these criminal cases or be involved in them, because we hope they're not, at some time in their lives, they may have to rely on the judiciary to resolve civil and domestic disputes. Trial court judges make decisions that impact people's daily lives. For instance, we decide if someone is wrongfully terminated from their employment, if someone is allowed to recover for injuries suffered

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

during an automobile accident or whether it's somebody gets custody of their kids and whether they receive child support to help them to take care of those children. So we need a competent and independent judiciary to assure that the constituents are well served. Our salary increases have not been keeping up with the cost of living increases. I received data from several judges complaining that while the Consumer Price Index has risen by 8.5-9 percent over the last couple of years, our judges' salary-- salaries have increased by only around 3 percent. Judges are really feeling the lower salaries, especially during these last few years of inflation. So we need qualified candidates, so we--so that--

**GEIST:** Thank you.

**SUSAN STRONG:** --we can have qualified judges appointed.

**GEIST:** I hate to stop you, but I have to continue the--

**SUSAN STRONG:** Sure.

**GEIST:** --tradition of the committee. Are, are there any questions on the committee? Senator DeKay.

**DeKAY:** Would you want to wrap up your statement real quick? Finish your statement?

**SUSAN STRONG:** Oh, sure. I was just, I was just going to say that to get those qualified applicants, we have to be competitive in salary across the legal community. So we want to attract applicants from the plaintiffs bar, the defense bar and corporate practice. And we believe we're stronger when we are more diverse, in background and experience. And I'll take any questions.

**GEIST:** Any questions? I actually have one.

**SUSAN STRONG:** Sure.

**GEIST:** I'm going to guess that this is a quite stressful job.

**SUSAN STRONG:** Yes.

**GEIST:** And I wonder if that, also paired with the salary, might be a reason that you only get a few applicants. I guess maybe that's common sense, but I don't know that people fully appreciate and I'm, I'm sure I don't. I only know in part, from some of the judges with whom I have

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

a good relationship, but you serve a very vital function and a very difficult job.

**SUSAN STRONG:** It is a difficult job and it has been for the last 50 years. And just recently is when we're experiencing this lack of, of people wanting to apply. So that's really concerning for us.

**GEIST:** And do you think that is solely the, the pay differential between private and public?

**SUSAN STRONG:** I can't say that that is the sole issue, but we believe it's, it's, it's close. I mean, we believe it's tied to that issue.

OK.

And I-- when I told the other judges that I was going to be speaking today, I had an influx of emails. I became the most popular judge in the state, instantly, when you tell somebody you're going to talk about whether or not they're going to get a raise.

**GEIST:** Yeah.

**SUSAN STRONG:** But so-- and I was surprised, frankly, by how many, from all across the state, were giving me the same concerns that we have here in, in Lincoln and Omaha, the, the lack of applicants, the, the salary, not keeping up with the cost of living. And even judges in our smaller communities are feeling that--

**GEIST:** Interesting.

**SUSAN STRONG:** --pinch. So.

**GEIST:** OK. Well, thank you. Thank you for what you do and thank you for your testimony. Senator McKinney, do you have a question?

**McKINNEY:** Thank you. How do you build confidence in those that are not county attorneys or working for the Attorney General to apply because they feel as though it's a waste of time?

**SUSAN STRONG:** Well, you know, we have had several people from the private sector, in the past, who have been judges. I think the best thing that we can do, as sitting judges. Is to try to recruit. And we do that. We've just been having a more and more difficult time in doing that in this-- these past, maybe five years. But you're right.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

We need more diversity. And that's what we are after. We want, we want people to apply from all over.

**McKINNEY:** Because I think we, we need judges, we need our judicial system. I just think that we have to get better at diversifying the bench.

**SUSAN STRONG:** Right.

**McKINNEY:** So all perspectives are on the bench and represented. And I-- that's all I was thinking about. Thank you.

**SUSAN STRONG:** Unfortunately, sometimes, it's-- I mean, it is a political process. So you have that in play, too.

**McKINNEY:** It's a problem, too. It shouldn't be.

**SUSAN STRONG:** Yeah. But there's nothing I can do about that.

**McKINNEY:** All right. Thank you.

**GEIST:** Any other questions? I don't see any. Thank you for your testimony--

**SUSAN STRONG:** OK.

**GEIST:** --and your service. We appreciate it.

**SUSAN STRONG:** And by the way, you have to be practicing for five years and 30 years old to apply for a judgeship. So--

**GEIST:** Thank you.

**SUSAN STRONG:** --just to clarify.

**GEIST:** Good afternoon.

**TRICIA FREEMAN:** Good afternoon. My name is Tricia Freeman, T-r-i-c-i-a F-r-e-e-m-a-n. I am a county court judge in the Second Judicial District, which consists of Sarpy, Cass and Otoe Counties. I am one of four. I appear today on behalf of the County Judges Association in support of LB799 and its amendment. I thank you, Senator Wayne and members of the committee for giving me an opportunity to testify today, and I'd like to take the opportunity to thank Senator DeBoer for bringing this bill. Chief Justice Heavican began his State of the

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

Judiciary address, in 2021, by reciting Article I, Section 13, of the Nebraska Constitution, which states that all courts shall be open and every person, for any injury done to him or her, shall have a remedy, a course of law and justice administered without denial or delay. And you can tell from the, the text, there's no exception, not even a national pandemic. Members of our communities across Nebraska rely on the courts to be available to hear their disputes and to resolve them fairly, competently and timely. To do that, we must maintain adequate judicial salaries to attract and retain good, qualified lawyers to fill judicial vacancies. County judges across Nebraska have exclusive jurisdiction to hear matters involving our most vulnerable populations, by appointing guardians and conservators and decreeing adoptions. We also settle issues in estate proceedings, address landlord/tenant issues, and decide a large variety of small claims and civil disputes. County judges test-- touch most criminal proceedings filed, by setting bonds and conducting preliminary hearings in felony cases and managing all aspects of traffic and misdemeanor cases, not to mention the countless search warrants and arrest warrants we issued at any time of the day or night. In most counties, county judges share responsibility with the district courts for handling protection orders. And outside Douglas, Sarpy and Lancaster Counties, county judges also have juvenile court jurisdiction. As you can see, the judicial branch must continue to attract a diverse group of applicants from all practice areas to fill current and future vacancies. I can say personally, I'm grateful for my colleagues whose practice area was different from mine and who are willing to share their knowledge and experience on matters awaiting my decision. Outside of their courtrooms, many county judges participate on committees to improve our courts, service to the public and access to justice, as well as to serve their state and local bar associations, to improve law practice and administration of justice. The role of the judicial branch is, is integral to strong, healthy Nebraska communities. I thank this committee and the Legislature for historically understanding and supporting the need for competitive judicial salaries and ask that you advance LB799, as amended, to General File. And I'd be happy to answer any questions.

**WAYNE:** Any questions from the committee? Senator Holdcroft.

**HOLDCROFT:** Thank you, Chairman Wayne. Just a comment. I recently spent some time in your court as an, as an observer.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**WAYNE:** I, I, I wasn't judging.

**HOLDCROFT:** I just wanted to say I thought you, you ran your court very professionally. Well done. Thank you.

**TRICIA FREEMAN:** Thank you.

**WAYNE:** Any other questions? Seeing none, thank you for being here.

**TRICIA FREEMAN:** Thank you.

**WAYNE:** Any other proponents?

**JASON GRAMS:** Thank you, Chairman Wayne, members of the committee. I'm Jason Grams. I am-- J-a-s-o-n G-r-a-m-s. I'm the president of the Nebraska State Bar Association, here to testify in strong support of LB799. Currently, the justices of the Nebraska Supreme Court are paid \$192,647.09 per year, in salary. Lower court judges are paid a percentage of that salary, ranging from 90 percent for county court judges to 95 percent for Court of Appeals judges. The NSBA periodically conducts a salary survey of attorneys in private practice. Attorneys completed the most recent survey in 2022, and although we have not published the results yet, we have some preliminary numbers we'd like to share with the members of this committee. One hundred forty-five Nebraska attorneys, who describe themselves as a partner or owner of a law practice, responded to our survey last year. According to the survey, the mean salary of a law firm partner in Nebraska is \$258,283 per year. That means Nebraska Supreme Court Justices are currently paid under 75 percent of what they would make as an average law firm partner and lower court judges, up to 10 percent less than that. And it should go without saying that Nebraska does not need below-average judges. For many years, Nebraska has been blessed with an excellent bench. It is essential to the operation of this state that this continue. However, some recent disturbing trends are reducing the number of candidates who apply for judgeships. The NSBA is frequently called upon to help fill candidate pools when not enough candidates apply for judgeships. This has been happening more and more frequently, as you've heard in prior testimony and it is not limited to the rural parts of the state. For example, the most recent search for a district judge, in Lancaster County, yielded only three applicants in a county of approximately 325,000 people and 1,260 licensed lawyers. Low salaries relative to the private sector is not the only factor causing the lower rate of

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

applications, but it is not helping. We need to correct this trend before it impacts the quality of our judiciary. That means judicial salaries must keep up with inflation and be at least somewhat competitive with what these public servants would earn. As private attorneys, I understand there's been an amendment. The NSBA supports this bill as amended. And on behalf of the legal profession, we thank the committee members for your attention and encourage you to advance LB799. Are there any questions?

**WAYNE:** Any questions from the committee?

**JASON GRAMS:** Thank you.

**WAYNE:** Any other proponents, proponents? Seeing none, turning to opponents. Any opponents? Anybody testifying in the neutral capacity-- neutral capacity? Seeing none, as Senator DeBoer comes up to close, we have one letter for the record and that letter is one letter of support.

**DeBOER:** Thank you, Senator Wayne. And I want to thank all the folks who came to testify today for the hearing. I think it's so important for us to think about judges' salaries and all the work that they do, especially as we're thinking as a body, as we as a committee are giving them more and more work to do when we ask them to do more and more with problem-solving courts, which are very intensive, intensive obligations. So I think it's very important to think about making sure that they have the, the salaries to keep them competitive. Because, as Senator Geist point out, it is a stressful job, particularly as we give them more obligations. So, I think that we should very strongly-- I want to very strenuously ask this committee to advance LB799 to increase their salaries. As we're thinking about salaries throughout the three branches of government, to increase those so that we can get the best candidates, not just for judgeships, but as we're going through this session, to think about our own staff in the legislative branch and increasing their salaries and all the other folks that we can, so we, as a full government, can be doing the best for our people and getting the best people for the job. So I'll answer any questions you have.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here. And that will close the hearing on LB799, and we will open

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

the hearing on LB494, Senator Dungan. Welcome to your Judiciary Committee.

**DUNGAN:** Good afternoon, Chair Wayne and members of the committee, I apologize for being just a couple moments late. My name is George Dungan, G-e-o-r-g-e D-u-n-g-a-n. I'm the state Senator for District 26, representing the people of northeast Lincoln. Today, I'm introducing LB494, which makes a minor, but important change to the Nebraska Rules of Evidence in order to align them with the federal rules of evidence and the rules in 33 other states. This rule change will conserve resources and improve the efficiency of both civil litigation and criminal trials. LB494 updates the Nebraska Rules of Evidence to allow for custodian certification of business or entity records by an affidavit, signed under penalty of perjury. Under the bill, before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record and must make the record and certification available for inspection, so that the party has a fair opportunity to challenge them on the grounds that the sources of information or the method or circumstances of preparation indicate a lack of trustworthiness or otherwise do not fulfill the requirements of the business record hearsay exception. This well-established hearsay exception allows parties to enter regularly compiled records within an organization so long as they meet certain criteria, including the documents being produced were not compiled just in anticipation of litigation, among other factors. One essential element is that the records have been-- have to be authenticated by a custodian of the business records. What has made Nebraska unique up to this point, is that our rules have not allowed custodians of these regularly compiled records to verify them by sworn affidavit. This becomes an issue that adds costs, as often, a business custodian needs to be flown in to testify to supply the needed foundation or authentication, rather, for the record. And especially during the pandemic, this became an issue that led to cost-- case delays, when national companies, for example, social media networks, banks or things like that, were not willing to send witnesses to come to Nebraska to testify, when the pandemic was in the middle of the 2020-2021 era. This bill requires that in order to introduce the evidence, the custodian must complete an affidavit, a copy of which is replicated in LB494, to attest that the records sought to be introduced do comply with the requirements of the business record exception. The attestation must be in the form of an affidavit, and it must be sworn to as directed in the form on pages eight and nine of

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

the bill. I also want to stress again, under the bill, the proponent of the evidence shall give advance notice to all other parties of their intent to offer the evidence with authentication by affidavit, thereby allowing the opponent party the opportunity to question or challenge the evidence if they so choose. Additionally, the ability to demonstrate authentication by affidavit in no way, shape or form does away with the ability to challenge the underlying business record, with regard to their admissibility. For example, an opposing party can still argue that the records were created simply in anticipation of litigation and challenge their admissibility at a hearing. Or they could also argue that the confrontation clause may apply to the proposed business records if in fact, their testimonial in nature, such as the results of a lab test for drugs. Following me, you're going to hear from Professor John Lenich, who will explain what the hearsay rule is in a bit more detail and what business records are. He'll describe why laying the required foundation is really, merely busy work at times and showed that is why the feds and other states have moved to the written certification approach that LB494 takes. You're also going to hear testimony from a practicing attorney about how this modification would aid in the process of litigation. Happy to answer any questions you might have and I would urge your consideration of LB494.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here. Will you be here for close?

**DUNGAN:** I will. Thank you.

**WAYNE:** First proponent. First proponent.

**JOHN LENICH:** Thank you. Good afternoon, Senators. My name is John, J-o-h-n, Lenich, L-e-n-i-c-h. I'm the Earl of Dunlap Distinguished Professor of Law Emeritus at the University of Nebraska and the civil reporter for the Nebraska Supreme Court Committee on Practice and Procedure. I'm testifying here today, however, as an individual citizen and not on behalf of the University or the committee. LB494 deals with the hearsay rule. Now, we call it a rule, but it's really a series of statutes, Sections 27-801 to 27-806. And under the hearsay rule, a witness normally can't testify about oral or written statements that were made outside of court, if those statements are being introduced to prove the truth of what was said. For example, a police officer in a bank robbery case can't testify that L told the officer that Barb robbed the bank. What L told the officer is hearsay.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

Why is hearsay normally inadmissible? It's normally inadmissible because it's normally not reliable. We don't know the basis for L's statement. We don't know what he saw or heard. We don't know where he was and we can't cross-examine him, because he's not in court. Now, there are quite a few exceptions to the hearsay rule, including one that's very commonly used. That's the business records exception in Section 27-803(6). The exception has two primary requirements. First, the record involves an event that occurs regularly in the course of the business's day-to-day activities and two, the record was made at or near the time of the event as part of the business's regular practices. For example, a trucking company's service records for its trucks, would-- might be business records or a manufacturing company's sales records. And the basic thinking behind the exception is that the records are sufficiently reliable because they're routinely made in the running of the business. Now, proof-- to prove the requirements for the exception, you normally need to call a witness who will-- who knows about the business's record-keeping practices and asks the witness some standard questions to establish that the requirements are satisfied. Most of the time this is pretty routine, which is why I call it litigation busywork. LB494 would eliminate busy work by giving people the option of providing a written certification from a person who's familiar with the business-- business's record keeping practices. Now, when the bill was drafted-- initially drafted, I suggested creating a form in the statute for it to be used for the certification. But I've since changed my mind, because it's really tough to draft one form that would cover every situation. So I think general language would better--

**WAYNE:** Thank--

**JOHN LENICH:** --would work better than the form--

**WAYNE:** --thank you for your testimony.

**JOHN LENICH:** --and we'll submit some written comments with some proposals.

**WAYNE:** Thank you for your testimony, sir. Thank you for your testimony.

**JOHN LENICH:** OK. Thank you.

**WAYNE:** Any questions from-- it's not just you. I try to keep it at 3 minutes, because we have some long hearings that, if we don't keep

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

consistently, I can get in trouble or something like that. Any questions? Seeing none, thank you for your testimony. Next proponent, next proponent. Thank you. Welcome.

**SCOTT EARL:** Good afternoon, Senators. My name is Scott Earl, S-c-o-t-t E-a-r-l. I'm here on behalf of the Nebraska County Attorneys Association. I'm a deputy Sarpy County attorney. I've been a prosecutor for-- since 2014. I prosecute, prosecute all types of felonies for Sarpy County. In that time, I've had many jury trials-- jury and bench trials, in both the county and district court. I've come to speak in support of LB494. As a prosecutor, we regularly receive reports from numerous businesses that affect our cases. Due to the hearsay, due to the hearsay rule, those records are only admissible when a record keeper is able to lay the proper foundation for that record. Mr. Lenich spoke to you a bit about how the mechanics of the, of the hearsay rule and exception work. I'm here to share how this has affected me and my practice and also, my office and the Sarpy, Sarpy County taxpaying citizens. In 2020, my coworker and myself had a murder trial in which Facebook records were relevant to, to the case. To lay foundation regarding those records, we had a witness from Facebook come to testify. Initially, though, we ran into issues, due to the pandemic and Facebook's refusal to permit travel for their employees to testify. This, in part, delayed trial at one point or another. Also, when trial did finally occur, Sarpy County had to pay nearly \$600 for travel expenses and lodging for the individual that came to testify. I realize this is not necessarily a large amount of money, but still, taxpayers should be able to save that money since these witnesses are not testifying about facts that are in dispute, typically. More common-- and I think this, this situation is going to become more common with digital evidence and just the volume of evidence that is coming about as, as records are more and more regular, with digital components. I also had a coworker, recently, who was preparing for a murder trial, in which he had difficulty getting cooperation from credit card companies and, and an insurance company while trying to prepare for that murder trial. It was difficult to get cooperation from the companies to provide, provide a record keeper to come testify in regards to those records. I do believe this would save time in the courtroom and time of the individuals called to testify. In each trial, individual witnesses require time to testify on direct, cross-examination and redirect examination. Even witnesses with relatively quick testimony, often-- might often end up taking 15 minutes and especially when compounded with transition between

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

witnesses. Also, there's-- since there is-- there must be some flexibility in regard to when witnesses are called. These foundational witnesses are often required to spend their time waiting around for their [INAUDIBLE] for their opportunity to testify. This is especially wasteful for those foundational witnesses that must come out of state, like those employed by social media companies or credit card companies. I believe this would, this would promote judicial efficiency by giving the judge the ability to consider the certification or affidavit as, as the evidence is offered. Both parties would have that ability to review the certification in, in advance, as well as the actual documentation, as part of the discovery process and the rule that has created. And then, they can decide whether there may be a legal basis to question the validity of the certification. This would also benefit both sides. This is not necessarily a, a prosecution favor-- favored rule or, or defense-favored rule. I'll take any questions if there are any.

**WAYNE:** Thank you. Any questions from the committee? Senator DeBoer.

**DeBOER:** Thank you for being here. Are these just for business records that are made under the normal course of business? Is this-- is there any sort of restriction on which business records? Is there-- or it's just all business records?

**SCOTT EARL:** It'd be anything that would fall under the business record exception, as far as the hearsay rule. So it would be any sort of business record. Now, the confrontation clause still would be a valid challenge, as we heard. You know, this wouldn't change anything about that. This would just give the, the judges the ability to, to say we are OK with receiving this, without actual, actual testimony.

**DeBOER:** So it lays foundation through an affidavit rather than testimony.

**SCOTT EARL:** Correct.

**DeBOER:** Perfect. Thank you.

**WAYNE:** Thank you. Any other questions? I don't, I don't like this bill. I don't-- I'm, I'm, I'm like, in the middle, because it could help on business records for phones. I know everybody needs that-- and the social media, but I just heard this bill yesterday about juvenile probation and, and police having access to it. And so, where I'm, I'm trying to figure out the foundational concerns. It's not a question,

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

it's just-- nevermind. It's Friday. You're good. We'll talk. We'll have-- we'll talk later.

**SCOTT EARL:** OK.

**WAYNE:** I think I see you on the 15th anyway.

**SCOTT EARL:** Yeah. It sounds good. Thank you, Senators.

**WAYNE:** Thank you. Welcome.

**MIKE GUINAN:** Good afternoon. Chairman Wayne and members of the Judiciary Committee, my name is Mike Guinan, M-i-k-e G-u-i-n-a-n, and I'm the Criminal Bureau chief from the Nebraska Attorney General's Office. I appear here before you today on behalf of the attorney-- of Attorney General Mike Hilgers and the Nebraska Attorney General's Office in support of LB494. LB494 would harmonize the Nebraska rules of evidence with federal rules of evidence, streamline the process for litigants in authenticating evidence and reduce the burden on the parties. Currently, the state rules of evidence require authenticating business records through testimony by a company's custodian of records. This can be incredibly burdensome. For example, we had a recent case in which records were produced from a company in California that the court found admissible at trial. We simply needed to have the appropriate testimony to authenticate the records at trial. In federal court, I could show authenticity by providing a sworn declaration from the custodian of records attesting to these records-- attesting that these records are what they purported to be. Those declarations are made under penalty of perjury and are simple to execute and provide. Since this case was in the Nebraska state court, we are not permitted to use a certified record for authenticity. Instead, we had to obtain live testimony. For an out-of-state party, that can be burdensome. In this particular example, my office spent weeks negotiating with the other side, attending court hearings in order to compel the testimony, for what ultimately, was a five-minute set of questions to authenticate those documents. Had Nebraska had in place the federal rule, countless hours and resources would have been saved. For litigants in civil and criminal cases, whether plaintiff, defendant, prosecutor or criminal defendant, having this rule would streamline proceedings and save costs. In addition, Nebraska's rules of procedure on evidence-- and evidence closely follow the fed-- federal rules. And this Legislature has adopted bills in recent, previous sessions, explicitly incorporating aspects of the federal

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

procedure and evidence. For example, Senator Lathrop, LB57, which adopted the present-sense impression exception to the hearsay rule; recently, that was signed into law in May 2021. Additionally, then-Senator Hilgers introduced the unanimous-- and unanimously passed a bill that incorporated rule 56, summary judgment, procedure from the federal courts, into state rules. That harmonization, just like this one, would save parties' resources. Lastly, it should be noted that Nebraska, mirroring the federal rules, has since 1975, to allow for authenticating foreign and domestic public records, by providing a sworn declaration from a custodian of records, under federal-- or under Nebraska rules of evidence 27-902(4). For these reasons, the Attorney General supports LB494 and asks that the committee move it to General File. I would be happy, be happy to answer any questions you may have, may have at this time.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here.

**MIKE GUINAN:** Thank you.

**WAYNE:** Any other proponents? Moving to opponents. Any opponents? Anybody testifying in the neutral capacity? Neutral capacity. Seeing none, as Senator Dungan comes up to close, there were no letters for the record. Senator Dungan, to close.

**DUNGAN:** Thank you, Chair Wayne. And thank you again, members of the committee. It's Friday. I won't take too much of your time. Senator Wayne, I think you actually hit the nail on the head with, sort of, the balancing act we want to do here. It's, it's complicated and it's hard. As you know, I was practicing and I'm currently a practicing lawyer. I was a public defender. And so, the last thing we ever want to do is circumvent individuals' rights to challenge evidence. But we also need to keep into consideration and take into consideration some of the things that were brought up here, with regards to difficulty getting people to show up, the fact that companies literally weren't sending people during the pandemic and therefore, evidence that would probably be admissible otherwise, wasn't coming in. One thing I want to highlight is this bill does apply to everybody across the board. This is how evidence would apply for every individual trying to enter something into evidence, so the rule affects everybody. In addition to that, as was mentioned, it does put us in line with the federal rules of evidence, which generally, I think, makes a lot of sense. But I do want to make clear it is a, a complicated issue and I do think we've

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

struck a good balance here, of protecting individual rights and being able to challenge the admissibility of evidence, while still taking into consideration judicial efficiency. So, again, I would thank you for consideration on LB494. And I'm happy to answer any questions you might have.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here.

**DUNGAN:** Thank you.

**WAYNE:** As that closes the hearing on LB494, we will open the hearing on LB576. Senator Cavanaugh.

**DeBOER:** Welcome.

**DAVE SUND:** Good afternoon, Vice Chair DeBoer, Chairman Wayne, members of the Judiciary Committee. My name is Dave Sund, D-a-v-e S-u-n-d. I'm the legislative aide for John Cavanaugh, representing the 9th Legislative District in midtown Omaha. He's in another committee right now introducing a bill. He'll be here for the close. Here today to introduce LB576, which creates an affirmative defense to negligence and nuisance actions for properly permitted land-management burns. Couple of years ago, Senator Cavanaugh had the opportunity to tour grazing lands in Nebraska and got to hear from landowners, farmers and ranchers about the problems of the eastern red cedar encroachment and the use of prescribed burns, or, as Nebraska statute refers to them, land-management burns, to prevent the spread of invasive trees. Nebraska law defines a land-management burn as a controlled application of fire to existing vegetative matter on land utilized for grazing, pasture, forests or grassland to control weeds, pests, insects and disease, prevent wild-- wildfires, manage watersheds, care for windbreaks and conduct scientific research. Last year, Senator Cavanaugh introduced a bill, LB953, that provided a limitation on liability for a properly permitted land-management burn. The Trial Attorneys Association opposed that bill, based on the language for the limitation on liability. And ultimately, you were unable to reach an agreement before adjournment last session. LB576 is an attempt at compromise language, rather than a shield on liability. Except in cases of gross negligence, LB576 provides for an affirmative defense. This means that in a negligence or nuisance action arising out of or relating to a land-management burn, if the defendant proves that they have complied with all terms of the permit for the burn, they would

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

have a valid defense in court to that action. Land-management burns are an important tool for grassland preservation, wildfire prevention and for our farmers and ranchers, but legal uncertainty and the threat of lawsuits make it more difficult for landowners to utilize this tool on their land. The burn must be conducted according to a plan that the requirements of which are outlined in existing Nebraska Revised Statute 81, 81-520.05. That section is not amended in this bill. The plan requires the name of the landowner, the name of the person who will supervise the land-management burn if it is not the landowner, the land management objective to be accomplished, a map showing the areas to be burned, including natural and manmade firebreaks, procedures to be used to confine the fire and boundary areas without preexisting firebreaks, a list of equipment that will be on hand, the types and conditions of the vegetative matter to be burned on the land and in adjacent areas, identification of roads and habitations that may be affected by smoke, a description of weather conditions believed to be required to successfully conduct the land-management burn, including wind speed and direction, temperature and relative humidity and such other information as may be prescribed by the fire chief of a local fire department. As always, Senator Cavanaugh is willing to work with anyone to make the bill better and address any concerns in good faith. Thank you for the-- your time.

**WAYNE:** Thank you. Normally we don't ask staff questions, but I talked to your Senator and he said we can grill you all we want. No. Thank you for being here.

**DAVE SUND:** All right.

**WAYNE:** Starting off with proponents. Any proponents? Proponents. Welcome.

**KRISTAL STONER:** Hello. Senator Wayne and members of the Judiciary Committee, my name is Kristal Stoner, and it's spelled K-r-i-s-t-a-l, last name Stoner, S-t-o-n-e-r, and I'm the executive director for Audubon Nebraska. On behalf of the 12,000 members of Audubon Nebraska, which is the state office of the National Audubon Society, we support LB576 and request this be part of the hearing record. Audubon is a conservation organization focused on birds and their conservation and we work to bring awareness to the condition of our environment and how it changed-- how changes impact birds, natural resources, our economy and communities. Nebraska is a grassland state and we are well known as the beef state, where cattle production is the largest segment of

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

Nebraska's agriculture. What might be less known is that Nebraska is home to over 400 species of birds and that our grassland birds have experienced a 53 percent decline, which is the steepest decline of any of the birds that we have studied, since 1970. So as we look at both of-- both our ranching industry and our grassland, birds are threatened as we see increasing encroachment from things like cedar trees. So since 2000, cedars have infested over 600,000 acres. And what that does, is it reduces forage quality and it reduces habitat for birds, as well as many other species. If we don't address this threat now, it's going to cost us \$20 million every year just to keep up with that encroachment and not let it get any worse. So prescribed fires, one of the most cost-effective and, and efficient tools for restoration of our native grasslands, it helps prevent wildfires by keeping those trees at bay. First, planned burns also reduce-- or also recycle our nu-- nutrients, increase native plant germination and they stimulate plants, so it actually increases forage production in many cases. Audubon has a long history of cooperation with the local fire departments and with private landowners and we always support policies that empower local landowners, as well as local fire departments. What this does is we find that-- we also find that the number one reason that landowners can be hesitant is because it's unclear to them what the liability situation would be. So if they're more confused and they're more hesitant, then we can't get these prescribed done [sic] as we need to. So LB576 will reduce this significant barrier for landowners, so we encourage you to support LB576. Thank you.

**WAYNE:** Any questions? Senator Blood.

**BLOOD:** Thank you, Chair Wayne. Just, just a quick question. I volunteer at Fontenelle and you know that we do the prescribed burns at, at Fontenelle woods. Right.

**KRISTAL STONER:** Yeah. Um-hum.

**BLOOD:** I didn't get a chance to look at the entire fire statute. Would this this pertain to, like nonprofits and organizations, in addition to like, public land?

**KRISTAL STONER:** I'm not a lawyer, but my understanding this, is it really clarifies and make sure that if you follow the permit, if you have things in prescription when you do the prescribed burn, then it's

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

just going to give you more coverage should there be a lawsuit for liability. That's my understanding.

**BLOOD:** Had Senator Cavanaugh been here, I would have been able to ask him that question. So if he does come for closing, I'll ask that question to verify. Thank you.

**KRISTAL STONER:** Thank you.

**WAYNE:** Thank you. Any more questions from the committee? Senator DeKay.

**DeKAY:** Thank you. With your bird associations and stuff, when they go out to do a private burn or even a public burn, do they require or get a contract between the landowner or the Park and Recreations or whoever they're working for [INAUDIBLE]?

**KRISTAL STONER:** Usually, as, as we talked right before the hearing, it's usually a collaboration of landowners that are working together. So what's in place is more of just an MOU for that burn association on how we're going to work together. We certainly share our equipment and make it available for anybody to check out and use. In terms of that, it's usually-- it's the burn permit that comes from the local fire department. So that's the, that's the document that we have in hand that we all follow, in terms of prescriptions.

**DeKAY:** So when they get a burn permit from the local fire department, do they have to list all the equipment and everything that they're using or just the protocol that they're going to try?

**KRISTAL STONER:** You know, that I'm not sure of. I can't speak to that specifics.

**DeKAY:** All right. Thank you.

**WAYNE:** Any other questions from the committee? Seeing none, thank you for being here. Next proponent. Next proponent. Welcome.

**KATIE TORPY:** Thank you. Good afternoon, Senator Wayne and respected members of the Jud-- Judiciary Committee. Sorry. My name is Katie Torpy, it's K-a-t-i-e T-o-r-p-y, here today representing the Nature Conservancy. The Nature Conservancy supports LB576. We are a leading conservation organization working around the world to protect ecologically important lands and waters for nature and people. We've

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

worked in Nebraska for over 50 years, where we own and manage over 66,000 acres in the form of nature preserves and working ranches. Prescribed fire is one of the most effective and economic tools available to manage vegetation at a landscape scale. It helps prevent wildfires, of which 2022, 2022 was the second-highest year on record for wildfires. So this is increasingly important. It also enhances agricultural land, restores native plant communities and improves wildlife habitat. At the Nature Conservancy, we've worked with private landowners along the Niobrara and Platte to restore fire to rangelands and to combat the spread of the eastern red cedar. Ranchers and the culture that has kept the Sandhills intact are key to assuring the productivity that it-- of this landscape continues to endure. LB576 creates a pathway for greater uptake of the tool allowing private landowners to achieve their land management goals in the most efficient and ecologically sound manner. Multiple benefits include killing invasive red cedar trees, suppressing the growth of other woody plants in the grasslands, improving forage quality in recently burned areas and influencing higher plant diversity and habitat quality, quality for wildlife and pollinators. These are impacts both bio-- biologists and ranchers want to see. Ranchers, who have gained considerable experience with fire and are finding benefits beyond the control of the eastern red cedar. Those include an ability to use fire to attract livestock to areas that are otherwise underutilized and improving the utilization of forage plants such as little bluestem. In addition, they appreciate the enhanced wildlife habitat created by the fires. Now is the time to connect the dots of, of all the cedar control efforts currently underway with conservation agencies and landowners across the state. LB576 provides needed clarity and will facilitate greater uptake of this essential tool. Thank you for your attention and I'll take any questions if you have them.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here. Welcome.

**BILL HIATT:** Good afternoon, Chairman Wayne and members of the Judiciary Committee. My name is Bill Hiatt, B-i-l-l H-i-a-t-t, and I am a resource conservationist with Central Platte Natural Resources District, located in Grand Island. I am testifying in support of LB576 on behalf of Central Platte Natural Resources District and the Nebraska Association of Resource Districts. The Central Platte NRD fire program began in 2004. It assists landowners within our district in planning, preparing and implementing prescribed burns through different means, education and training, cost share, advice or

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

contracting. Through contracting, our staff will write the plan, work with the landowner on what preper-- preparation needs to be done and our burn crew will implement the burn plan with help from the landowner. The ultimate goal of our fire program is to give landowners the knowledge and means to use prescribed fire safely using the best science information and techniques available. This proposed amendment will be a tremendous benefit to prescribe burners in Nebraska. Liability has been a constant concern to landowners and professionals alike. The amendment would provide reassurance that if you have done your due diligence throughout the process, planning, preparation and implementation, that you are offered reasonable protection under the law. There is a great need for the expansion of the use of prescribed fire for many reasons, the main being woody species encroachment, eastern red cedar in particular. As has been seen throughout the great plains, grassland conversion to woodland has extremely detrimental effects on rangeland productivity and the loss of suitable wildlife habitat for endemic prairie species, such as grassland birds. Fire is the most effective tool we have against this conversion and with Nebraska being 97 percent privately owned, landowners are the ones that will be and are leading the effort. As a fire professional, my part is to provide those landers-- landowners with expertise and advice, to accomplish their goals in a safe and effective manner. Thank you for the opportunity to testify and I would be happy to answer any questions.

**WAYNE:** Senator DeBoer.

**DeBOER:** Thank you, Senator Wayne. So when we get these permits and the plans, they're not specific to a particular day, right, because you have to have them open to a number of days when the conditions are right.

**BILL HIATT:** Yes. Yep. So--

**DeBOER:** So-- go ahead.

**BILL HIATT:** --so our-- the process I go through is, you know, once I have the burn plan completed, completed, it's not required by law, but I turn it-- I give it to the chief that I'll be asking for the, the permit and then-- so then, he's familiar with it and, and then can ask me questions about it. I've-- in the past, if they've had questions, I've met them at specific units and taken them around to show them

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

what my plan is for it. And it really just depends on the chief, on what he-- he or she wants.

**DeBOER:** So if there's a range of days in which a person can--

**BILL HIATT:** Yeah.

**DeBOER:** --enact the plan, let's say.

**BILL HIATT:** Yes. So you have a prescription, which is just a set of conditions that we, we want to be within. And that's usually to limit fire behavior to where it's not dangerous to us or anyone else and to where we can actually keep the fire where we want it. That's the whole point of the plan.

**DeBOER:** So the plan lists-- does the plan list conditions, like it needs to be winds out of the northeast or--

**BILL HIATT:** Yes.

**DeBOER:** --southwest or whatever--

**BILL HIATT:** So--

**DeBOER:** --plus, then this miles per hour?

**BILL HIATT:** --so the basic plans are-- what goes into every prescription that I write is relative humidity, wind speed and direction temperature. And then, if, if it's a particular-- if I, if I think it is needed, I'll add other things to that. But those four basics are what I include in every plan I write.

**DeBOER:** And so who, sort of, has the discretion to enact a plan and say, now's the time. We're within those things. Who-- who's the person that does that?

**BILL HIATT:** So every, every burn has a burn boss, is what we call it. And so they will, you know, keep an eye on the weather forecast and everything. And then, they'll-- they will gather the crew. And this is how it's done for prescriber associations also. They-- they'll gather their crew and equipment, you know, take weather measurements on site, usually using handheld weather meters. And then, it, it-- and then we'll conduct a test fire. And if all that is good, then we'll go. And

that's, that's in, in addition to getting the permit from the fire chief.

**DeBOER:** And what are the qualifications to be a burn boss?

**BILL HIATT:** There, there are professional systems out there that do that. For right now, like our, our program, we, we don't require that. We just want-- and for landowners, it's more of a question of experience, comfort and ability to, to lead.

**DeBOER:** Could anybody be a burn boss?

**BILL HIATT:** Yeah. So to, to me, fire is a learned skill and any-- anybody could be, once they reach that-- reach a point where they have, they have the experience and ability to make, make the right decisions to keep everyone safe.

**DeBOER:** But no one-- but there's no specific credentialing that we have anywhere?

**BILL HIATT:** Not, not, not currently.

**DeBOER:** And so, you create the permit.

**BILL HIATT:** No. No, I create the plan.

**DeBOER:** You create the plan?

**BILL HIATT:** Yes.

**DeBOER:** Thank you. Sorry.

**BILL HIATT:** Yeah.

**DeBOER:** Someone else issues the permit.

**BILL HIATT:** Yeah, usually the local fire chief.

**DeBOER:** The local fire chief issues the permit. You create the plan. And then, anyone else who feels that they're confident, without any further credentialing, can enact the plan by going and taking the meter readings to make sure that they're within the parameters that the plan had suggested.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**BILL HIATT:** So, so I mean, technically, yes, But for for our program in the prescribed burn associations that I deal with regularly or that I've seen that are already established in Nebraska, it's a very organized thing. It's not just a random people showing up. There-- yeah, we, we have meetings that we get to know each other. We discuss what we have going on and leading up-- during the planning preparation phase. I mean, that-- for like a large burn like the groups out west do, you know that's 1,000 acres, 3,000 acres, but that could be years ahead, for that one day burn, years ahead of planning and preparation. So usually everybody's on the same page when we go out.

**DeBOER:** OK.

**WAYNE:** Senator DeKay.

**DeKAY:** So where you're at, what's the average size of a burn for you in a day? And what's the size of the crew that does the burn?

**BILL HIATT:** So, I actually looked this up just in case you guys asked. So in the last 7 years, our, our average burn size has been 70 acres for the eastern half of our district. For the western half, where we have active prescribed burn groups, their average is about 850.

**WAYNE:** 850 burns or 850--

**BILL HIATT:** 850 acres per burn. And so some are, some are larger, some are smaller.

**DeKAY:** And I would say that the preparation-- this is just a comment-- the preparation does go in because you got to have the fuel for the burn, so land has got to be set aside. So dead grass is stuff is the fuel that you use. So there is a lot of prep going into it. And I'd invite anybody that wants to go to a prescribed burn to get involved and see how it works and it's pretty interesting [INAUDIBLE].

**WAYNE:** So where do I sign up for-- to be a burn boss?

**BILL HIATT:** You can come up to Knox County.

**WAYNE:** All right. I'm, I'm taking you up on that. I'm going to come be a burn boss. I used to play-- I used to get in trouble when I played with matches, so this is all new to me. Any other questions?

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**BILL HIATT:** We, we try to do that a little more organized than just playing with matches.

**WAYNE:** I did it at the scene, but I still got in trouble.

**BILL HIATT:** Yeah.

**WAYNE:** All right. Any more questions? Thank you for being here.

**BILL HIATT:** Thank you.

**WAYNE:** This is a-- why is this bill not in natural resources? Welcome.

**MARK GOES:** Thank you and good afternoon, Chairman Wade[SIC] and members of the Judiciary Committee. My name is Mark Goes, M-a-r-k G-o-e-s. I'm a cattle producer, a past college instructor of 28 years and a Nebraska Cattlemen member. I'm here to testify on behalf of the Nebraska Cattlemen, Nebraska Corn Growers Association, Nebraska Farm Bureau and Nebraska Soybean Growers Association and the Nebraska Pork Producers. I spent 28 years of my life teaching students animal science and range management concepts, including proper prescribed burn practices and utilization of those practices as management tools on their operations. I've witnessed how impactful land-management burning can be in curbing the rapid expansion of eastern red cedar trees and other woody species overtaking the state's grasslands and rangelands. Over the years, I've had the opportunity to learn and teach others that prescribed fires are conducted with extensive preparation, planning and careful execution. The burn plan requirements of a landowner to obtain the burn permit include: the landowners information, the name of the person who will supervise and be the fire boss of the land-management burn, the objective to be accomplished with that burn and a map showing the areas to be burned, including natural and manmade firebreaks, procedures to be used to confine the fire in boundary areas without preexisting firebreaks, a list of equipment that will be on hand, the types and conditions of the vegetative matter to be burned on the land and in adjacent areas, identification of roads and residents that may be affected by smoke and fire. A description of weather conditions necessary to conduct the land management burning safely and successfully, including the wind speed and direction, the temperature and the relative humidity. The local fire chief reviews this information to ensure the burn plan complies with the requirements and then determines if the land-management burning will be conducted, placing necessary attention

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

on the safety of the people and the property outside the burning areas. Today, I believe land-management burning, also called prescribed fire, is a critical tool to assist ranchers in preserving and protecting our grasslands from the encroachment of cedar trees, other woody and undesirable species. Cited from the Central Platte NRD and Prescribed Burn Cost Share Program: the purpose of a prescribed burn is to control the undesirable vegetation, to prepare sites for harvesting, planting, seeding to control plant disease, reduce wildfire hazards, improve wildlife habitat, improve plant production, quality and quantity, to remove slash and debris and enhance seed and seedling production, to facilitate distribution of grazing and browsing animals and restore and maintain ecological sites. Ranchers routinely demonstrate that land-management burning can be completed safely. LB576 helps establish protection for the producer. It allows them to establish that the burn was conducted with extensive preparation, planning and careful execution. Thank you, Senator John Cavanaugh, for supporting the landowners in their battle with woody encroachment in our grasslands and maintaining healthy rangelands. The organizations I listed in support of LB576 and ask members of the Judiciary Committee vote to advance this bill out of committee. I'm happy to take any questions that you may have.

**WAYNE:** Thank you. Any questions from the committee? Seeing none, thank you for being here. Appreciate it.

**MARK GOES:** Thank you.

**WAYNE:** Next proponent. Next proponent. Seeing none, we'll turn to opponents, opponents. It's a great tie. I got the exact same one.

\_\_\_\_\_ : Carolina. North Carolina colors.

**WAYNE:** Welcome.

**DAN THAYER:** Thank you, Mr. Chairman, committee members. Dan Thayer, T-h-a-y-e-r, just like Thayer County from Grand Island, on behalf of Nebraska Trial Attorneys. I'm also a farm owner, so I know a little bit about the cedar fires and I want to share a few things with you. One, I have empathy for the ranchers and farmers in Nebraska that have cedar tree problems. It does encroach on their ground, pasture grass-- ties up millions of dollars or excuse me-- millions of gallons of groundwater. So I understand that perfectly. But this is why we are opposed to the bill. We hear prescribed burn and we think of a gentle,

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

maybe two-inch flame, slowly going across the ground. This is just off the Internet. This is what--

**WAYNE:** We don't, we don't use props, but I can get copies to everybody. Well, I don't take away your time, but can you grab one of those and make copies for everybody? Thank you.

**DAN THAYER:** This is a common view of what a full-grown cedar fire looks like. And it's common for flames to shoot up 30 feet into the air and for embers to fly. These are big fires and they're dangerous. They're inherently dangerous. Current Nebraska law works. That's the second reason we're against this bill. Nebraskans sit as jurors, or we have judges who make decisions based upon negligence and reasonable behavior of the people involved if damage occurs or personal injury. This bill last year, it was touched on that took-- tried to take the standard from ordinary negligence to gross negligence. Gross negligence, one of the definitions: near-total disregard for the safety of the property or person of, of another individual. That failed and it failed for a good reason. This year, cleverly, the ball-- bill is amended to declare that if there's an out-of-control fire, it's an affirmative defense of the burning party who's following the burn plan. What's an affirmative defense? Very simply, if an allegation is true, an affirmative defense can block or limit the liability of that true allegation. Now here, if the burning party gets a permit and follows the burn plan and they burn down the house or the barn of the neighbor, they get to file an affirmative defense and say, I followed the plan. And as Senator pointed out just a couple of minutes ago, there's major problems in regard to the qualifications of who can carry out these burns. And with an affirmative defense, a judge can limit or totally dismiss that case, based on that affirmative defense. It's a bad idea and it gets worse. And that's because of the poor drafting that Senator DeBoer pointed out and for some other reasons as well, including the time to carry out this particular burn. Finally, last year, it was, quoted-- an Oklahoma State University study was quoted. Apparently, Okie State keeps the largest database of control burns in the great plains. They out, out of--

**WAYNE:** Thank you for your testimony. I'm sure somebody will ask you a question. Senator Blood, followed by Senator DeBoer.

**BLOOD:** Thank you, Chair Wayne. And thanks for the fun pictures.

**DAN THAYER:** Yes.

**BLOOD:** Quick question, though. You talk about affirmative defense, but doesn't that affirmative defense still need to be credible? So, I mean, it doesn't take away from the credibility, does it?

**DAN THAYER:** If you have the burn permit and the burn plan, and the evidence is that you followed that plan, they get to allege an affirmative defense, that they followed the plan and that, therefore, can limit or absolve liability.

**BLOOD:** But-- and I understand that. And I may not be phrasing this correctly. So doesn't the-- because I am not a lawyer and I don't pretend to be. So doesn't the burden of credibility still fall on the person doing the burn, when they go to court, though? So, I mean, we're saying that they have the competitive advantage, is basically we're saying, with the affirmative defense. But is there still not a burden for them to show that indeed, with this piece of paper and whatever else they present for evidence, it still has to be credible?

**DAN THAYER:** When I file a lawsuit on behalf of an individual that lost their house or their farm in one of these controlled burns, and I make my allegations in writing. An answer is, typically, then filed afterwards, of the burning party, who allege-- will allege under these circumstances, an affirmative defense that they followed the burn permit and burn plan. Of course, in court, going directly to your question, you'll have to have credible evidence.

**BLOOD:** Right. I mean, because there may be things that are reasonable or unreasonable that sway it either way. Is that correct?

**DAN THAYER:** Correct.

**BLOOD:** All right. Thank you.

**WAYNE:** Senator DeBoer.

**DeBOER:** Thank you. I have a really great pun that I wrote down, so I really want to use it. Won't this have a chilling effect on prescribed burns? If we allow a-- if we allow this affirmative defense, it's good, right? It will have a chilling effect on the burns. If we, if we do not allow some limitation of liability for them, what I've heard in the last year's hearing, was that there are not as many prescribed burns as there should be for our land, for any number of things, from

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

birds to, to whatever. And so, we want to have something that, that sort of stops that chilling effect.

**DAN THAYER:** I don't know of the number of prescribed controlled burns in Nebraska in the last year, five years, ten years. I know that it exists because I've seen them happen and it's an ordinary negligence standard and the reasonable man standard. Our concern is that these limitations on liability and this bill in particular, we believe was very poorly drafted, is going to then, limit the liability. When right now, with a 99.3 percent success rate, according to the University of Oklahoma, why would we want to tinker with that? Few things in life have a 99.3 percent success rate. That's what's happening right now. That study was quoted in last year's testimony.

**DeBOER:** The 99.3 is, is--

**DAN THAYER:** Success rate on prescribed burns and not getting out-of-control fires. So it's working now, very well.

**DeBOER:** But what the testimony last year, I recall, was that there would be more prescribed burns, but folks are worried about liability if a prescribed burn, notwithstanding all of the work that they've done to try to make it as safe as possible, everyone thinks it's going to be fine, but it might grow out of-- you know, it might get out of hand. Just that risk itself is that chilling effect. And so, we have too few prescribed burns. We have land. We need to do a burn so badly. Red cedars have gone everywhere on it. I don't think it's chilling us. We just haven't gotten our act together to get it done. But if it would, I mean, we need to do it. It's something that needs to be done. So how do we, how do we help folks to do it in a safe way? Is-- I'm asking you, this, this bill is poorly drafted. You and I-- you, you referenced my comments earlier. How do we make it better? There we go. There's my question. I got there eventually.

**DAN THAYER:** I'd be glad to get together with the sponsors of the bills to come up with some, hopefully, some reasonable steps. But going directly to your question, every activity has a chilling effect. Seventy-five miles an hour down I-80 has a chilling effect for those that want to go 85 and 95. And so, that's always a balancing test. And with the, the document that I gave to you, the, the exhibit, this is an inherently dangerous activity that needs limitations. We're not talking about two-inch fires that slowly creep across grassland. These dry, mature cedars go off like little bombs and they produce a

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

tremendous amount of heat. The flames, I'm not exaggerating, 30 feet in the air and embers are flying. It deserves to have a chilling effect, so that the neighbors' properties and their safety from personal injury is not jeopardized.

**DeBOER:** OK.

**WAYNE:** Any other questions? Senator DeKay.

**DeKAY:** And I agree. I-- every spring we see fires like this, where we do are burns. But if you have a burn association and you got the burn team out there with a new burn boss, would we-- where are we at, as far as doing the right protocols as far as black lines, using riverbeds, roads to start your black line and have your black lines in place. One question I'd have about this picture and I agree we see them all the time, would be the fact, is this picture taken along the edge of the black line or is this out in the middle of the burn, where there's a quarter mile, half mile burnt grass around it, where this picture was taken?

**DAN THAYER:** That picture was taken out in the middle of a pasture.

**DeKAY:** In the middle of a pasture?

**DAN THAYER:** Yeah.

**DeKAY:** So there's a pretty good chance it was black-lined all the way around it. So ash or embers, embers weren't going to carry it past the black line.

**DAN THAYER:** I can't, I can't comment [INAUDIBLE].

**DeKAY:** I mean, I'm not putting you on the spot, but there-- when we're doing our burns, if we have, we burn around-- if this is going to be on the edge of a black line, where it's going to cause us a problem to put it-- get it out in a safe manner, we will work around that area and not include that in our burn, burn line.

**DAN THAYER:** Well, with, with 93 different counties, whoever's counter you go up to for one of these permits and plans, you know, the answer is going to vary significantly. And there may be, as the gentleman from Grand Island testified a couple of minutes ago, may be very detailed, and there will be others that'll say keep an eye on it. And with, again, with the type of fires that we're talking about here, we

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

think this is a really bad idea in this bill and that the system is working well, right now.

**DeKAY:** Well, in my perspective, prescribed burns have got to be part of our land management, our pasture management. And it's a-- I'm not saying it's 100 percent foolproof that something doesn't get away, but it's an effective tool. It's cost efficient, time efficient. And, and in regards to using mechanical eradication of cedar trees or chemical-- we're talking about nitrates in water. So if you're using herbicides to eliminate the trees, then you have one more component that could be a [INAUDIBLE]. So however we go, we got to keep going forward with burn, burn associations and be able to help them be able to--

**DAN THAYER:** I agree.

**DeKAY:** --feel protected in how they do these burns.

**DAN THAYER:** I agree with you 100 percent. The burn of cedars is cost-effective and it addresses a real problem in Nebraska, but current law is working. And those safeguards that are in, under ordinary negligence standards, is working for Nebraskans. You don't read about out-of-control verdicts or out-of-control decisions-- court decisions, uncontrolled burns in this state. You don't read about that, of courts or juries making out of control decisions on prescribed burns. It's working. It doesn't need to be changed, in our view. Thank you.

**WAYNE:** All right. Any other questions? No, I do appreciate the picture because I was thinking my father-- grandfather had a farm and we used to love doing pitch burns, but it was never-- so I was thinking like, a little candle rolling across the-- that's interesting. Good. Any other questions? I'm learning a lot today.

**DAN THAYER:** Thank you.

**WAYNE:** All right. Next opponent. Next opponent. Next neutral. OK. No more opponents? Neutral testimony, neutral testimony. Welcome. This is not Banking. This is Judiciary.

**JERRY STILMOCK:** Different hat.

**WAYNE:** Oh, OK.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**JERRY STILMOCK:** Mr. Chair, members of the committee, my name is Jerry Stilmock, J-e-r-r-y S-t-i-l-m-o-c-k, testifying on behalf of my clients: Nebraska State Volunteer Firefighters Association, Nebraska Fire Chiefs Association, with over 9,000 members representing both firefighters and EMS. Five quick hits, if I can. Fire background: recently, April 2022, three counties south of North Platte, it was the Road two-- 702 fire. Over 1,800 people were evacuated in five towns. September 2002, Banner County, 4,300 acres. 50 volunteer firefighters were on the scene from over 15 departments. September 2022, that Sunday, Lancaster and Gage County volunteer firefighters were out all day and into the evening, over 20 departments from Lancaster County alone. October 2022, The Halsey fire, 15,000 acres burned. July-August, 2022, Carter Canyon fire. Nine days before it was under control. Over 15,000 acres burned. 2012, go back a little bit further, the devastating year, over 500,000 acres were burned that year, 65 structures destroyed. Costs alone for firefighting purposes, \$12 million. None of these were because a prescribed fire got out of control. I have to be perfectly clear, none of those were the situation. Why do I share that? Because it is dangerous. It is a dangerous profession. We know that, because last year alone, in Nebraska, three volunteer firefighters were killed in serving. In 2013, if you remember, two-- 19 firefighters, federal firefighters, the Hotshots, were killed in Arizona because of a wildland fire. It is dangerous business. This isn't new to the Legislature. Senator Bob Wickersham started it in 1990, starting this discussion. Senator Annette Dubas carried that tradition on in 2002-- 2015-- 2007-2015. Many, many, many, many hours of meetings and legislation was introduced by both of those senators. Here's a hypothetical. Play with me, just for a moment. What if that plan-- now, this is neutral. What if that plan was followed to a tee? Everything right down the line, affirmative defense submitted. But you know what? Even though that plan was, was filed and submitted and carried out, 6 hours later, 12 hours later, that ember sparked. That ember blew. And it went on and it killed somebody. Those are the things that are in front of you, in terms of an affirmative defense and how would that work. The plan worked to a tee. Bingo. But then, the ember was created. For Nebraska, for firefighters, both paid and volunteers, there's a fireman's rule. The fireman's rule-- and that's why my associations are in a neutral position-- the fireman's rule simply states that firefighters are out there. They have no cause if they are injured or killed in the line of duty as a firefighter, because they look toward worker's comp. And the public safety-- public service sector, firefighters are out there to

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

serve the public and they have no remedy, except if the fire was caused willfully or wantonly. So we have no issues with liability. We have no issues of our safety. We have no issues if our equipment is lost, in terms of where-- what about liability? I need to stop. The red light come on-- came on.

**WAYNE:** Thank you. Senator Blood.

**BLOOD:** Thank you, Chair Wayne. Thanks for coming in, Jerry.

**JERRY STILMOCK:** Senator.

**BLOOD:** So-- but if they follow the plan to the tee and there's an ember, wouldn't that mean that they didn't follow something? I mean, if there's an ember that just like, magically pops up, you probably didn't stick around long enough to make sure the embers are out. You probably didn't necessarily follow protocol. So wouldn't the burden then, fall on you that you didn't do what was needed for an affirmative defense, because the burden of you maybe missing something was part of that?

**JERRY STILMOCK:** Perhaps. I-- best I could say, Senator, is perhaps. And this is why. What do we say? We're from, we're from Nebraska. Hang on an hour. The weather's going to change. Right. So I have the perfect burn plan. Nothing exceeds five miles per hour or you do not set that fire. It didn't. It didn't proscriptively-- prescriptively, before the fire, it did not during the fire and it did not for 6 hours after the fire. The wind did not blow. And then something happened. The wind shifted and that ember is ignited. A person is killed. The way I read it, in a neutral position, is where does liability go? Well, it looks like an affirmative defense because the plan was followed to a tee. Your question rises to, perhaps, to a issue of burden of proof and, and--

**BLOOD:** Right.

**JERRY STILMOCK:** --the standard of proof, rather than would it be an ironclad defense? I, I could not answer it. The one final part of my answer to your question, please, is what other area of the law states that if a plan is filed, followed, there is no liability. Senators, you made an excellent point in saying, well, what about-- Senator DeBoer made the point. I'm going to stop because nobody asked me a question. I want to be polite. It's Friday.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**WAYNE:** Appreciate it. Any other questions? Senator DeKay.

**DeKAY:** So in-- with the fire associations, are, are they, are they willing to work with different burn associations to do the prescribed burns and help follow up to plan where they need to, that you're associated with or--

**JERRY STILMOCK:** Sir, that's a great question. If I understand your question, is will volunteer fire departments go out and be a part of the burn. And-- is, is that your question, sir? In, in some parts of the states, yes, some part of the state, yes, that will happen. Some volunteer departments will go out there and actually carry out the burn itself and-- while others, they, they will not be a part of it whatsoever, sir.

**DeKAY:** Do, do the associations feel that prescribed burn is a necessary tool?

**JERRY STILMOCK:** That's an excellent question, because that is what a group of 20 people, as we sat around discussing this legislation, pondered. Is prescribed burn a good policy, complementing what Senator DeBoer said earlier. One thing that I haven't heard this afternoon, is insurance is cost prohibitive. We all know that when negligence happens in an injury or death or loss of property occurs, there's usually insurance behind it. And these folks are able to get insurance, is my understanding. I haven't, I haven't heard anything this year about prohibitive cost of insurance. Don't know.

**DeKAY:** A lot of times with the association that we're deal with, the private landowner that we're doing the burn for, has, has the insurance that-- in case something does happen. And they sign off on that, that there-- if there's a liability issue, they're putting their trust in us to do it the right way. But at the end of the day, if it does cross and burn some land of a neighbors or something and something going forward, that's where their farm or ranch insurance helps cover the costs of any damage that's done.

**JERRY STILMOCK:** Yes. So the, the, the point I understand you just made, sir, is, yes, the landowner is, is placed in jeopardy or is responsible, but it's actually the landowner's insurance carrier. So it's a question of insurance, in my mind.

**WAYNE:** Any other questions from the committee?

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**DeKAY:** Last question.

**WAYNE:** Oh, go ahead. Keep going.

**DeKAY:** Do you have any idea where Platteview is playing basketball this week? Just kidding.

**WAYNE:** Are you reffing that game?

**JERRY STILMOCK:** They wouldn't, they wouldn't let him near the gym on Monday night. [LAUGHTER].

**WAYNE:** Senator McKinney.

**McKINNEY:** So if not a-- and thank you, Senator Wayne, and thank you, too. If not an affirmative defense-- well, even if we, if we kept affirmative defense, would you be open to like some language that said unless you can show like, the entities were willfully ignorant or reckless or, or something like that?

**JERRY STILMOCK:** Yeah, again, a great question, Senator. I gotta keep reminding myself I'm here in a neutral capacity, Senator Cavanaugh. That, that-- my understanding, that's what last year's legislation was. And, and there were groups that were opposed to that idea, as well, sir. I-- well, for one is it-- I mean, that's way out there, man. That's-- I, I, I, I don't know how to respond to question. It's, it's, it's well framed, but it is-- is the public policy of having prescribed burn in Nebraska so you don't have this devastating 22,000 acre burns. Is it worth it to move to an area of willful wantonness in terms, in terms of negligence, to say the negligence has to be so extreme that only in the sense of willful wanton is, is a acceptable standard of negligence that would weigh-- that Nebraska wants to do more prescribed burns. So therefore, we're going to reduce that, that standard of negligence to willful wantonness.

**McKINNEY:** Because, I guess the struggle is if somebody has a plan and they do everything to the tee and something happens-- yeah, that's kind of difficult, but if they just recklessly just burn and not, you know, take into account the plan or anything, I understand that.

**JERRY STILMOCK:** Another excellent point, if I may. We love 4th of July. We love January 1st. We love fireworks. For some reason, we are enamored with fireworks. But what happens if the, the city of Omaha approves a plan? And that fireworks display is going on at TD

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

Ameritrade, at the ballfield and it, it, it nips at CHI Center and CHI center has, has-- well, with that firefighting plan, that fireworks plan, was approved by the city of Omaha. Should that fireworks company only be held to a standard of-- not-- have the benefit of affirmative defense and escape liability, not have liability, because we followed the fireworks plan. All the wind was coming out of the south. Everything-- sorry, everything was going toward north Omaha. I didn't mean that intentionally. But, but, but now, the, the wind shifted. And it-- now it's, it's-- now, it's out of the north-- northwest and it's going to CHI Center, CHI Center. What-- is that the same type of thing you would do? I, I don't know. And that's, that's why we wrestle with this. It's a big issue. Deaths happen.

**McKINNEY:** All right. Thank you.

**JERRY STILMOCK:** Thank you, sir. Very good question. Thank you.

**WAYNE:** Luckily, both of them are ran by CHI, I mean by MECA, so [INAUDIBLE]. Nevertheless, thank you for being here.

**JERRY STILMOCK:** Yes, thank you, Senators. Good day.

**WAYNE:** Next neutral testifier. Seeing none, as Senator Cavanaugh comes to close, there are three letters for record, two in support and one in neutral.

**J. CAVANAUGH:** Thank you, Chairman Wayne. I apologize. I was in HHS. It seems to be, whenever you have one bill, you get two bills at the same time. So-- I-- and I really didn't hear most of the testimony because I got here late. But I'm sure you heard really, what the, the need is. Prescribed fire, the reason I'm interested in this is that I got to go on a prescribed fire tour with Senator Gragert, up in his neck of the woods, about two years ago and saw the results of that and the need for it. And, and you probably heard from the testimony, the groups that are interested in this, it is agricultural producers, cattlemen, corn growers, Farm Bureau, but it's also environmentalists. It is wildlife management folks. And the reason people want this is because it is the best way to recover land that we're losing to invasive species. As Senator DeKay pointed out, you can do it less expensively, you can do it without chemicals and it really does help regenerate the land. And there are certain wildlife that is fire dependent that they're going to-- their habitat's better when we burn the land. And so we're trying to find a way to do this safely and in compliance, but

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

we're trying to help people who are willing to do this, which is the thing that we want to help people do, make it be a little bit easier for them. I would point out just to, you know, the stuff that I didn't hear was Mr. Stilmock's reference there. In that scenario. Senator McKinney, if you in that hypothetical, if you continued with that demonstration after the wind shifted, you would be in violation of the plan, because the plan says the expected wind and humidity conditions, under which you're going to perform in. And if the conditions were to change and you still did it, you wouldn't be afforded the protection of LB576, because you were not going in compliance with the plan. You heard about how 90-some percent of these are successful. Again, they're successful when they follow the plan. So the plan is relatively onerous, has a lot of requirements about the conditions under which you can do it and the things that you-- the resources you use when you do perform these things. You need a burn boss, you need a, a-- you need the adequate number of people and the adequate number of resources, and you have to have the right conditions. I would also just point out that the requirements say that the fire chief shall issue the license, unless they find that it can't be done safely. So they're not just going to issue this in, in any condition, when they think that there's, not enough people on the list, when they think that there's not the right equipment and when they think that the weather's not going to be appropriate. So, you know, I could keep going, but I, I know it's Friday afternoon. I think you got a few more bills. But-- and then, too, I think the point about whether-- working with the trial lawyers, I would just say I have tried and tried and tried to work with the trial lawyers. I've sat down and met with them. I have offered meetings. I have offered alternatives to this bill. And I get mostly, get stonewalled on this. And so, I'm at the point where I'm certainly willing to entertain their expertise on how to make this work in an appropriate way. But fun-- I will, I will not just acquiesce and be slow-walked on something. So if they're not genuinely interested in trying to figure out how to make this work, they're not going to be a part of that conversation. And so, that's where we're at.

**WAYNE:** Any questions? Senator DeBoer.

**DeBOER:** Thank you.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**WAYNE:** I'm sorry. Send him to HHS. He can answer them over there, since that was a more important committee than ours. Go ahead, Senator DeBoer.

**DeBOER:** So couldn't you use all the information that you got a plan, that you were within the plan, that you got the permit, couldn't you use all of those as a defense now?

**J. CAVANAUGH:** I think that that would be relevant information in a, in a trial if you were going to get to that point. But this would just give it a little bit more protection to people who are following through with doing what we know is best practice. It's basically establishing a, you know-- well, a standard for which people are supposed to perform, which we would find that you're not going to be negligent or liable.

**DeBOER:** So it, it establishes a standard, but plans aren't standardized, we heard. And a burn boss isn't standardized, as to what's required. Is there a way to develop a standardized requirement for burn bosses and a standardized requirement for a plan that would allow--

**J. CAVANAUGH:** I think that would be-- I think that's certainly possible. And that might be something, you know, somebody on the committee might have more expertise about it than I, I do and certainly, some of these other folks about whether those are-- how exactly to go about that. But I mean, that, to me, is a very constructive suggestion.

**DeBOER:** Because if there's just an unstandardized thing, if you have this unstandardized thing, you could have one end of the spectrum or the other in terms of being a very good plan or not a great plan. And if they have the same weight of law, you can use a good plan for an affirmative defense as well as you can use a bad plan for an affirmative defense.

**J. CAVANAUGH:** Well, and, and as you heard, the-- I, I think that there's the possibility of that, of course. But the fact that every issue by the local fire chief and they have an interest in these fires not getting out, they're going to hold these to a standard. They're going to hold them to as high a standard as they possibly can, to make sure they're not going to get out. But I don't think it hurts to-- yeah-- to create a uniformity, at least a minimum standard, that needs

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

to be followed. I, I wouldn't have any problem with that. I don't have the expertise to make that standard, so I'd be happy to entertain anybody's suggestions on how to do that.

**DeBOER:** Because we don't want to have a chilling effect on prescribed burns, right. OK. Thank you.

**WAYNE:** Senator Holdcroft, followed by Senator DeKay.

**HOLDCROFT:** Thank you, Chairman Wayne. I was just curious, does the Department of Agriculture play any role in this-- in the coordination of the overall strategy of where to burn, when to burn?

**J. CAVANAUGH:** The State Department of Agriculture?

**HOLDCROFT:** Yes.

**J. CAVANAUGH:** You know, I, I don't recall that they do. I think the U-- U.S. Department of Ag has some kind of programs for doing it. But I don't-- I'm not aware of the State Department of Agriculture playing in it, but I can check on that for you.

**HOLDCROFT:** Thank you.

**WAYNE:** Senator DeKay.

**DeKAY:** I wished I'd have been able to ask this sooner or thought of it sooner. What is the-- in a thumbnail, what is the differences between this bill that's presented this year and the one that was presented last year?

**J. CAVANAUGH:** That's a great question, Senator DeKay. I was sitting here trying to recall-- so last year-- well, we wrote this bill in response to the criticisms we received from the testifiers last year and I guess, didn't figure it out with them, despite the fact that we tried to work with them in the intervening year to alleviate their concerns. But we-- last year would have been a-- just a more broad immunity for folks when they followed-- basically, it just would have been a blanket immunity, if you followed the prescribed burn plan.

**DeKAY:** All right.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**J. CAVANAUGH:** So this is-- this would probably be considered-- I, I in intending it to be a step back from that. I guess maybe we haven't gone far enough, stepped back far enough.

**DeKAY:** Thank you.

**J. CAVANAUGH:** Sure.

**WAYNE:** Any other questions? Senator Blood.

**BLOOD:** Thanks, Chairman Wayne. I don't think he expected so many questions on this, so. But that's what happens when you don't show up in the introduction. We have to ask you questions at the end, so it slows us down.

**J. CAVANAUGH:** Yeah. That's why I came back. It's because of my high level of respect for this committee, that I came back.

**BLOOD:** Nebraska Game and Parks, like nine years ago, put together the Nebraska Prescribed Fire Council. You're aware of that?

**J. CAVANAUGH:** Yeah.

**BLOOD:** And they had meetings with stakeholders, talked about prescribed burn techniques and, and fire prevention. What data were you able to glean from all of their work that helped you with this or that you think that would be beneficial?

**J. CAVANAUGH:** Oh. Well, I mean, I couldn't-- I guess I couldn't answer that question at the moment. I have to-- I don't have the data for it and, and I don't know who testified earlier. Did you have the testimony about-- the University of Oklahoma testimony from last year? You weren't here last year.

**BLOOD:** I, I cannot hear you.

**J. CAVANAUGH:** I, I can't ask you a question, I know. But I'd have to get back to you on that one.

**BLOOD:** OK.

**WAYNE:** Any other questions from the committee? Seeing none, thank you for being here.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**J. CAVANAUGH:** Thank you. Have a good weekend.

**WAYNE:** Let's-- Committee, let's keep this engagement going with our great questions. Next is L-- as we close the hearing on LB576, we will open the hearing on LB139, Senator Brandt. And I want to thank you for being in our committee and I appreciate you being here. You showed up early to see the dynamics. I really appreciate it.

**BRANDT:** I didn't want to miss the burn bill for the second year in a row.

**WAYNE:** Welcome.

**BRANDT:** Good afternoon, Chairman Wayne and members of the Judiciary committee. My name is Tom Brandt, T-o-m B-r-a-n-d-t. I represent Legislative District 32, Fillmore, Thayer, Jefferson, Saline and southwestern Lancaster Counties. Today I am introducing LB139, which would increase the jurisdictional amount for Small Claims Courts. Small Claims Court allows for disputes to be resolved quickly and inexpensively. It grants citizens access to the court system for the type of cases that otherwise would likely not be worth the expenses and effort of seeking out and hiring legal counsel. For these types of cases, even finding an attorney willing to take them would likely be challenging. This is especially true in Nebraska, where the current jurisdictional amount for Small Claims Court is \$3,900. Nebraska currently ranks 47th among states for small claims jurisdictional amounts. As a result, small claims cases have dwindled from 4,977 in 2012, to 2,314 in 2022. There were 62,066 civil cases filed in 2022, showing that small claims filings represent a very small portion of the total cases filed. Even if we doubled the amount of small claims cases next year, it would be fewer Small Claims Court cases than just a decade ago. Prior to bringing this bill, we reached out to several organizations, most of which believe this is a good idea. There have been conversations with the Nebraska State Court Administrator, Administrator, about the impact on county judges. They expressed a concern that raising the jurisdictional amount, immediately, to \$10,000, would strain the courts. We plan to work with all of the stakeholders on an amendment that would lower the amount to address their concerns. The fiscal note, when you look at that, would-- does reflect that we may have to add some staff if it's increased to \$10,000. Part of the amendment would be to adjust the jurisdictional amount, using the Consumer Price Index, from every five years to every year. If you just look at the data, it is obvious that our Small

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

Claims Court jurisdictional amount is too low. This impedes the ability of individuals and businesses to access efficient and cost-effective resolutions for small disputes. LB139 is a bill that can address this issue. And if I learned one thing in serving four years on the Judiciary Committee, it is this simple statement: justice delayed is justice denied. With that, I would be happy to answer any questions.

**WAYNE:** Any questions? Seeing none, thank you for being here.

**BRANDT:** You bet.

**WAYNE:** You want to sit up here in honor of being a former chair?

**BRANDT:** I think [INAUDIBLE].

**WAYNE:** OK. I was just checking. Welcome.

**ADAM FESER:** Thanks for having me. Good afternoon, Chairman Wayne and members of the Judiciary Committee. My name is Adam Feser, A-d-a-m F-e-s-e-r. I am the director of cooperative advancement for the Nebraska Cooperative Council. The Council represents the interests of agriculture-- agricultural, rural, electric and telephone cooperatives in our great state. Several months ago, we had a member reach out to see if the council could do anything about the small-claims jurisdictional amount, \$3,900 is just too low. We surveyed our members and a clear consensus formed that increasing jurisdictional amount would be beneficial. I spoke with Ag Valley's CEO this morning and he said that having a no-cost option to settle disputes is important. In the ag world, \$3,900 is not-- \$3,900 does not go-- get you far, as I heard from various folks when calling around about Nebraska's jurisdictional amount, you can't even settle a dispute over a fender-bender for that. So we began investigating and, indeed, Nebraska lags far behind most of our country in our small claims limit. The handout I provided shows jurisdictional amounts for 50 states, Washington, D.C., and some U.S. territories for the sake of comparison. Some states have counties mixed in, but this is a pretty good representative piece of data. When I began reaching out to organizations and individuals, including businesses and small businesses, small business organizations, nonprofit entities, attorneys, legal organizations, most folks seemed to agree that we need to increase the jurisdictional amount. They also said it's not a top priority for them, but the tenor was generally supportive. Small

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

Claims Court broadens access to the court system and the justice it provides, so the limit you set should reflect the reality of what constitutes a small claim. It is also clear that simply using CPI to adjust every five years is not sufficient. Small claims limit was set at \$3,500 in 2010. It's only increased \$400 since that time. With a broad consensus that \$3,900 was too low, Council reached out to Senator Brandt. We appreciate him bringing this bill. Council originally decided \$10,000 was the correct limit to pursue. This is the most common limit in the country, fairly close to the national average and makes intuitive sense. But after meeting with the Court Administrator and a few county judges, it became clear they were concerned \$10,000 would increase their caseload too much. As Senator Brandt mentioned, we're willing to work to find a compromise to address the issue. Ideally, that compromise would move us closer to the national average, which is about \$8,700. I looked into small claims in cases of neighbor-- in a neighboring state, Colorado. Their jurisdictional limit is \$7,500. In 2021, they had 4,561 small claims cases, and that's despite having a population nearly three si-- times the size of Nebraska. As Senator Brandt pointed out, the number of Small Claims Court cases has steadily been decreasing. The handout I shared has data for small claims cases going back to 2007 in Nebraska. And as you can see, there were substantially more small claims cases then. From 2007 to 2012, there were far more small claims cases. The statute had set the number of county judges at 55. As I read it, the courts were able to handle a much larger amount of cases with three fewer judges than they currently have. Information in the fiscal note does not appear to be supported by the experience of our neighboring state, Colorado. It is certainly not supported by the national average of small claims jurisdiction as set forth in the handout. As it says in the Neb-- on-- in the Nebraska Judicial Branch website, Small Claims Court provides a prompt and inexpensive way to resolve. And I will--

**WAYNE:** Thank you. Any questions from the committee? Seeing none, thank you for being here. Next proponent. Proponent. You didn't wait this long not to testify. Proponent. OK. Moving to opponents-- oh, proponent?

**JOHN LENICH:** Yes.

**WAYNE:** All right. See, I convinced somebody. Get up and go. There we go. [LAUGH] Welcome back.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**JOHN LENICH:** Thank you, Senator. My name is John, J-o-h-n, Lenich, L-e-n-i-c-h, and I support the proposal to raise the Small Claims Court minimum because it would allow individuals with smaller claims to be able to bring them without hiring a lawyer or try and handle the case themselves and deal with the complicated aspects of the formal rules of evidence and procedure. And although \$10,000 sounds like a lot, it really isn't these days anymore. If, for example, we have a dispute between a carpeting store and-- and a homeowner, homeowner is saying you didn't put the flooring in the right way or didn't come forward, that case is going to involve putting new flooring in, \$5,000 easy. So, again, there is a real limitation, I think, on the ability of people to seek redress when our Small Claims Court maximum is only \$3,500. And there is another possibility too. While the committee is considering this issue, might consider raising the juris-- the amount in county court from \$57,000 to perhaps \$75,000. That would tie in very nicely with the county court civil actions expedite-- or Expedited Civil Actions Act that the Legislature passed in 2000 and that took effect last year. It aims at personal injury cases, and it's a really nice system with a very good set of court rules that the Supreme Court has adopted. And there are those cases that, you know, \$60,000-70,000 in personal injury, again, that sounds like a lot, but in the way things are today, it's really not and, therefore, I would encour-- I would support this bill and encourage the committee to consider raising the county court jurisdictional amount. Thank you for your attention.

**WAYNE:** Thank you. Any questions from the committee? Seeing none, thank you for being here.

**JOHN LENICH:** Thank you, Senator.

**WAYNE:** Any other proponent? Proponent, proponent. Seeing none, moving to opponents, opponents. Welcome.

**C. JO PETERSEN:** Good afternoon. I am C. Jo Petersen; that's C. J-o P-e-t-e-r-s-e-n. I'm a county judge in the Fifth Judicial District, and I'm here on behalf of the Nebraska County Judges Association in opposition to LB139 as introduced. The increase in the jurisdictional amount from \$3,900 to \$10,000 or even \$7,500 causes concern to the county courts. While we do not imp-- do not oppose some increase in the jurisdictional amount, and we're recommending that increase be \$5,000, we strongly believe that the substantial increase sought would result in consequences which would be detrimental to the courts. Such

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

an increase, we believe, would cause both a fiscal impact-- filing fees may have to be increased and additional judges added-- as well as judicial time impact on the county courts. Small claims cases take more time than many civil matters, and the weighted caseload reflects that. Small claims cases are given 30 minutes, civil cases 8 minutes. That case weight would most likely go up with an increase in the jurisdictional amount, as the more money involved, the more complex the case. When, as with our small claims cases, the parties are self-represented litigants, as attorneys are not permitted in Nebraska on small claims cases while they are in our surrounding states, it's simply a fact that more time is needed by court staff and judges to process these cases. Additionally, the very nature of small claims cases is to allow a party to pursue a claim against another party without having to hire an attorney. The substantial increase in the jurisdictional amount may well result in defendants responding with counsel and making it harder for plaintiffs to have-- to have that access to justice the Small Claims Court is in place to provide. More time spent on more cases, and more complex cases due to the increase proposed, would also likely result in county judges having to decrease the time we spend on the wide variety of the other cases we're required to handle. Increasing the jurisdictional amount may also affect ab-- the availability of mediation at no cost to the parties, which we believe is an important tool to the small claims process. There are simply too many unknown factors to determine exactly what consequence would result from an increase of two or two-and-a-half times the current jurisdictional amount. There's no question that a shift of civil cases to the small claims docket will result in an increase of workload for county courts. Without any way to gauge how significant the shift of cases will be, as a result, how significant the increase in judicial time spent on small claims cases to county judges will even be more efficient and prudent to increase the jurisdictional amount in a smaller increment to allow the courts to then monitor the consequences, the judicial time spent, and the fiscal effect an increase may have on the county courts. Again, our recommendation would be an increase to \$5,000 and a requirement for mandatory mediation when available. Both would allow the courts to ascertain over a period of time the judicial impact for time and the fiscal impact of such an increase without causing an undue strain on the judiciary and the requirement of additional judges to handle the increased caseload.

**WAYNE:** Thank you.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**C. JO PETERSEN:** I'd be glad to answer any questions.

**WAYNE:** Thank you. Any questions?

**C. JO PETERSEN:** If not, thank you.

**WAYNE:** I mean, I have a couple. I just-- I just need to understand. So small county-- I mean, small claims, if they come in with an attorney right now, it gets-- they go to county court, right?

**C. JO PETERSEN:** They-- they can't.

**WAYNE:** No, no.

**C. JO PETERSEN:** Yeah.

**WAYNE:** If one of-- if--

**C. JO PETERSEN:** If-- if--

**WAYNE:** --I file a small claim against Senator DeKay--

**C. JO PETERSEN:** --you file-- if the other side comes in with--

**WAYNE:** --he comes in with an attorney, it goes to county court.

**C. JO PETERSEN:** They have to transfer it to civil court.

**WAYNE:** So that's already an issue now, right? So that issue doesn't change just because--

**C. JO PETERSEN:** No-- well, if the amount goes up, then I'm guessing more defendants might hire counsel.

**WAYNE:** So the problem that I-- the problem that I'm seeing, really, across the state is that attorneys aren't taking cases because they're-- they are only like \$7-- \$7,500. And so if a \$7,500, let's say, property claim, you hire an attorney, you're going to spend significant amount of dollars ju-- just having the attorney. So attorneys are declining them, and so these people are--

**C. JO PETERSEN:** I don't know that we see that in rural Nebraska.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**WAYNE:** That's what I'm won-- I mean, that's what I'm trying to flesh out here. Is it-- is it more of a "big three" county issue versus rural?

**C. JO PETERSEN:** I know that there are a lot of small claims in Douglas County.

**WAYNE:** Yeah. That's what I'm trying--

**C. JO PETERSEN:** I talk to my brother in there and they handle a ton of small claims cases.

**WAYNE:** OK. I'm just-- just thinking out--

**C. JO PETERSEN:** So I-- I-- whether or not it's the dollar amount, whether it's not attor-- it's attorneys that don't want to take those cases, because they're \$7,500, I'm going to charge you \$5,000 or \$2,000 to do that, it's not cost-effective.

**WAYNE:** It's not cost-effective. And then on the flip side, as an attorney, you know this too-- having pro se counsel, while the courts are supposed to treat them the same, we always try to give a little leeway because they're-- they're not attorneys. So it does make it harder from an attorney's perspective sometimes to deal with pro se because you can't get-- so I'm struggling with this as I'm thinking out loud, but I'm just trying-- I mean, I know it's going to be a little bit increase of work, maybe more out in rural, but I'm just-- this is an issue where \$3,500-- we turn down a lot of clients for \$3,500-- or even \$5,000 or \$7,000, because it-- and I tell them it's just-- you're-- it's gonna be-- it's cost-prohibitive. You're-- you have a property damage for a car that's worth \$7,000, you need that car to transport your kids around, me-- you can get as much money as you can as by-- and by hiring an attorney, you're not gonna-- you're not gonna get a replacement value of your car at \$5,000 because your attorney took \$2,000.

**C. JO PETERSEN:** Along the--

**WAYNE:** So how do we balance that, is what I'm trying to figure out.

**C. JO PETERSEN:** Along the same lines, I'm telling you that if you add that much money to the small claims docket, you're just going to

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

increase the time county judges spend on small claims. They take a lot of time.

**WAYNE:** No, I'm-- yes. I've been--

**C. JO PETERSEN:** And if that's the real issue--

**WAYNE:** --stuck behind a lot of those hearings, so I know. I under-- I understand. OK. Thank you. I'm just trying to-- just thinking through it. It's Friday, so we can think out loud. OK. Thank you so much for being here.

**C. JO PETERSEN:** Thank you for your time.

**WAYNE:** Next opponent. Welcome.

**TIM HRUZA:** Good afternoon, Chairman Wayne. Members of the Judiciary Committee, my name is Tim Hruza, last name is spelled H-r-u-z-a, appearing today in opposition to LB139 on behalf of the Nebraska State Bar Association. Judge Petersen did a really good job of sort of outlining the concerns, and I also think the fiscal note does a pretty good job of highlighting the two things that I want to talk about today. The Bar Association has absolutely-- is-- is absolutely in support of increasing the number here. Right? So I think I think the lawyers that we have heard from and the-- the discussion that we've had in our committee meetings throughout this process, and we've been-- the Cooperative Council was good enough this last fall to reach out to us-- we've been working, grappling with this conversation for several months now. The number-- raising the number makes sense. Ten thousand is a pretty substantial jump compared to where we are and the concern from our end is-- is not-- is-- is really a strain on judicial resources in light of the purpose the Small Claims Court is designed and meant to serve. So let me start maybe with that second part. Small Claims Court serves an important purpose in allowing people access to the courts, as we've all discussed here. It's an expedited process that doesn't include attorneys, that has a limit in terms of the amount of money that you can recover to have jurisdiction. Along with that, though, includes reduced filing fees and, as Judge Peterson explained and as the fiscal note-- note alludes to, additional court time. We're always cognizant of court resources and the hours in the day that we have for our judges to use. These types of cases, as you've mentioned, Mr. Chairman, are fairly intensive because they're-- they're pro se versus pro se. We think they serve a place. But I-- I

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

think the other additional piece is that it's meant for those folks who need to come into court to have an issue resolved between the parties. What we have always been strongly opposed to, and I think it probably goes back a little more than ten years ago, the last time that we've touched this issue, we don't want it to become a collections court. And so we current-- presently have a cap of, I think, ten cases per year that an individual can use the small claims mechanism for. If you were-- if you have those limited instances, it makes a lot of sense, and that's why we're open to an additional jurisdictional amount. But if you're talking about increasing it to \$10,000, and-- and I know we're not messing with the number of cases that you can file in a single year right here, but-- but when you start talking about \$10,000, you start getting some real controversies that probably ought to be or-- or start to look like they're being handled in a more professional or in a more-- I want to-- corporate way, right, as opposed to parties who need to get into the court to have a judge resolve a dispute between them. With that all being said, I'm happy to answer questions. I know we're short on time. This is-- this is one of those things where we are open to negotiations. We have good conversations with Senator Brandt, with the representatives of Cooperative Council. Lawyers understand that the number should probably move up. I don't know what that number needs to be, but at this point, \$10,000 is very concerning to us in terms of how it affects the court.

**WAYNE:** Any questions from the committee? I guess my concern is, thing is about access to court, where there is a-- I would say \$10,000 and below, there's a lot of people who aren't accessing the court because of the situation I just described with-- with the Honor here-- here, that that \$3-- \$3,500 to \$10,000, how many people are not accessing the court from that?

**TIM HRUZA:** I--

**WAYNE:** You don't-- you don't know the answer to that. But my-- but my question is, is the-- is there-- if the fee's at \$29, why can't you do a sliding scale to \$10,000? So at \$10,000, if you have a \$10,000 claim, why couldn't you make that the regular \$49 fee so you can go \$3,500 stays the same at \$29, and then you go from \$20-- or \$3,500 to \$7,000, \$39, and \$7,000 to \$10,000, \$49? What's the--

**TIM HRUZA:** So--

**WAYNE:** That-- that would solve your funding problem.

**TIM HRUZA:** Yeah, de-- definitely, from the filing fee standpoint, and that's sort of where I think, too, we're definitely open to additional costs. I know-- I know the judge testified that maybe \$5,000. I know that we've had conversations with Senator Brandt about potential other numbers. I think the concern for us is-- and admittedly, we've been where we are for so long, but a large-scale jump like that will have an impact and it's unclear what that would be, whether you stair-step that in, whether-- and again, if you go back to when this was last visited and they put the cost of living adjustment piece in, that allows the court then on its own-- the Supreme Court adjusts by cost of living up from that \$3,500 that's set in statute, so right now it sits at \$3,900. That only happens, though, under the statute every five years. I think we would absolutely be open to doing that more often, more regularly, on a regular basis to ensure that we're talking about the jurisdictional limit advancing as costs or as-- as those things change, too, more frequently, so.

**WAYNE:** I understand that. But down here, especially in Judiciary, there are tons of bills that are advocating for new penalties. That's going to increase time with judges. I-- the argument of time that judges have to work on cases, particularly misdemeanors with county judges, at least my time here, you've never argued, the Bar, on behalf of courts, have never argued that increased penalties will also increase time with judges and we should hire more judges, so why-- why is this different?

**TIM HRUZA:** I would tell you that we rely strongly on the time study and the weighted caseload study that's conducted on a regular basis, and the court that gives us feedback. As-- as we continue to add additional time and those sort of things, I think that's what you see reflected in the-- in the fiscal note, as well, which is, hey, if you put 10,000 more cases on the judges, that weighted caseload is very likely then-- or, sorry, if you raise it to \$10,000 and then you see additional case filings come in, that weighted caseload is going to demonstrate that we have a need for more judges, which will result then in additional resources. I'm not here necessarily saying that I oppose adding judges if we need them. Right? I'm here telling you that under the current structure that we have, when you go up in such a big chunk, you run the risk, really, of straining the resources of the court, but then also, as I mentioned before, maybe overstepping a little bit of what the intent of that small claims jurisdictional

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

amount and what that avenue for recourse was-- was kind of designed for.

**WAYNE:** OK. But we just had an amendment on the floor today that added four more misdemeanors, five more misdemeanors on a gun bill.

**TIM HRUZA:** Right.

**WAYNE:** That's five more cases times four people in a car. That's 20 more citings. The judicial branch has never raised that issue of more criminal cases that need more judges. So why is it, when we're increasing access to court for people-- here's my problem. You go into the hospital. You get in a car wreck, go into the hospital. Your car is only worth \$3,500, maybe-- maybe not even that much. But your-- your hospital bill, if they do an MRI and an x-ray, is going to be a thousand to \$2,000, so you're putting somebody in the position that they have to go litigate an \$8,000 claim, to hire an attorney, of which the standard is one third, and let's say they give them a break and go 20 percent, that-- that individual comes out with nothing. They're still in the-- actually in the negative. So the best option for them is to-- and I tell this all the time to my clients, hey, you'd be better off trying to work with the insurance company and filing yourself. Your claim's only worth \$5,500, \$6,000, like don't pay me to do that.

**TIM HRUZA:** Well, and a free-flowing conversation--

**WAYNE:** Yeah, we're just free--

**TIM HRUZA:** --this one may be getting a little bit outside of where I intended to testify today. But I-- I also think, to that comment, Mr. Chairman, and-- and the judge sort of alluded to this before earlier, and I'm sure you kind of have-- are familiar with how it works, but when you start getting into those higher amounts, too, the defendants in those cases for \$8,000 or \$9,000 are far more likely at that point to go get an attorney and then you just remove it to civil court anyway. Right? I guess it-- that changes in that situation who-- if you go higher an-- if the defendant hires an attorney to stop themselves from getting an \$8,000 judgment against them--

**WAYNE:** Right.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**TIM HRUZA:** --because it-- because it-- when you get to those amounts, it might be worth finding a defense attorney--

**WAYNE:** So you walked right--

**TIM HRUZA:** It's just who's paying the--

**WAYNE:** Right. So you--

**TIM HRUZA:** --fees, but then you remove it anyway.

**WAYNE:** So you walked me right into my point.

**TIM HRUZA:** But--

**WAYNE:** If I file a claim, if I have somebody cl-- file a claim against an insurance company or against their neighbor who has insurance, they're going to remove it to civil court, so we're not talking about that much time for a \$10,000 claim or less.

**TIM HRUZA:** Maybe for tho-- for those types of cases, sure, yeah, for those that have-- where insurance is involved or where it's those types of cases. You'd still have a removal poss-- process.

**WAYNE:** I'm just concerned that there is a gap that-- that people are not firing cases because they can't get counsel because it just doesn't make economic sense. You actually put your client in a worse position, and \$10,000 and below are typically those ca-- those claims. That's my--

**TIM HRUZA:** I don't-- I don't disagree with your sentiment. I just don't think the \$10,000 and below is the number.

**WAYNE:** Is the right number, OK.

**TIM HRUZA:** I think it's somewhere in between the-- the current \$3,900 and the \$10,000 that's proposed.

**WAYNE:** So like \$9,999?

**TIM HRUZA:** And 99 cents, yeah. [LAUGHTER]

**WAYNE:** All right. Any other questions from the committee? We'll talk about this. Thank you for being here. I appreciate it.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**TIM HRUZA:** Thank you, Mr. Chair.

**WAYNE:** Next-- I did. I asked before that. Where are we at? Opponents, sorry, opponents. Any other opponents? Seeing none, we'll move in neutral testifiers. Welcome back, Mr. Steel.

**COREY STEEL:** Thank you, Chairman Wayne and members of the Judiciary-- Judiciary Committee. I am Corey Steel, C-o-r-e-y S-t-e-e-l, and I am the Nebraska State Court Administrator. I want to thank Senator Brandt for taking the time to talk with us at the-- at the Court Administrator's Office regarding this bill. I'm here in a neutral capacity just to provide some more information and some feedback based on the conversation that Senator Brandt and I have had and that we've had with the cooperatives and the county court judges. I'll try to stick to components that haven't been addressed by Judge Petersen and Tim Hruza. One of the things that we've talked to Senator Brandt about is one of the things, Senator Wayne, you were hitting on, is-- is the judicial increase. With this bill, we took a look at all of the civil cases that had a judgment between \$4,000 and \$10,000 and how many of those could potentially then go to-- would have maybe been in the small claims, could have. Right? This is not a guarantee. This is not an exact science. But how many of those could have potentially been in the small claims if the jurisdictional limit was \$10,000? That would estimate about 36,384 cases last year. And again, as Judge Petersen discussed, the average case time for a county court judge with civil cases is 8 minutes; for a small claims case, it is 30 minutes. So it's a mathematical equation of it's going to increase judicial time. We also-- one of the things Senator Wayne was hitting on, we don't know how many new cases would come because people don't come to court for \$3,900 at this point. They-- it's not worth their time, energy, effort. Raising that jurisdictional limit, we would see new filings. That's unestimated. We don't know how or how we would come up with that number. To answer Senator Wayne's question, as I was listening, Douglas County obviously is our largest. Douglas County itself in the county court has roughly just shy of 10,000 small claims cases currently last year. That jurisdictional would potentially double in Douglas County if it was raised to the \$10,000 limit. The other in our fiscal note that I wanted-- that Tim Hruza did a good job, and Judge Petersen, is-- is the filing fees, and-- and that-- that's something that potentially can be or-- or could be adjusted if the Legislature felt the need to do that. One of the things that we have discussed with Senator Brandt is changing subsection (4) of 25-2802 so it wasn't every five years to be adjusted by the CPI. Maybe that should be done

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

annually by the Supreme Court, so that would increase at a faster rate and it would stair-step, so we could then determine and have more flexibility. With that, my red light's on. I will take any questions that you may have.

**WAYNE:** Any questions from the committee? So if we get \$1.2 million, it solves the problem? That what the fiscal note says?

**COREY STEEL:** On this bill, I don't believe we put an exact number. We said the potential for two additional judges across the state.

**WAYNE:** OK. All right. We'll have conver-- I'll leave it to Senator Brandt and you to figure out all that, but so thank you. Any other questions? Seeing none, thank you for being here.

**COREY STEEL:** Thank you.

**WAYNE:** Next neutral testifier, neutral testifier. Seeing none, as Senator Brandt comes to close, we have 1,400 letters for the record-- no, just one letter for the record, one support and--

**BRANDT:** All proponents?

**WAYNE:** --[LAUGH] and one letter-- one letter of support. Welcome back, Senator Brandt.

**BRANDT:** Yep. Thank you to all the testifiers today, Like our only proponent testified, Nebraska has one of the lowest in the nation. We're 47th at \$3,900 today. Judge Petersen hit on the filing fees. Today it costs \$29 to file in small claims; it costs \$49 to file in civil court. That could possibly be raised. I know last year the committee had a bill in front of them to raise a bunch of stuff. Thirty minutes versus 8 minutes, 30 minutes on a civil trial, 8 minutes on small claims, and while it's true there's a time difference from the court's standpoint, on that civil, 8 minutes, you have two attorneys sitting there and the clock is running. So, I mean, the cost is simply transferred from the courts to the attorneys. We will be at \$4,900 in two years anyway, with the way the current bill is written, because the CPI adjusts every five years. So taking this to \$5,000 instead of \$10,000, I know some of the parties are looking at that. I think realistically and talking to all the parties, we're somewhere between that number and possibly \$7,500. We're working with all the parties. We agree with the Bar Association. We do not want this to be a collection agency. We did not change the ten limit per business. We

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

agree with Mr. Steel about possibly adjusting the CPI annually versus every five years. And I guess I'd just like to make this final point. At the current rate we're going, in the last ten years, we have less than half of the number of small claims that we used to have. We're down to 2,300. In another ten years, it won't make any difference anyway. There won't be any small claims left in the state of Nebraska if you trust that current slide that we're on. So with that, I'd be happy to answer any questions.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here.

**BRANDT:** You bet. Thank you.

**WAYNE:** That closes the hearing on LB139. We'll IPP that later today. We'll move to LB767, Senator DeKay. Welcome to your Judiciary Committee. We don't have sponsorships up here. [LAUGHTER] I'm just playing.

**DeKAY:** Thank you. I gotta warn you right now, my voice is only gonna hold out for about another hour and 13 minutes.

**WAYNE:** All right. [INAUDIBLE]

**DeKAY:** Chairman Wayne and members of the Judiciary Committee. I am Senator Barry DeKay, spelled B-a-r-r-y D-e-K-a-y, representing District 40, northeast Nebraska, and here today to introduce LB767. I am bringing this bill on behalf of the Nebraska Commission on Public Advocacy, or NCPA. LB767 would increase indigent defense fee from current \$3 to \$8 for cases filed in Nebraska Courts. The purpose of this increase is to ensure that the NCPA is properly funded. Before the commission was created, private practice lawyers from Omaha, Nebraska-- Omaha and Lincoln were usually appointed to represent indigent defendants charged with murder in Nebraska's smaller counties. In most counties, court-appointed attorneys in murder cases are paid around \$125 an hour or appointed more per hour. In typical non-death penalty murder case, court-appointed counsel will often bill the county at at least \$100,000. In murder cases in which the state gives notice of its intent to seek the death sentence, court-appointed counsel may bill the county considerably more than \$100,000. Since the Sixth Amendment of the United States Constitution and Article I, Section 11, of the Nebraska Constitution grant the right to an effective assistance of counsel, it is financially prudent for

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

defendants charged with offenses such as murder to have an experienced lawyer from the beginning of the case rather than risk an appeal or challenge resulted in a new trial and all of the costs that would entail. The NCPA was founded in 1995 with the purposes of providing indigent defense counsel for certain crimes, thus saving counties taxpayer money. The commission was created in part because of the Richardson County's experience in paying court-appointed defense counsel in two high-profile murder cases. Number one was the 1985 Rulo cult murder, and number two was the 1993 Boys Don't Cry triple murder. Richardson County reportedly spent over \$1 million on those cases and had to take out a bank loan to pay court-appointed lawyers. As a result, Richardson County nearly went bankrupt. As I noted previously, these types of cases can be very expensive to defend. The cost for defense of a case always goes to the counties unless the commission handles the case. There's many counties out there, particularly smaller rural counties, that simply cannot afford it in many cases, putting them in a situation where they have to raise property tax levies, cut services, or find some other creative means to pay the cost of providing defense for indigent defendants. Since 1996, the commission has represented or currently represents more than 1,500 indigent defendants who were charged with and or convicted of murder, kidnapping, sexual assault, manslaughter, child abuse resulting in death, or seriously [SIC] body-- bodily injury and robbery and drug distribution in 72 counties, 185 indigent defendants in murder cases in 53 counties, and 13 indigent defendants who were sentenced to death and 1 indigent defendant who was executed. While Lancaster and Douglas County can afford the cost of defending people charged with the most heinous crimes, most of Nebraska's rural counties do not have a public defender with experience defending murder cases, with even fewer having experience defending a death penalty case. If the commission takes a case on, it does not bill the counties for any of its services. I will note that both Douglas and Lancaster Counties have used and benefited from the services of the NCPA as well; however, NCPA must be asked to accept cases. From 1996 to 2003, the commission received General Funds. During this period, the counties that used the commission's services were required to pay one third of the commission's actual cost of the defense. At that time, two of the commission's six lawyers' salaries were funded by grant money that was no longer available in 2003. In 2001, the budget session, large growth was projected for the budget for the next biennium due to the construction of the Tecumseh prison and one-time aid to community colleges. Additionally, the General Fund mini-- minimum reserve was

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

projected to have a \$37.1 million shortfall. Because of those issues, the Legislature determined the commission could sustain itself with a \$2.75 indigent defense fee to be taxed as cost in most cases filed in Nebraska's state courts. In 2003, the commission became 100 percent cash funded. The salaries of the commission's six lawyers, administrative assistant, paralegal and investigator were paid with cash funds. In 2005, the indigent defense fee was increased to \$3. The fee has not increased in 18 years, or since 2005. The current financial situation of the NCPA is projected to worsen if something is not done and no additional funds are appropriated from the General Fund or received from a fee increase. At the end of the fiscal 2021-2022 year, the commission had \$64,000 in its cash fund. In the current '22-23 fiscal year, the commission is projected to be in the red by \$20,500. In fiscal year '23-24, the commission is projected to have a cash balance loss of \$935,000. Ultimately, something needs to be done this session or the commission will have to expend-- expend the entirety of its cash reserve. For the last several years, the commission has had more murder cases, including death penalty cases, than it should probably handle and have been declining appointments, most non-homicide cases. Because the commission was created to defend murder cases, it has always accepted appointments in murder cases despite its heavy caseload, unless it has a conflict of interest. With adequate funding, the commission could fill the attorney vacancy and return to the ca-- caseload carried before the vacancy. With the additional funding, the NCPA could hire a seventh lawyer and carry a greater caseload, including some sexual assault cases, and provide even greater property tax relief to the counties that uses its services. Rising operating cost is one factor for the difficulty of keeping the commission funded today. Another item to consider is the fact that court filings have decreased significantly since 2008, therefore impacting the Commission's budget and ability to adequately fulfill its mission. It's difficult to quantify in this decline, but prior testimony before this committee this year and in previous years reveal it is happening. Part of the reason for this drop in filings is that some proceedings where fees might be charged now take place outside the traditional court setting. COVID in 2020 was also a big disruptor as well. The NCPA now projects that the revenue received from the filing fees will decrease 6 percent each year for at least the next three fiscal years. I know the Legislature has looked at this issue several times. Former Senator Morfeld introduced a couple bills while Senator John Cavanaugh had an interim study on LA-- LR396 that looked at this issue last year, the Appropriations Committee found

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

that possible mechanisms to fund the commission include indigent defense fee at the present rate at \$3 or at a greater rate, general funds contributions from the counties that use the commission's services, or the combination of these mechanisms. The commission contacted national criminal defense organizations about grant funds and learned there are-- presently are no grant funds available for offices like the commission. LR395 did find that, with adequate funding, the commission could fill the attorney vacancy and return to the caseload it carried before the vacancy. I believe you all should have had handouts on the NCPA from when the committee was-- heard LB555 earlier this year. Senator John Cavanaugh also introduced LB554, which would appropriate \$2,100,000 from the General Fund to the Commission in fiscal year '23-24 and the fiscal year '24-25. It is my understanding, however, that Governor Pillen's budget recommendation encourages the Legislature to consider changes to the indigent defense fee as opposed to appropriations from the General Fund. If the General Funds can't be found, the only path forward that I see to fund the NCPA is to raise fees. My bill does this with a \$5 increase to the fee and provides the committee with another path forward to keep the commission funded as is. Per fiscal note, in fiscal year '23-24, the Commission predicts the indigent defense fee will generate \$1,112,975 in additional revenue; in fiscal year '24-25, the commission predicts the indigent defense fee will generate \$1,057,325 in additional revenue. The in-- additional revenue will allow the commission to meet its budget request of \$1,757,187 for the fiscal year of '23-24 and \$1,848,090 for the fiscal year '24-25. As you see from one of the handouts I gave you, if I would say that if there-- this committee decides to go with the fee route, at the very least, there needs to be at least a \$3.55 increase to be able to meet current needs for the current budget, but the commission would be left short one lawyer. Todd Lancaster from the NCPA will follow me with more in-depth information on the cash crunch that the commission faces, highlight the good work that they do, and answer any of your questions. I know that he's brought some documents and other things to explain the need for this increase. He also brings a wealth of knowledge regarding the commission. I urge you to support the good work of the commission by your favorable consideration of LB767 and I would be happy to try to answer any questions.

**WAYNE:** Any questions from the committee? Senator Blood.

**BLOOD:** Thank you, Chair Wayne. Senator DeKay, thanks for bringing this forward. I'm going to save some of my questions, because I did listen

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

to you in the opening, for the expert, but I do have two questions for you. LB554, Senator Cavanaugh's bill, it's our understanding that the Governor won't fund that from the General Fund. So I guess the question I have for you, and I'm not saying this to be a smart-aleck, what would you say the definition of indigent is?

**DeKAY:** What's the definition of what?

**BLOOD:** If you're indigent, what does it mean?

**DeKAY:** It's that you're not able-- you're a defendant that's probably not going to be able to afford a trial attorney, and you're going to have to use a public defender.

**BLOOD:** So isn't that the purpose of why we have the filing fee so low? And why are we depending on them to fix a deficit that obviously we screwed up on? I mean, even if you raise the rates, you're basically saying we're still going to be short half a million dollars. They clearly need the funds. We've given-- we're giving raises to judges, which, again, I'm not saying they don't deserve those raises, and I think that the vast majority of people, except for maybe the Parole Board, are underpaid here in Nebraska and that we do need to have competitive wages. But with that said, we're only talking \$2 million. Two million dollars is a lot to me, but in our budget, we know it's not huge. Why can we not go back to the Governor's Office and say we have LB554, we need this to be sustainable and part of the budget, we need to take a serious look at this over some of the other silly things we're funding in this budget? Why are we going to tap people that are indigent for more money?

**DeKAY:** In my opening statement, I stated that the Governor approves or likes the filing fee case scenario over the General Fund.

**BLOOD:** But who's the legislative body in Nebraska?

**DeKAY:** Can I finish?

**BLOOD:** I'm--

**DeKAY:** Please. No, I'm-- I'm explain--

**BLOOD:** Actually, I want to know that.

**DeKAY:** OK.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**BLOOD:** Who's the legislative body, Senator?

**DeKAY:** We are.

**BLOOD:** OK.

**DeKAY:** But with that being said, if we're able--we're not-- this isn't-- this is going-- there's going to be a lot of debate on how this fund is-- how this commission is funded. So it doesn't say it's off the table for General Funds. It does say that these are the two options I brought-- are being brought forward. Senator Cavanaugh and I have both visited with each other extensively on it. We have some other options and they'll be heard behind me and be said in my closing that there are opportunities, either work one or-- one or the other bills. In my estimation, in my opinion, we need this funded one way or the other. Where the money comes from, that's yet to be determined, but we need to-- we need to work on getting this because there-- there are counties going bankrupt with in-- an in--

**BLOOD:** I-- I agree and-- but you still have not answered my question. Why have we not gone back to him and asked that question?

**DeKAY:** We're-- we-- we-- Senator Cavanaugh and I have talked this morning. That-- that is a conversation that will probably happen in the first part of next week. We've talked to Appropriations and we're trying to work out a system out of the equation that will benefit all of us, and so it-- it's not off the table. We are going to be talking to-- Appropriations Committee, we've already mentioned, are concerned with it. There's a-- I've laid out there that on how much they are wanting to-- everybody's asking for money, so they're wanting to make sure that the money that's being appropriated out through that committee is-- is what they intended for it. So those conversations are happening with the Appropriations Committee this morning. They will continue. There's going to be a conversation with the Governor, so there's still a system to be worked out, equation to meet the needs of the-- to cover this fund going forward.

**BLOOD:** OK. Thank you.

**DeKAY:** Thank you.

**WAYNE:** Any other questions from the committee? Thank you. The first up, we'll have proponents, proponents. Welcome back.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**TODD LANCASTER:** Thank you. My name is Todd Lancaster. I'm agency counsel for the Nebraska Commission on Public Advocacy. I've been with the commission since 2007. Jeff Pickens, chief counsel, couldn't be here today. He had surgery this morning. I'm sure he wishes he was there instead of in a bed. Last March, as we heard Senator DeKay, and I'd like to thank him for bringing this bill today, introduced LR396, an interim study. And I'm give-- having passed out a report from that study that discusses our financing-- financial needs and-- and issues. I'm not going to go through the co-- commission's history. It's-- it's in those handouts and what Senator DeKay has already told you. The commission since 1996 has tried murder cases and other serious crime felonies throughout the state. We have tried 1,500 ca-- handled 15 cases in 72 counties. We have had 185 defendants in 53 counties that were charged with first-degree murder. We've handled 13 cases in which defendants were sentenced to death. We provide services to the counties at no cost to the counties because we don't charge the counties any money for our services, thus saving them millions of dollars in tax-- taxes so they don't have to pay for appointed counsel. The \$3 indigent fee, as stated, has not changed since 2005. Case filings since 2008 have declined dramatically. The commission's revenue, based on that \$3 fee, in 2000-- 2008 was \$1.3 million. In 2021, the fee was less than-- or the amount was less than \$7,500. Our present annual revenue was down \$550,000 compared to 2008 and 2009, and we predict that that filing fee decrease of 6 percent will occur for the next few years. Since 2014-15, we've had to draw from our cash fund. In 2015, our cash fund was \$1.2 million. In 2020-21, it was \$15,000. There are two competing bills, as you've heard, and you've heard that Governor Pillen believes that we should be adequately funded through the filing fees. Obviously, senators can debate about which is the most appropriate, but we hope that the members of this Legislature and committee believe that we serve a vital purpose and that providing indigent fees for counties-- or indigent defense for counties-- saves those counties lots of monies, like counties throughout the state that we've represented people in first-degree murder cases and death penalty cases. So we would ask that you advance LB767 to the floor, and I'd be happy to ask-- answer any questions this body might have.

**WAYNE:** Any questions? Senator-- Senator Blood.

**BLOOD:** Thank you, Chairman Wayne. Why is your preference to move this bill forward as opposed to LB554?

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**TODD LANCASTER:** I would-- I would tell the committee that the Chief Counsel Jeff Pickens' preference is either of those bills.

**BLOOD:** OK.

**TODD LANCASTER:** His concern is that we-- we remain funded. I--

**BLOOD:** I concur. I think the work you do is very important, so I want to put that out there, just so you know you don't have to sell me on how important [INAUDIBLE] But my concern is that it seems that not everybody feels you're that important if they're putting the-- the burden on you to figure out ways to pay for something that we really should provide in the state of Nebraska and should be in our budget. That's where I stand.

**TODD LANCASTER:** And-- and I think Senator DeKay, in his statements, kind of addressed this. We-- we at one point were funded by the General-- the budget General Funds. And when there was a shortfall, the body decided we could be funded through this indigent fee, and that worked for a while, but then the fee-- the filings went down so dramatically.

**BLOOD:** Sure.

**TODD LANCASTER:** And with that, our revenue has gone down dramatically.

**BLOOD:** How-- how long ago was that? I was trying to find that in the report.

**TODD LANCASTER:** Pardon me?

**BLOOD:** How long ago was that? I was trying to find that in the report. Do you know what year that was?

**TODD LANCASTER:** Since 2000 and-- oh, 2003 was when we switched from General Funds and grants. There were some federal grants that then were discontinued. And so in 2003 is when we switched to being funded solely by the indigent defense fee. So the [INAUDIBLE] was the only way we could get any money and that's, as to this day, the only way we get fundings, unless this body gives us supplemental funding, which happened the last two years because of our shortfall.

**BLOOD:** So have you been trying for a while to bring attention to this concern?

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**TODD LANCASTER:** Yes, we brought this to the-- I believe it was the-- either this body or the Revenue Commission [SIC] probably six years ago and said-- at that point, there was a move to take, I think, \$250,000 from our cash fund and we-- we came and testified that we needed that because our funding was going down so much, and we were told not to come in and ask for more money until we used up our cash fund.

**BLOOD:** Well, six ago-- six years ago, we used to have death by fiscal note because we had no money. Now we have money and it seems like it's a free-for-all, but we're missing opportunities to fund things that we really need to fund. So I appreciate you giving me a little bit of the history on that because I was waiting for you to actually tell me that, so thank you very much.

**TODD LANCASTER:** Certainly.

**WAYNE:** Any other questions from the committee? Seeing none, thank you for being here.

**TODD LANCASTER:** Thank you very much.

**WAYNE:** Next proponent.

**ELAINE MENZEL:** Good afternoon, Chairman Wayne and members of the Judiciary Committee. For the record, my name is Elaine Menzel; that's E-l-a-i-n-e M-e-n-z-e-l, here today on behalf of the Nebraska Association of County Officials in support of LB767. And as was testified by Senator DeKay very aptly, this is in-- the Public Advocacy Commission is very valuable to providing indigent defense services. It assists counties with respect to providing property tax relief because counties are responsible through the U.S. Constitution, which then comes down to the state, and then the counties are required to provide that indigent defense. And so within the state statute, it talks about your-- within your legislative intent why, in part, the Public Advocacy Commission was developed. I am providing you the same information, essentially, that I provided to you when Senator Cavanaugh introduced 5 LB555 related to the Public Advocacy Commission and cautioned that we hoped that you would continue to fund the commission and keep them for the purposes for which they were initially developed. I do want to extend my appreciation to both Senator DeKay and Senator Cavanaugh for their keeping this issue to the forefront. The legislation, LB554, was introduced in front of

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

Appropriations last week. One of the questions that I was asked while I testified on that was whether we preferred it to be cash funded or General Funded, and I said we don't care, rather, that we just want it to be funded. And frankly, I would like for both to be occurring so that their services are able to be at least, at a bare minimum, sustained, but possibly enhanced. With that said, I think perhaps a combination of the two proposals could be used so that, rather than be competing, that they could be used in combination. With that, I'll ask that you perhaps-- well, just one additional comment. Senator Blood, you had asked whether this is an issue that's been brought to the Judiciary Committee before or legislators before, and it has been through the years and it has been something that we have continued to support the commission's work. So with that, I'll answer any questions if I'm able to.

**WAYNE:** I have a-- any questions? I have a really dumb question. Are you guys an agency?

**ELAINE MENZEL:** We're a nonprofit agency-- or association, excuse me.

**WAYNE:** But do-- we don't fund you directly though. How does it go?

**ELAINE MENZEL:** It-- you do not fund us direct-- or you're-- you're correct. The counties do pay membership dues in part. We also offer various other programs and services that we receive funds through.

**WAYNE:** So it's-- it was paid-- it was created-- County Revenue Assistance Act [SIC], provide property [INAUDIBLE]

**ELAINE MENZEL:** Oh, I'm sorry. Are you asking about the Public Advocacy Commission--

**WAYNE:** Yeah, I'm sorry, not you. Yeah, yeah, yeah. I'm sorry.

**ELAINE MENZEL:** --versus our association? I apologize.

**WAYNE:** No, no, that was me. I asked a bad question. So my que-- I mean, I should have asked the other person. Sorry.

**ELAINE MENZEL:** The--

**WAYNE:** I just--

**ELAINE MENZEL:** The Public Advocacy-- the Public Advocacy Commission is funded through cash funds, it-- the-- my best understanding.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

Previously, it had been funded through General Funds and a portion of counties being reimbursed.

**WAYNE:** Do you know this answer? And if not, I'll have to ask him afterwards, but do you know if it's directly given to them or do they go through an agency? My understanding, we can't give directly to things. We have to go through an agency.

**ELAINE MENZEL:** I--

**WAYNE:** You don't know?

**ELAINE MENZEL:** I-- I better-- yeah, I better stop in trying to attempt to help you through--

**WAYNE:** There-- no problem.

**ELAINE MENZEL:** Sorry.

**WAYNE:** Any questions? Seeing none, thank you for being here.

**ELAINE MENZEL:** Thank you.

**WAYNE:** Next proponent.

**MIKE GUINAN:** Good afternoon, Chairman Wayne and members of the Judiciary Committee. My name is Mike Guinan, M-i-k-e G-u-i-n-a-n, and I am the criminal bureau chief for the Nebraska Attorney General's Office. I appear before you today on behalf of Attorney General Mike Hilgers and Nebraska Attorney General's Office in support of LB6-- or, I'm sorry, LB767. We support LB767 because our system of justice has benefited by having capable attorneys prosecuting and defending major crimes like murder, and we have an acute need for criminal attorneys' resources in greater Nebraska. Rural Nebraska is losing attorneys. It's been my experience that rural counties are not just short prosecutors and defense attorneys-- attorneys. They are short attorneys in general, with experienced attorneys dying, retiring, and moving on, and too few attorneys moving in to replace them. This leaves a wide range of legal work, trust and estates, business planning, family law, tax work, criminal defense work, and so on, spread over fewer and fewer attorneys. When it comes to handling major crime cases such as murder, it is clear that the problem is especially acute. Murder cases, for instance, require significant effort and expertise, months, if not years, of preparation, reviewing stacks of

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

records, gigabytes or possibly terabytes of reports and discovery, coordination of numerous lay witnesses, involvement of expert witnesses from across the state, maybe across the nation, knowledge of the relevant science, case law, suppression issues, overall motions, practice and so on, and the ethical obligations to represent your client zealously and confidently, all combined to demand a huge dedication of time, effort and expertise. There are many smart, talented and accomplished attorneys across the rural part of the state that could handle these cases. So many of them, though, do not have the capacity to take on such cases. The Nebraska Commission on Public Advocacy plays a vital role in this state's criminal justice system filling this void. These major cases also involve a large expense to the counties in which they occur prior to trial, for trial itself, and then afterwards on appeal, especially in cases involving indigent defendants. You never want to try a case twice, and that's no truer than in a murder case, given the time, effort and expertise and expense. With the commission, you have a group of attorneys with the expertise and experience to handle these cases correctly, avoiding the numerous pitfalls which can lead to significant time, effort and expense of trying a case again. From the number of cases we handle at the commission, I'm aware that they are stretched very thin in terms of personnel. For example, just the other day we received our fourth call from a county attorney seeking either guidance or assistance in a homicide case, all outside of Lincoln or met-- Lincoln or Omaha metro area since the beginning of the year. I presume the commission may have received the same calls on most or all of these cases. These are the types of cases in the areas of the state that the commission cannot simply decline to take. While the Attorney General takes no specific position on the source of funds--

**WAYNE:** It's kind of like the Supreme Court. We cut you off with the--

**MIKE GUINAN:** Sure.

**WAYNE:** --especially because it's Friday. Any questions? So one question: Do you try most-- well, not you, but does your office come in and prosecute most of these murders in rural or do local?

**MIKE GUINAN:** We do-- we handle probably the majority of the cases outstate, yes, not all of them.

**WAYNE:** I'm about to put you on the spot for an ethical question. Do you-- do you think if this was tucked underneath the judicial branch,

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

there's an ethical problem with judges appointing this commission or this-- an attorney from the commission and being paid out of the general budget? I'm just trying to think if there's a--

**MIKE GUINAN:** Hmm.

**WAYNE:** --because right now the problem is they're in their own little thing and we're always-- but if this was part of an overall branch of government, then-- then they'll get General Funds.

**MIKE GUINAN:** I-- I don't know how to answer that, Senator.

**WAYNE:** But you don't-- it's not-- I don't know. Don't worry about it. I was just asking, too, as I'm trying to figure out if-- if they appoint-- if they control the budget and they appoint it and then there was an appeal from it, how would that-- to the Supreme Court, would they be--

**MIKE GUINAN:** Would-- would the commission handle their own appeals?

**WAYNE:** Yes.

**MIKE GUINAN:** Is that what you're asking?

**WAYNE:** Yeah.

**MIKE GUINAN:** They do.

**WAYNE:** They do.

**MIKE GUINAN:** Yes.

**WAYNE:** Yeah, that might be a problem. OK. I'm trying to think through this. There any questions? All right. I'm just trying to get the General Funds. I'm sorry. Go ahead. Have a good day, sir [INAUDIBLE] now.

**MIKE GUINAN:** Yeah, thank you.

**WAYNE:** Next proponent. Welcome.

**JASON GRAMS:** Thank you, Mr. Chairman. Members of the committee, Jason Grams, J-a-s-o-n G-r-a-m-s. I'm the president of the Nebraska State Bar Association and I make this statement in support of LB767. Just outcomes in criminal cases require capable counsel for both the

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

prosecution and the defense. The Nebraska Commission on Public Advocacy was created in 1995 to provide legal representation to indigent defendants charged with first-degree murder and serious, violent or drug-related felonies. The commission was created in part as a way to provide property tax relief and to protect smaller counties from bankruptcy. Prior to the establishment of the commission, a small county could go broke covering legal fees associated with a single capital case. The commission is currently understaffed and without an increase, the commission will have to reduce services available, thereby increasing cost to counties. These are complicated cases and the stakes are very high [INAUDIBLE] some of those-- some of the most complicated cases. Having a Commission on Public Advocacy also helps ensure that the lawyers providing representation in these cases are well trained and experienced. If quality representation is not provided on the front end, then counties can expect a claim of ineffective assistance of counsel and incur additional fees defending that. As you can see from the maps that we disseminated, there are 12 counties in Nebraska without access to a single attorney today and 18 others with three or fewer attorneys. We've projected in the next five years, if the number of lawyers reaching retirement age are not replaced, those numbers will increase to 18 counties with no lawyers and 32 with three or fewer, and I'd mentioned that a lot of them don't take criminal defense appointments. Simply put, there are some areas of the state where there are no lawyers available to competently handle these types of cases. The commission is currently funded from court filing fees. Over the years, the commission has been asked to take on additional functions without additional funding. Court filings across the board have been decreasing over the past several decades for a variety of reasons, and this trend seems to be continuing. To stabilize funding for this important state agency, the filing fee must be increased. And I would just say, since I have a little bit of time left, that the Bar Association supports this and the other bill, and that's our position. In conversations, we didn't vote on this, but I can tell you that it's also the position of every member of the executive council of the State Bar that I talked to that the funding for this agency should come out of General Funds and not fees to keep it at a-- a-- a level level and allow planning by this important agency. If there are no questions, I'd ask that both of those be advanced.

**WAYNE:** Thank you. Any questions? Seeing none, thank you for being here.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**JASON GRAMS:** Thank you.

**WAYNE:** Next proponent. Next proponent. Next proponent. We'll turn to opponents. First opponent.

**SPIKE EICKHOLT:** Good afternoon, members of the committee. My name is Spike Eickholt, Sp-i-k-e E-i-c-k-h-o-l-t. I'm appearing on behalf of the ACLU of Nebraska in opposition to LB767. I did visit with Senator DeKay on a number of occasions and explained our opposition. We have no opposition whatsoever to the Commission on Public Advocacy. They do serve a-- an important purpose. They are a valued agency for this state, particularly for the rural parts of the state. The attorneys in that office are some of the best in the state that practice criminal defense at the trial and appellate level. The issue that this bill presents to us that we have opposition to is how it is paid for. As Senator Wayne alluded to, we don't have a court fee system to pay for judges. You heard earlier today how judges deserve a pay raise from General Funds. The Attorney General was here testifying in support of this bill. Their office is paid for by General Funds. Indigent defense, quality defense should be paid by the state similarly as General Funds. It's an obligation the state has to provide for this cost, and particularly for the smaller counties. And attached to my testimony, I have given some examples from my own failing law practice of how these ca-- court fees work. They are user fees. In other words, you pay it every time you go to court, whether you're there for a criminal case, whether you're there for a civil case, whatever. And I've given some examples of how it's broke down. If you look at some of the examples I've got there, there's an indigent defense fee of \$3 that's taxed on every case. You want to divorce your abusive spouse, you pay a bunch of court costs and included in there is indigent defense fee. That's who it's going to be increased upon. You get stopped for a traffic ticket and if you're a particular part of the state in a particular part of the community that's overpoliced and overcharged and overprosecuted, you're going to get that tax. It's a tax on people who go through the system. That's the only way to look at it. That's the accurate way to depict it. And frankly, as a member of the Bar Association, I can say this because I'm sure they'll take my money next year when-- when I'm asked to join. I'm disappointed that the Bar Association is here supporting increasing court fees. Courts should be open, just like the Legislature is open. I don't pay a fee to testify on bills. That's my right. Maybe I should. It costs staff time, of course, to, and there are people here that have to work for us, so of course it has a cost, but that's an obligation that the

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

Legislature provides for the community. Similarly, if I want to use the court system for redress, it should be open, affordable. And the association, the professional associations, should not lobby and advocate for increasing fees. We are opposed to that. We did support Senator Cavanaugh's LB554. We are at a time in our state's budget. We have ample reserves and really what the state-- what the Commission on Public Advocacy needs here is a modest amount of money. We would encourage the committee to not advance this bill and instead ask that the Legislature appropriate General Funds to cover costs for the Commission on Public Advocacy.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here. Next opponent. Welcome.

**ROBERT BRYANT:** Thank you. Chairman Wayne, members of the Judiciary Committee, my name is Robert Bryant, R-o-b-e-r-t B-r-y-a-n-t. I'm here on behalf of Nebraska Collectors Association to register our opposition to LB767 and make a little bit of history being on the same side of a bill as the ACLU. This bill will increase the filing fee for court actions, increase in the indigent defense fund by \$5. The Nebraska Collectors Association Membership, we make up some of the largest users of the civil county courts in the state where most of our cases are filed. The-- this \$5 increase would represent about a 10 percent increase in the overall filing fee, which is currently \$49. And so the purpose of that increase is to fund the-- the indigent defense-- it's the indigent defense fee which would fund-- which would fund this program, which we do not oppose in any way and we support it. We just oppose the funding mechanism. So like the ACLU, we would ask that this committee consider other funding sources from the general fee-- the General Fund instead of increasing court fees. The judicial system is not and never has been meant to be a user fee-based system. Increasing the fees limits access to the courts and puts a burden on the average citizen, as well as those who can least afford it. Court costs are often taxed to the consumer in our cases, and so those fees are putting burdens on citizens who are already struggling. That burden extends from the consumer all the way through to the mainstream businesses who will have to pay more ini-- initially, and that comes down to a business decision where they have to consider the filing fee when they are deciding whether to file a case or not. So we've heard a lot today about the decrease in case filings. And so this increase might be counter-- it might be counterproductive in the-- in the sense that these main street businesses might file less cases, and then they're going to lose some funding that way anyway.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

This proposed increase also comes at a time, as has been mentioned, when the state has more money than they've ever had before, and they can appropriate that money through the General Fund, so I would ask for this committee to oppose LB767 because of its funding mechanism.

**WAYNE:** Any questions? Seeing none, thank you for being here.

**ROBERT BRYANT:** Thank you.

**WAYNE:** Next opponent. Next opponent. Anybody testifying in a neutral capacity, neutral capacity? As Senator DeKay comes close, we have five letters for the record, four in support and one in a neutral capacity.

**DeKAY:** When it comes to fee increases, I am willing to work with the committee on that, however we get to that point. I will reiterate that keeping the NCPA funded will help with property tax relief. It is ultimately up to this committee and Legislature to decide on the funding mechanism that they want to pursue. There are many combinations to get this funded, and Senator Cavanaugh and I agree that this is needed to be funded in some form, and we are willing to work to accomplish that. With that, thank you for your time and if you have any questions, I'll try to answer them.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here.

**DeKAY:** Thank you.

**WAYNE:** And that'll close the hearing on LB767 and open the hearing on LB156, Senator DeBoer.

**DeBOER:** Hello, Chair Wayne and members of the Judiciary Committee. My name is Wendy DeBoer W-e-n-d-y D-e-B-o-e-r, and I represent the 10th Legislative District in northwest Omaha. I'm here today to introduce LB156, which increases the caseload cap for the Office of Public Guardian, which I'll refer to as OPG. Currently, the caseload is capped at 25-- 20 public wards per member of the OPG multidisciplinary team. LB156 would modestly increase that cape load-- caseload cap to 22. When the OPG was originally established in 2014, the caseload cap was 40 per associate guardian. In 2016, the cap was reduced to the average of 20 per each full-time member of the multidisciplinary team. When our Office of Public Guardian reaches its current cap, any new referral-- referrals are put on a waitlist. In 2022, that wait-- waitlist had 96 individuals on it. But I'm told that judges know how

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

long that waitlist is and don't even put many of the folks on the list that they know need to be on the list because it's just so pointless to get on such a long list, so the number of folks that need guardians is likely much longer. Hospitals or physicians are by large-- by the lar-- by far the largest referral source for the Office of Public Guardian. In many cases, individuals on the waitlist linger in a hospital after being-- being medically re-- ready for discharge while waiting for a guardian to be appointed because a legal guardian is necessary to access a payer source like Medicaid and to consent to treatment decisions like transfer to po-- post-acute facilities. Post-acute facilities generally will not accept a patient without a payer source or a legal guardian to make medical decisions. Patients remain in the hospital long after their need for acute care has subsided, and that is rarely what's best-- it's never what's best for patients and it creates all kinds of challenges for a hospital system because we have people who are in hospital beds who do not need to be in hospital beds for hundreds of days longer than they need to be-- I'm not exaggerating by that-- hundreds and hundreds of days more than they need to be. So this creates a capacity strain on our hospitals for patients who are sitting there waiting just for a guardian. They're at the highest level of care and they don't need to be, just waiting to be transferred out of the hospital because there simply isn't room for them on our guardianship program. We need public guardians to help those who cannot help themselves, so lack of guardians affects our hospital co-- capacity, the cost of healthcare. But mu-- much more importantly to me, a lack of guardians leads to worse outcomes for patients, a worse quality of life. You can imagine living in a hospital bed versus living in a care facility. So my goal is to find solutions to-- that support the capacity of the OPG to enhance outcomes for folks who shouldn't have to live out their lives in a hospital bed simply because there's no one to do their paperwork. This bill and the one that's next are a number of different solutions that I've proposed to get folks off that waitlist and out of the hospital beds that they don't need to be in, but I look forward to working with you and other colleagues to enhance the capacity of OPG to meet the needs that exist across our state. Thank you.

**WAYNE:** Any questions from the committee? Hearing none, thank you.

**LAURA BETZOLD:** Good afternoon, Chairman Wayne and members of the committee. My name is Laura Betzold, L-a-u-r-a B-e-t-z-o-l-d. I am here representing Nebraska Medicine. I have provided written testimony, but I just want to highlight a handful of things. First, as

a hospital, we are required to treat all who come to us, but the next level of care, the post-acute care facilities are not required to take everyone who needs them. And so that creates what you've heard already about, which is the set of patients who are in our hospital who don't meet our level of care but cannot move on to the next level of care. Many of these patients require a guardian because they can't make decisions for themselves. They can't sign documents regarding their healthcare treatments. They can't complete paperwork for benefits. They can't approve the type or location of care after hospitalization. We do everything we can and try to use less-restrictive alternatives to guardianship, but many of those are not options for these patients. They can't use the Surrogacy Act because we aren't able to find any family or friends who qualify as decision makers for them under the Surrogacy Act. We can't use POA or have them sign something at the time that they come into us, like some people can sign a consent to treat, because they obviously don't have capacity. And oftentimes we can't use limited guardianships because many fi-- financial institutions and banks only recognize full guardianship. When a guardian is needed, we search everywhere for family or friends, and if they are unable or unwilling to assume this role, then we have to turn to the state and the court system to appoint a guardian through the Office of Public Guardian. What this means for our patients is a very long hospital stay that's not needed. They stay anywhere from 137 days to well over a year waiting for a public guardian. This is terrible for their health, it's expensive to the health system, and it means that a hospital like ours can't serve patients who need to transfer from other hospitals for our level of care. Last-- we're looking for all solutions. Last year, we advocated for, successfully, more money for OPG for more public guardians, but the result has not helped. We-- we have the same number. We currently have seven patients who've been in our hospital and remain in our hospital, who don't need our care but can't move on because they're on the waitlist. While we recognize this would increase the caseload for public guardians, we are not set up to handle these patients and their health just gets worse while they're with us, so we're looking for any other solution we can. This is one option, there's another bill, and we're also open to discussing other alternatives.

**WAYNE:** Thank you for your testimony. So the seven patients, can't the-- sorry. Any questions? Can't the like Nebraska Leg-- what am I trying to say? Nebraska Legal Aid, can't they file a petition on behalf of those seven?

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**LAURA BETZOLD:** Yeah, so those seven-- we have more than seven--

**WAYNE:** Right.

**LAURA BETZOLD:** --patients who are waiting. And we actually, over last year, we had about 950 avoidable days, patients were in the hospital who needed to get out. And we do have a-- a medical-legal partnership with Legal Aid, and they actually are the ones who handle petitioning, but they petition the court for a public guardian to be assigned to these patients. And they-- like these seven, for example, they've gone to court, the court has agreed that they need a public guardian, but then they're on the waitlist because the Office of Public Guardian responds to the court that they don't have capacity. And because they have X number of public guardians, they can only handle by statute 20 cases.

**WAYNE:** Right.

**LAURA BETZOLD:** And so they can't take them.

**WAYNE:** Can a-- can a hospital become a public guardian-- I mean, become a guardian of-- of a patient?

**LAURA BETZOLD:** Actually, no, there's a statute that prohibits caregiver-- people who are responsible for the care from acting as a guardian for these individuals, for-- for anyone in their care.

**WAYNE:** OK. [INAUDIBLE] but that's OK. Thank you. Any other questions? Seeing none, thank you for being here. Next proponent.

**MARGARET WOEPPEL:** Chairman Wayne and members of the Judiciary Committee, my name is Margaret Woepfel, M-a-r-g-a-r-e-t W-o-e-p-p-e-l. I'm the vice president of quality, data and workforce with the Nebraska Hospital Association. And thank you, Senator DeBoer, for introducing this bill. After hearing numerous anecdotal stories about the difficulties transferring patients out of hospitals and into post-acute settings, the Nebraska Hospital Association began collecting monthly data from our member hospitals since last fall. According to this data, statewide, 290 patients have been waiting longer than seven days for placement in a post-acute setting, and this is one snapshot a month, month over month. In addition to those 290 patients waiting longer than seven days, 10 to 20 patients have been waiting longer than six months. Lack of guardianship is one of the top ten barriers to discharge from our hospitals and is attributed to

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

those who have the longest stays or those who've been waiting over six months. As you can imagine, these patients, our citizens of Nebraska, are not happy waiting in limbo at a hospital for weeks or months to move into an appropriate post-acute care settings. In the summer of 2022, the NHA launched a transitions of care council to monitor and provide solutions to this issue. Members of the council include hospitals, post-acute, and the Nebraska Office of Public Guardian. During these meetings, we have explored prolonged-- the reasons for prolonged delays, and the Office of Public Guardian has reported that they are experiencing staffing and resources shortages. The transitions of care council has discussed these challenges at length and are proponents of this bill as one piece of the transitions of care solution. We support increasing the average ratio from 20 to 22. During our transitions of care council meetings, we heard from neighboring states and their ratio goes up to 40. A modest increase to the ratio of an average of 22:1 for Nebraska is a conservative but proactive step towards getting patients into the appropriate care setting. In 2022, the Office of Guardian report stated they had a waiting list of 96 Nebraskans. If each of the 17 guardians in that report took two additional Nebraskans, we would immediately reduce the waitlist by over one third. Nebraska hospitals do understand that guardianship co-- cases are complex and ratios must be carefully considered, which is why we support this conservative step of increasing the ratio by two.

**WAYNE:** Thank you.

**MARGARET WOEPPEL:** Thank you.

**WAYNE:** Any questions from the committee? No. I wrote down some questions and I was just making sure I had-- no, you're good. OK. Seeing none, thank you for being here.

**MARGARET WOEPPEL:** Thank you. Welcome.

**LISA VAIL:** Good afternoon, Chairman Wayne and members of the Judiciary committee. My name is Dr. Lisa Vail. I am-- L-i-s-a V-a-i-l. I'm the system vice president of patient care services and chief nursing officer for Bryan Health, a locally owned and governed Nebraska hospital comprising of six medical centers. I've been a registered nurse for over 40 years. I come to you today on behalf of Bryan Health System and the patients we care for in support of LB156. At any given time, there are approximately 50 patients effectively stuck in one of

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

the Bryan Health's hospitals due to a multiple of complexities. They no longer have medical necessity for acute care services but require a level of care beyond what they could provide for themselves. This population of patients need post-acute placement in a long-term acute care hospital or in a rehab, assisted living, skilled nursing or long-term care facility. All of these facilities require a payer source and a decision maker to review a patient's case for placement. When a patient is determined to be nondecisional and does not have a family member or friend who can serve as their decision maker, one must be assigned by the Office of Public Guardian. It is not uncommon for patients to wait six months or longer to be assigned a guardian. We currently have one patient with a length of stay over 480 days. Their first barrier to discharge was guardianship, of which they waited 388 days, submitting the application every 90 days, as per the OPG procedure. Now they face another barrier of securing a payer source, which can be another months-long process. Once both of these steps are complete, a facility will review the case for placement, as none of these steps can concur simultaneously. This bill increases the caseload for public guardians from 20 to 22, as we've already heard. It will allow the OPG to care for 32 additional wards with their current staff of 16. LB156 will not fix the complex case placement challenges in our state. This bill is a piece of the patchwork of solutions that are before the Legislature this session. Earlier in the session, testimony was heard by the Health and Human Services Committee on LB353, LB227, and LB517. Today you are hearing testimony on LB156 and LB157. It takes approaching this issue from a variety of angles to completely solve the crisis. LB156 will create desperately needed capacity in the Office of Public Guardian, broadening their bandwidth to provide this important public service for patients across our state, improving the process for proper post-acute placement. I'm grateful for the opportunity you've given me this afternoon to share with you a glimpse of the challenges our Nebraska hospitals and the patients, friends and neighbors we mutually serve face. As you hear from myself and others today, I ask that you be moved to take action in support of LB156. Thank you for your time and I'd be happy to answer any questions.

**WAYNE:** Thank you. Any questions? Seeing none, thank you for being here. Next proponent, proponent. All right. Moving to opponents, next opponent. Welcome.

**MICHELLE CHAFFEE:** Thank you.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**WAYNE:** Thank you for your patience for this long credit.

**MICHELLE CHAFFEE:** Oh, well, thank you for waiting me while I juggle things. So my name is Michelle Chaffee, M-i-c-h-e-l-l-e, and I'm the director of the Office of Public Guardian. Good afternoon on Friday to the Judiciary and to Chairman Wayne. I'm here to-- in opposition to LB156. The caseload capacity for the A-- OPG was ad-- adju-- adjusted by the Legislature in 2016. Data collected over the first year of the OPG implementation demonstrated that associate public guardians served individuals with high needs, including severe and pervasive mental illness. Full guardianships were 99 percent of the appointments. The associate public guardian serving the Office of Public Guardian wards averaged 2.5 hours per week per ward, so the total caseload capacity at that time for the APG was 40. And despite best practices and the national standard of being 20 cases per caseload, it was identified that, yes, they needed to reduce it to 20 because 20 would still be a 50-hour workweek for my associate public guardians, which is what it continues to be. In addition to the rest, it was 1.5 hours for the multidisciplinary team, so on top of that. So every asso-- every ward takes at four hours per day-- per week, per ward. I've provided you the 2022 OPG annual report and it-- just to show you that it does identify that 2.5 hours per week per ward is still what we're looking at in regards to our responsibilities. So if you added two cases for the 28 OPGs, that would res-- result in 40 additional wards across the-- the OPG with 160 hours of additional staff per week. We just don't have that ability. That means we'd have to pay overtime, which, as you'll see in the fiscal note, ends up being quite a bit of money. The-- the most important thing that I want to challenge, though, is that this is really an issue that would cause real concerns for the wards that we serve. And if you add two more to an already overburdened system with no additional consideration, then you're going to end up with not only continued overturn like I've had in the last year. We've lost fi-- five associate public guardians who the workload has just been too much, so I am concerned about that. I would also point out that the statistics that the Nebraska Hospital Association-- and I'm done.

**WAYNE:** Thank you. Any questions from the committee? Senator Holdcroft, followed by Senator Blood.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**HOLDCROFT:** Thank you, Chairman Wayne. Sorry, I never even knew we had an Office of Public Guardians. So-- so you fall under Probation? Is that right?

**MICHELLE CHAFFEE:** The Supreme Court.

**HOLDCROFT:** The Supreme Court.

**MICHELLE CHAFFEE:** Uh-huh.

**HOLDCROFT:** And-- and what is your-- do you have an authorized strength? Is that the-- that restricts you from hiring more people, or is it just that you can't hire more people, I mean, you can't find the people?

**MICHELLE CHAFFEE:** This year, it has a lot to do with the turnover. And, yes, we've tried to hire more people. I hired three additional people and had three had them quit within six to eight weeks. I then hired two more and they quit within the first three months. I mean, the-- the job is really, really tough. And one of the things I want to point out is that part of the issue with the Hospital Association, which you'll see on their statistics, is that it's the lack of behavioral health or places for people to get out of the hospital to go. And so when you have severely mentally ill people, there are many, many locations in the state that will not take them, even with a guardian. The person that they identified that was in-- in the hospital for a number of-- of-- of days and even after they had a guardian is because there-- there's nowhere, place that will take them. And the person has immigration issues, and so they did not qualify initially until we could find the immigration information. So it takes incredible amount of work in order to try and meet the needs of people who absolutely have no one in the world except and try to take care of their needs.

**HOLDCROFT:** So what are the qualifications to be a public guardian?

**MICHELLE CHAFFEE:** Yeah. To be a public guardian, you need to have a bachelor's degree and then have a history of case management, so dealing with people. We have ones that have dealt with developmental disabilities, mental health issues. We also have people who have been involved with mental health issues or social-- social work, and so those are the types of people that end up working for us.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**HOLDCROFT:** OK. And I saw a number here. Someone said there were 17 guardian-- public guardians. Is that--

**MICHELLE CHAFFEE:** There are-- that are currently serving, there are 17. We got three additional this last year, so we have 20.

**HOLDCROFT:** OK. And are you dispersed? I mean--

**MICHELLE CHAFFEE:** Yeah. We have people in-- we have people in Scottsbluff, North Platte, Kearney, Hastings, Norfolk, and then we have people who are in Lincoln who serve the Milford-York area and also the Wa-- the Wahoo area, and then we have a number in Omaha.

**HOLDCROFT:** OK. Thank you.

**WAYNE:** Senator Blood.

**BLOOD:** Thank you, Chairman Wayne. Thank you for coming out. I am familiar with the work you do, and I thank you for it. I think it's very important work, especially when we're talking about people towards the end of their life. I think we in Nebraska and other states have taken away a lot of dignity that these people deserve, and so I'm glad there are people like you.

**MICHELLE CHAFFEE:** Thank you.

**BLOOD:** But with that said, I'm concerned because you're in opposition, but I'm pretty sure that our first proponent sits on your advisory board. Is that true?

**MICHELLE CHAFFEE:** Um-hum.

**BLOOD:** Why do you think that there's a difference of opinion?

**MICHELLE CHAFFEE:** Well, I-- it's just massive, so let's start with, first of all, I am totally support-- I understand the problems with the beds. I am totally-- I actually have been a guest to the TOC, but I do not believe that guardianship is the answer for the-- of getting rid of the bed problem, so let's separate out the numbers in the beds of the 900. And if you look at the seven that they identified, of our waitlist, I took-- we took-- we were able to take nine people off our waitlist la-- in January. Seven of those were from hospitals. So we are, in fact, doing a lot in regards to that. And when you look at the-- the data from last year, across the hospitals, there were 51

individuals who were put in-- who were nominated for our care that were incapacitated and in the hospitals, and so 51 of that 900, and yet we provided-- when we do take on guardianships for people, we're willing to do that. We're very supportive of doing that. What we're not supportive of is having 22 people without any in-- any increase in-- with-- with having no increase in associate public guardians. They want to increase two associate public guardians and for us to take care of those 40 people, I would be glad to do that, but I can't take those 40 people within my 20 associate public guardians right now, not when they're already working 50 hours a week.

**BLOOD:** So-- so if I hear you correctly, your issue isn't that you don't think that there's room for improvement, but that you don't see improvement as being-- increasing the workload, but would be to increase the experts.

**MICHELLE CHAFFEE:** Absolutely.

**BLOOD:** OK.

**MICHELLE CHAFFEE:** Yeah, that's the main issue, is that if we were able to have additional, we would-- we did not-- we were not able to-- to. We have had a waitlist for four years and last year was the first time that we had any funding that added people to our-- to our servicing system. And so what happens is we are not right-sizing what is really happening in the geographic areas and data in Nebraska. I have 100 people that are nominated to the associate the-- to our Office of Public Guardian every year. I have 25 people that either lo-- die or are-- terminated their guardianships. That means I have 75 that will always be on my waiting list because I have a need for 100 every year. I need five public guardians every single year in order to deal with the 100 per year that we get nominated for.

**BLOOD:** So that's probably one of the reasons that you have a hospital administrator, I'm guessing, on your advisory board, because you know that, because of mental health and because baby boomers are aging out, that it's going to continue to increase. Why is the state not giving you what you need? We're-- we're putting money into lakes and canals and--

**MICHELLE CHAFFEE:** Well, this last year, and thanks to, again, collaboration with the Nebraska Hospital Association and the hospitals

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

and seeing that we needed, they identified and-- and Senator Kolterman brought a-- a bill for \$500,000.

**BLOOD:** Yeah, I remember that. Yeah.

**MICHELLE CHAFFEE:** OK. And so that was the first time in seven years that we had been given any additional funds. And actually, those funds didn't come from General Funds. They ended up coming from the-- from the-- from the--

**BLOOD:** ARPA?

**MICHELLE CHAFFEE:** --the Supreme Court--

**BLOOD:** Oh, Supreme--

**MICHELLE CHAFFEE:** --who gave-- they gave those funds. That's what I want to make a point of, is the answer is not having the-- the Office of Public Guardian have more people with-- with less resources. If you would look at our-- our ca-- our annual report, you'll see that the people that we deal with are the-- some of the most needy people that you would ever come across in the state. And we have-- we served 305 people last year. If you look on-- I think it's dealing with the [INAUDIBLE], like the type of people we have, they had a thousand different conditions, those 300 people. They were-- either had Alzheimer's or mental illness or physical illness or-- so all of those things, developmental disabilities. We have a lot of people who are coming out of the foster care system, and at 19 and 20, they're given-- being put into our system. Well, we will have them for the rest of their life, so I'm just saying I-- I'm in opposition to what this bill is asking of the Office of Public Guardian, not in-- at-- in opposition to the hospitals or their needs. I-- I-- I understand.

**BLOOD:** Or in opposition of bringing on more staff to cover these needs?

**MICHELLE CHAFFEE:** Right. If you could bring me more staff, I'd be glad to-- to serve whoever you guys identify as the conditions in which I should.

**BLOOD:** Thank you.

**MICHELLE CHAFFEE:** Sorry.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**WAYNE:** Any questions from the-- Senator McKinney.

**McKINNEY:** How short-staffed are you? What's the number?

**MICHELLE CHAFFEE:** Well--

**WAYNE:** I could answer that I can't get a-- I can't get anybody. Yeah, nevermind, nevermind, nevermind. I [INAUDIBLE]

**MICHELLE CHAFFEE:** Right-- OK, right now, I-- I've really struggled this last year because I have-- I've been five short since June. And so-- and then I hire and people leave, and I had somebody leave last week and I had somebody leave in January, even though I hired three in January. I was so excited. We were getting so close, so-- but I hope that the funds that have been identified by the Supreme Court to help in staffing, as far as what's paid, will be helpful to that. And I-- and I also hope that the \$700,000 that's been requested through Appropriations, thanks to Senator DeBoer, will be considered, OK, those two things, to your answer-- to your question. In Dec-- in November, when the Office of Public Guardian's data is collected, I had 90-some people on my waitlist. We've been able to get down to 43 people on our waitlist and 20 that are still pending, so they're within the process of application. So we have about 63; of those, 29 are from hospitals. But as I said, we recently were able to take nine off of our hosp-- off of our waitlist, and seven of those were ho-- from hospitals. We also have just recently, thanks to work by the probate section of the Asso-- the ABA, the Nebraska Bar Association have stepped up and offered their services to take some of our people from us, so.

**McKINNEY:** How-- how short-staffed are you?

**MICHELLE CHAFFEE:** In order to take care of these 63 people, I would need to have three public guard-- three more public guardians.

**McKINNEY:** OK, and a follow-up: I know you mentioned that people need case management experience and things like that. I know jobs say a lot of things in job descriptions that they actually train you for anyway. So do you really need case manage-- case management experience, or could you train people up?

**MICHELLE CHAFFEE:** We're always willing to train people up. But the problem is, is that if you don't have the case management, you can't

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

get them-- you-- you don't know how to do the Medicaid, the Social Security. You don't-- we train you how to do that.

**McKINNEY:** Could you teach them that though?

**MICHELLE CHAFFEE:** We do teach them. But people, when there's no place to put people and you're getting calls from 8:00 in the morning till 5:00 at night because somebody is mentally ill and out on the street, like at Christmas, you'll see on the first page of my letter, I had eight people in my guardian that was-- that we were guardians for that were homeless and they-- it was 31 degrees below zero.

**McKINNEY:** So on average, how long would it take you to train somebody up?

**MICHELLE CHAFFEE:** We'd provide really good-- like you don't have any cases the first six weeks to three-- after that you get four cases, so we just start adding.

**McKINNEY:** So you're not throwing people to the wolves.

**MICHELLE CHAFFEE:** Right, we're not--

**McKINNEY:** OK.

**MICHELLE CHAFFEE:** --because we-- we lost so many people. And so now it's like, OK, even though we have this waitlist, we cannot continue to bleed staff.

**McKINNEY:** Also, looking at your team and looking at the advisory team, where's the diversity?

**MICHELLE CHAFFEE:** Well, we had-- until we lost-- we had three African American staff members, until we lost two staff members who left; we have a Hispanic, so 4 of the 17 that we had, so we had some diversity, but we're always open. I mean, it was-- it was-- I was sorry to see--

**McKINNEY:** Why are they the ones leaving?

**MICHELLE CHAFFEE:** Well, I think it was finances, You know, it was that you can make a lot more money doing things with a lot less stress because of what our salaries are. So it's just--

**McKINNEY:** All right.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**MICHELLE CHAFFEE:** And then you want to celebrate for them. You know, they got what-- they got the-- the experience and they moved on and--

**WAYNE:** Thank--

**McKINNEY:** Thank you.

**WAYNE:** Thank you.

**MICHELLE CHAFFEE:** Yep.

**WAYNE:** Any other questions? Seeing none, thank you for being here. Next opponent. Next opponent. Seeing none, testify in a neutral capacity? Welcome.

**TIM HRUZA:** Good late afternoon, Chair Wayne, members of the committee. Tim Hruza, last name spelled H-r-u-z-a, appearing today on behalf of Nebraska State Bar Association in a neutral capacity on LB156. I'll keep my comments brief. When this bill was first introduced, we had a strong kneejerk reaction to be opposed to it. There was tons of discussion and I think there are several attorneys that have serious concerns about increasing the caseload ratio. The one thing I do want to stress in my remarks generally about these types of cases is they're extremely intense. They are-- they are-- these are the highest-level folks who need a great deal of attention and who require a lot of time from the individuals who serve as a guardian or-- or conservator, and the Public Guardian's ability to handle those cases is stretched very thin. We do very strongly support Senator DeBoer's bill, LB761, to provide more resources. I really do think this is one of those resource issues. There-- there's a long history of how the-- how the guardianship issue has developed in Nebraska and from the legal perspective and how attorneys serve in these roles. I think the last comments from the testifier before me, from Ms. Chaffee, really do highlight the intensity of the cases, the stress that is involved, and the fact that we-- we simply-- we probably need more people handling these cases rather than more cases being handled by a few-- by the same amount of people. With that, thank you very much, and I'm happy to answer any questions you might have.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here. Any other people testifying in neutral capacity? Seeing none, as Senator DeBoer comes up to close, we have one letter of

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

support and zero letters of neutral, zero letters of opposition.  
Senator DeBoer to close.

**DeBOER:** Thank you, Senator Wayne. Thank you all for being here on a Friday afternoon. I wanted to start by saying that the issues with the waitlist are definitely not because of the Office of Public Guardian. The Office of Party-- Public Guardian is doing amazing, hard, amazing work. I know I said "amazing" twice. They need to be fully funded, no question, end of conversation. They need to be fully funded. That's why I brought a bill to Appropriations this year to add more public guardians. The-- the reasoning for bringing this bill-- well, at first I thought maybe it would be modest; when we talked to them, no, it wasn't-- in part is to demonstrate that we cannot find our way out of this problem by just asking more from an already overworked group of people doing a very stressful job. It doesn't seem like this is the way to get to where we need to go. We're going to have to find another way, so I would ask that the committee hold this bill-- probably should've said that at the beginning-- because this isn't the-- the answer, I don't-- I don't think, we're discovering. This isn't the silver bullet, but here's the issue. This is a legal problem. There is a legal cause that folks cannot get to the right facility for them. We, we are the ones who are responsible for the fact that folks can't get to the right facility, the right treatment that they need. It's not the hospital's fault. It's not the OPG's fault. It's our fault. We have legal barriers, which are good and should be there in place to say you have to have a guardian if you are not capable of making decisions for yourself. Those are laws we put into place. It's not because the hospital has done it. We put those laws into place that suggest this is how folks who don't have the ability to make decisions for themselves get their decisions made. And because of that, we put the mechanism in place to get that done, which is the Office of Public Guardian, because these are people-- these are people who don't have anyone-- could be me. I'm not married. I don't have any kids. Could be me someday-- that doesn't have anybody there to do this job for them, and they're lying in a hospital bed without anyone to take care of them. If this isn't what government is for, I don't know what government's for. Making-- helping these folks to get to the right level of care, to deal with those legal issues that we created the roadblocks for, for good policy reasons, but we've created them and now they're in a situation where they cannot get to where they need to go because of us, that's something that we need to fund. We need to fund. We need to strategize. We need to put things together. It's not

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

the hospital's fault. The Office of Public Guardian is doing their very best. That's the problem. That's the problem we're looking for solutions to today. I'll answer any questions.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here. And that closes the hearing on LB156 and now we'll open the hearing on LB157.

**DeBOER:** Good afternoon, Chair Wayne and members of the Judiciary Committee. My name is Wendy DeBoer. W-e-n-d-y D-e-B-o-e-r. I represent the 10th Legislative District in northwest Omaha. I'm here today to introduce LB157, which allows for the appointment of a temporary guardian for the purpose of assisting a person in applying for government benefits or private benefits. The bill allows, but does not require, the OPD-- OPG to serve as the temporary guardian for this limited purpose and allows the temporary appointment-- oh, and-- OK, so it allows the OPG to serve as temporary guardian for this limited purpose, and we are envisioning an amendment to this bill which it allow-- would allow for the temporary appointment for outside counsel, for lawyers to act in this capacity. Under the green copy of the bill, the temporary appointment would go within the existing OPG caseload. We've just had a hearing on why that would be problematic. We thought that perhaps doing that for a temporary position might be workable. I understand that it would-- it would be difficult. LB157 is targeted to specifically address one of the challenges for individuals in needs of guardian while they're on the waiting list for appointment of a long-term public guardian. So as previously stated, a legal guardian is necessary to access a payer source like Medicaid and to consent to treatment decisions like transfer to a po-- post-acute facility. So this creates a problem where a patient may wait for several months on the waiting list for a public guardian and then once the public guardian is appointed, once they've waited for the appointment, only then can the guardian begin the process of enrollment for public or private bene-- benefits for the patients, which that adds days, weeks or months to the process. By engaging a temporary guardian while the patient is on the waiting list for the OPG for the limited and specific purpose of applying for private or government benefits, we envision that this would provide a quicker transition to placement once a patient is finally off the waitlist and has a long-term guardian. I understand that the OPG will be asking to do this work under their existing caseload cap, as this would create additional workload. For the 2022 annual report, the average award in full guardianship requires four hours per week of service from an OPG,

including monthly in-person visits, communication with direct service providers, financial case management, and response to emergency needs. Under this limited temporary guardianship, the responsibilities will be a limited subset of financial case management, gathering financial and personal information, completing application documents, and will likely be significantly less stressful and time consuming than some aspects of a full guardianship. So we're just trying to find a solution here. I'm committed to addressing the needs for increased OPG capacity, including increased funding, but we're also trying to find creative strategies to enhance capacity within the existing arrangement. After our hearings yesterday, for some reason, that triggered something maybe I was thinking about today, and I had this new idea to use an appointment mechanism similar to what we do in defense attorney cases in places where there is not a public defender. The court can appoint someone from a list of attorneys who have volunteered to do this work to be a public or a defender in a county where there is no public defender. I imagine a similar process. It would be similar to our guardian ad litem process where the court goes through a list of people in the county who are willing to act as public guardians. These would be attorneys, and we do this for the temporary position for applying for Medicaid. Obviously, this is a work in progress, and I don't have an amendment to show you, but the idea would be to do exactly the scheme that I have, but try and do that the state pays for this. But it would be-- it would be for folks who are willing to do it on an appointment basis. Maybe they don't want to be a full-time OPG, and this would allow us to get folks throughout the state and in Omaha and Lincoln, where I understand the needs are the highest, to do these guardianship positions on a temporary basis. At least that would get folks further along the process and speed them up a little bit. So I'd like to make sure we discuss this in this hearing. I've tried to talk to folks and kind of let them know that this is an idea I'm thinking about today. Some folks have suggested, well, shouldn't hospitals pay for guardians? There's a couple of-- I want to introduce that question, as well, because that was one mechanism folks were talking about. But here's the problem. You don't want someone to pay for guardians for folks that they're trying to get out of their hospital. Conflict of interest there, right? If it's not the right thing to get someone out of the hospital, you don't want a guardian to feel pressure from their employer or the person who's giving them money to be a guardian to say, oh, let's get them out of the-- the hospital. So you can't have a direct pay from the person who's doing the care. It has to be some

other thing. Someone said, why don't we just have hospitals pool money and then from there they get hired? So it wouldn't be that direct benefit. But why should the hospitals be paying for this work? As I said in my close for the last hearing, really should be something that is done by the state. The state has created a mechanism wherein folks need to have some kind of legal guardian, and we should fund that legal guardianship. So I would suggest a pilot program either in a city-- a county with the city of the primary class or a county of-- with a city of the metropolitan class, which is Lincoln or Omaha, where we could try to do something with a temporary guardianship that would be appointed by the court, similar to our guardian ad litem structure. I'm happy to answer any questions.

**WAYNE:** Senator DeKay.

**DeKAY:** Real quick, you triggered something when you said about having hos-- when the question was asked about having hospitals funded. The concern that I have with that is a lot of your rural hospitals are basic critical-need hospitals that are working on a shoestring budget right now, and to be able to come up with more revenue to cover those costs would be very detrimental, especially to rurals, where they're basically just prepping them and a decision might be-- need to be made by a guardian, but they're just prepping them to move on to a bigger hospital. So that's a concern I have with that.

**DeBOER:** I absolutely agree. I don't think this should be on the hospitals. It should be on us. We should be paying for this because we are the ones who create the legal structure that they're caught up in.

**WAYNE:** Any other questions? I had a lot, but-- because I'm in this area-- area. I'm appointed as a court visitor GAL on many of these cases, but in the essence of time, we can have those conversations in-- in Exec or wherever, but I'm real familiar with the-- the problem. In fact, I'm sometimes appointed just so people know, if anybody says I have conflict or whatever, I'm appointed sometimes in Douglas County to be a guardian ad litem, not a court visitor, but to also help go out and find successor guardians, because the waiting list is so long that the court is appointing people in Douglas County to see if they could figure out if there's somebody out there that could-- that could do it, so just so everybody knows that I don't have a lot of those cases. I think I only have two or three pending right now, but what happens to this bill doesn't change what I do. But I want people to understand that if there is an appearance of something,

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

that's what it is. I have no questions. So we'll start with proponents. Yeah, I have a very wide range of practice, Senator DeKay. I came down here and lost all my criminal clients because they like you to show up in court. Your crimi-- they get arrested, not on your own time, so it's kind of hard to plan. Welcome.

**TIFFANY JOEKEL:** Good evening, I think, officially now. My--

**WAYNE:** [INAUDIBLE] go ahead with that.

**TIFFANY JOEKEL:** My name is Tiffany Joekel, T-i-f-f-a-n-y J-o-e-c-k-e-l, and I'm director of government affairs at Nebraska Medicine. You know, it's late and I won't belabor the point I think has been clearly made. Our hospitals and other-- our hospitals and others in the state are struggling. We have situations in which we come to a last resort, which is a need for a public guardian. We have exhausted friends, family, and people are either unwilling, unavailable to serve in this capacity for patients. We don't take this lightly, not only because it is a very serious legal issue to pursue guardianship, but also it's not a prompt response. You know, it's not something-- so-- so we pursue this, absolutely, as a last resort. LB157 is an attempt to provide some way to address the challenge that we face. So at this point, a patient may wait on the waitlist and after they get a guardian, it's only then that we can really begin to pursue any public benefit process because-- it's not necessarily because our health system can't help with the application for Medicaid, for example. We can certainly do that. But what we can't do, and I don't think it's appropriate for us to do, is get access to bank records, retirement, pensions, any sorts of asset or financial information that may be important to determine what sorts of public benefits a patient may be eligible for. So that means that we have to wait on the waitlist, and in some cases that's months, and wait until that we finally get a public guardian appointed. And at that point, the med-- the public benefit application process can really start in earnest. This does not solve the problem, but it is one effort to try to think creatively about how to help this process along so that a patient can move to the more appropriate level of care as quickly as possible. I want to just speak to some challenges or some issues that have been brought about this temporary limited purpose will remain temporary or limited as is written in the bill. I do understand that there are some temporary guardianships that are extended currently. Temporary guardianship exists currently, and there is a concern that this will just do the same thing. The way the bill is written right

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

now, it's very limited to application for public or private benefit. So while it may continue, it's only for that limited purpose, so it's not as if this limited opportunity can make placement decisions or make medical decisions. This is a very limited purpose to meet a very limited need. I also want to acknowledge the hard work that OPG does. They do deal with some very difficult cases, but sometimes something like this would help us tremendously. We had a patient that was with us for 300 days. We had a placement willing to take them, but placements don't take them without a payer and they don't take them without a guardian, so we waited those 300 days until a guardian could get in place before we could start that conversation.

**WAYNE:** Thank you.

**TIFFANY JOEKEL:** So with that, I would take any questions.

**WAYNE:** OK. Any questions from the committee? Senator Holdcroft.

**HOLDCROFT:** Yes, Chairman Wayne.

**WAYNE:** I was just thinking-- I was like, I know his name. I just couldn't get-- I couldn't grab it. Oh, Lord.

**TIFFANY JOEKEL:** It's late on a Friday.

**HOLDCROFT:** Thank you, Chairman Wayne. So help me understand. So they were in the hospital for 300 days. Obviously, they're accruing fees, expenses which you're not collecting or trying to collect?

**TIFFANY JOEKEL:** So the way hospital inpatient care is financed, it's typically we are paid an amount based on the diagnosis that patient walks in with. And so that diagnosis, let's say it's on average they anticipate a six-day stay and, you know, they have a-- there's a certain average or estimate for the kinds of procedures that will be required. So we're paid a lump sum based on that di-- the diagnosis that patient walks in with. If they stay for 6 days or 60, we get paid that same amount, so there is no additional compensation per diem for the-- the days that they stay there.

**HOLDCROFT:** Paid by whom?

**TIFFANY JOEKEL:** Us. We absorb that care.

**HOLDCROFT:** OK, so--

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**TIFFANY JOEKEL:** I mean, we're-- for that initial reason that they come into our hospital, if they have a-- a commercial payer, they'll pay that DRG. If they're-- if they're Medicaid, you know, whomever their payer is that comes in pays that initial inpatient. But for any extended stay that's beyond what they came in for acute patient care, we-- our hospital absorbs the cost of that.

**HOLDCROFT:** So once you get a guardian and they do the paperwork and say they qualify for Medicare or Medicaid, do you try to go back and collect your-- your back fees on the-- you know, you just absorb it?

**TIFFANY JOEKEL:** We-- we can't. There's no-- there's no per diem structure set up in Medicaid. They pay us for the diagnosis that they came in for, and that's how it's set up, so there is no recoupment for, you know, the 30 days that they stayed beyond the average or what was wrapped up in that.

**HOLDCROFT:** But don't they qualify, depending on the age, of course, for Medicare while they're in the hospital?

**TIFFANY JOEKEL:** Yeah, same. They also pay on a DRG basis, so it's based on that diagnosis-related group, is the DRG. That's-- it's a lump sum amount, so, again, it-- they pay based on the diagnosis, not how many days they stay in a hospital.

**HOLDCROFT:** OK. Thank you.

**TIFFANY JOEKEL:** Look.

**WAYNE:** Any other questions from committee? Seeing none, thank you for being here.

**TIFFANY JOEKEL:** Thank you.

**WAYNE:** Next proponent. Welcome back.

**MARGARET WOEPPEL:** Thank you. Chairman Wayne and members of the Judiciary Committee, my name is Margaret Woepfel, M-a-r-g-a-r-e-t W-o-e-p-p-e-l. I'm the Vice president of workforce quality and data for the Nebraska Hospital Association, and I am testifying in support of LB157. You have the data in front of you. We've talked about it at length, but I would just like to focus in on the temporary guardian as a add-on to LB761, which was brought by Senator DeBoer, \$700,000, in the Appropriations Committee. The appointment of a temporary guardian

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

for the limited purposes of assisting a person in applying for private or government benefits will help. In the hospital setting, patient waits months for a public guardian and only after they have a public guardian can the patient begin application for Medicaid. The Medicaid application can take weeks or months on top of that wait for paperwork to be found, gathered and approved. All this time, the patient is waiting for transfer to the appropriate level of care. An interim temporary guardian who can simply help patients start their benefits application can shave weeks or months off the patient's unnecessary wait. Any questions?

**WAYNE:** Any questions from the committee? I liked that testimony.

**MARGARET WOEPPEL:** Thank you.

**WAYNE:** You still have 1:50 left. All right. Next proponent. Wait, are-- we're talking proponents.

**BO BOTELHO:** I know. You are-- you are correct, Senator. It's the first time my agency has sent me in, in behalf of a bill.

**WAYNE:** [LAUGH] We are having fun on a Friday. Welcome.

**BO BOTELHO:** Good afternoon, Chairman Wayne and members of Judiciary Committee. My name is Bo Botelho, B-o B-o-t-e-l-h-o, and I'm here-- and I am the general counsel for the Department of Health and Human Services. I'm here today to testify in support of LB157. Some Nebraska residents who need public assistance lack the capacity to apply for it. While guardianship proceedings can be initiated to appoint a guardian for incapacitated persons needing assistance, it can be difficult to find someone willing and able to serve as a guardian. Persons who are not interested in serving-- in serving as a temporary or permanent guardian for all purposes might be willing to serve for the limited purpose of applying for benefits. Exempting these temporarily limited guardians from the caseload ratio of the Office of Public Guardian would potentially increase the availability of members of that office to perform this important function. Although a temporary guardianship may not re-- resolve all needs, it'll allow the department to establish needed services and help stabilize the individual's circumstances. Receiving public assistance can help people live their best lives by allowing them to receive the appropriate level of care in the most appropriate setting. DHHS

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

respectfully requests the committee to advance LB157. Thank you for the opportunity to testify. I'll be happy to answer any questions.

**WAYNE:** Any questions from the committee? Thank you for being here.

**BO BOTELHO:** Thank you, Senator.

**WAYNE:** No, he's a-- he's a proponent.

**ANGENITA PIERRE-LOUIS:** Yeah.

**WAYNE:** Just make sure-- OK, because-- make sure we get that right.  
[LAUGHTER] Welcome.

**LISA VAIL:** Good afternoon again, Chairman Wayne and members of the Judiciary Committee. My name is Dr. Lisa Vail, L-i-s-a V-a-i-l, and I am assistant vice president for patient care services and chief nursing officer at Bryan Health. From the conversation this afternoon, I am speaking in support of LB157. However we might be able to expedite the ability to get a temporary guardian to move forward with financial paperwork and getting that process going, it would save significant time for us because, again, we cannot do that and find a place concurrently. We need a guardian first before we can find the payer source, and it does make a huge difference, not only for these patients but everybody else who needs services at our hospitals. Just this week, due to the complexities of some of these patients and others, we're holding-- we're at full capacity and holding 25-plus patients in our emergency room with no beds to put them in, and it's been that way for the last three days. So it's making an impact in our ability to care for those who truly need acute care services. So I just want to thank Senator DeBoer for her continued focus on the post-acute placement challenges in our state and for all of the conversation this afternoon, and I really hope that we can find a solution to seek this support for the principles of LB157. So thank you. Any questions?

**WAYNE:** Thank you. Any questions from that committee? Seeing none, thank you for being here. Next proponent, proponent. Next proponent. OK, moving to opponent, next opponent. Welcome.

**MICHELLE CHAFFEE:** Again, Chairman Wayne and members of the Judiciary Committee, my name is Michelle Chaffee, M-i-c-h-e-l-l-e C-h-a-f-f-e-e, and I serve as the director of the Office of Public Guardian, and we are opposed to LB157 as it is written to include the Office of Public

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

Guardian taking on temporary guardianships without counting towards the associate public guardian's caseload. I-- because of the late time, I'm just going to jump to a few things. One is, if you would look on the second page, which is a breakdown of what Medicaid applications and what it takes for-- even if it's a temporary. The Office of Public Guardian had-- looked through our cases and we had 32 cases that we were a temporary guardian for that needed benefits and, as you will see, that the temporary guardianships, it's not the application process, it's-- it's the verification of the funding that becomes an issue. When we-- from our representative samples, the average case took 138 days to get Medicaid. The-- the minimum was 6 days and the maximum was 388 days. So when you're talking about here, just take this and just add it to your already caseload and just do it as a temporary because it's like 90 days, that's not the way it is. The total hours spent on all cases in the representative sample was 2,712, an average of 77 hours for being able to get to the place where we could have Medicaid. The range was from 13 hours minimum, when it was really easy--- there is no assets, you just file it-- and 413 was the maximum. If you look at the last two handouts that I gave you, those are the tool kits for Medicaid, and it'll show you what you have to go through in order to provide and get Medicaid. So when we start talking about a temporary guardianship that's going to be added to the Office of Public Guardian's responsibilities, please-- please be aware we're not talking about filling out an application. We're talking about finding assets, figuring out the real estate. And then the other thing you need to realize is that 63 percent of these cases don't get okayed until they go through an appeal process, so you have to appeal the-- the-- the process. You have to-- or you have to spend down their assets. And so it's not about temporary just to apply for Medicaid. You have to do the verification, the-- and all of the work to do it, especially if you have to sell property in order to get the Medicaid. So I'm not against-- you know, if that's what-- that wants to be done, I think you could do that for temporary, but not the Office of Public Guardian as seeing like that's just a temporary and we should jump ahead of all the waitlist cases in order to take the temporary Medicaid applications.

**WAYNE:** Thank you for your testimony.

**MICHELLE CHAFFEE:** Thank you.

**WAYNE:** Any questions from the committee? Senator Holdcroft.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**HOLDCROFT:** Thank you, Chairman Wayne. I'm just curious-- well, it's only curious. I, you know, recent-- not recently, actually been a few years, I-- I took care of my mother's transition, you know, and-- and she-- she had assets. She had-- so she-- I mean, we-- we-- we went to an elder care lawyer and to preserve assets that she gave us an option to where we could move money into trusts, we could, you know, make her appear poor. There was-- it was all legal, but we-- we qualified her for Medicaid if we wanted to. Now we never-- we never executed the plan.

**MICHELLE CHAFFEE:** Right.

**HOLDCROFT:** But do you go through all those steps with-- with these folks or do you just pretty much spend down their savings and then-- until they qualify for Medicaid?

**MICHELLE CHAFFEE:** It really depends on like-- it depends. Most of the time, though, that when we get them, I'm talking about assets of a house or assets of, you know, \$2,000 or \$3,000, \$4,000. We only have-- we've had three cases where we've had millionaires who are under our care. One was a rancher, a lady who never had family. She-- and she had a trustee, so we just did the medical decision making, so we didn't do any of the elder plans, so.

**HOLDCROFT:** OK. Thank you.

**MICHELLE CHAFFEE:** Yeah.

**WAYNE:** Any other questions? So pro-- attorneys can't be appointed. I think you were here when I said that I get appointed sometimes to find successor guardians. How would you feel if-- if the court started appointing attorneys as temporary guardians for that limited purpose as your--

**MICHELLE CHAFFEE:** We already-- they already do that.

**WAYNE:** They already do that.

**MICHELLE CHAFFEE:** In fact, with Legal Aid, you know, you're aware that they have the-- the contract for a whole lot of the hospitals to find petitioners to petition for guardianships and--

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**WAYNE:** But-- but those are the ones in the hospital, so I'm-- I'm just saying, so like I file a petition for an emergency, invoke the public, you send back the--

**MICHELLE CHAFFEE:** Yeah.

**WAYNE:** --case load's already met or whatever, can't-- can't find anybody. What if we gave the authority to the judges to at that point appoint attorneys as temporary guardians? No, I'm not asking for more work because I-- I'm down here too much, but--

**MICHELLE CHAFFEE:** No, we do, do that and it's done often and it's done consistently. There's temporary guardians who are attorneys.

**WAYNE:** So how do your standards in that-- and we go through the training, but I'm trying to think of your reporting and what you do. How-- how do we ensure the court matches kind of what you're doing so it's a smooth transition to when the-- when the office picks up?

**MICHELLE CHAFFEE:** Well, you'd have to go and-- and it-- you'd have to file a te-- you know this. You'd have to file a temporary first. And so once the temporary-- you could do a temporary and permanent and that gets filed, and then you come in and say the temporary-- and this is how it's done. They do a temporary and they identify a guardian ad litem-- a-- an attorney. And so when they get off of our waitlist, when we say, hey, we have-- then the temporary automatically gets put onto us as a permanent.

**WAYNE:** No, what-- what I'm saying is right now there is-- I don't know if you call it movement. I don't know what to say. The attorneys right now in Douglas County aren't even recommended for an emergency through Office of Guardian-- Public Guardian because we know there's a-- we know you don't-- have a waitlist, so we're just-- so people-- you're not even getting requested, and so I think there's--

**MICHELLE CHAFFEE:** OK, I see what you're saying.

**WAYNE:** So I'm saying if there's-- there's a mechanism, maybe through your office, where we say-- so--

**MICHELLE CHAFFEE:** If you take a temporary--

**WAYNE:** Here's what I'm trying to think of. Here's what I--

**MICHELLE CHAFFEE:** Yeah.

**WAYNE:** So-- so sorry in criminal cases in Douglas County, you-- attorneys go through training. They're on a list. In order to be a juvenile guardian, you have to complete and you're on a list and-- and courts can appoint from that list. I don't think we have the same thing for temporary guardians. But what if that was created and your office maintained that list, but it gives judges the opportunity to be temporaries-- I mean not judges, but attorneys. So there's a list. Would that be something you'd be interested? I mean, of course it costs money, but would that be something that maybe you would help with in that process or could--

**MICHELLE CHAFFEE:** Right. Absolutely. We're open to a lot of things. Let me just share with-- for example, one of the things that we're doing now is seeking out volunteers who would be guardians, period, and then processing that and providing that information to the court so that they have-- and we're working in conjunction with Adult Protective Services because they have difficulties, so we'll be looking at volunteers. We also-- you know, if there's a temporary that's being done currently while they're waiting for us on the waitlist, then-- then they usually file for us to be permanent while they do the temporary and is me-- when they're identified, then they--

**WAYNE:** So how many-- this is the last question. How many-- have you-- not how many-- have you seen a-- a migration where Douglas and Lancaster County are moving people out of their-- out of your-- the jurisdiction-- the-- however you break it up, the east, to other ones just so they can get appointed the office-- a guardian?

**MICHELLE CHAFFEE:** Well, yes, but the-- the rules are that you have to file it where the-- the-- the person is-- resides. And so if they're Douglas County, they have to have the guardianship filed in Douglas County.

**WAYNE:** But it-- the guardianship is filed. But if we find a placement that a place-- a place takes somebody in Ponca, we'll move them up there and then transfer it over there and then magically the list is no longer full so they can be on the list. Have you seen that movement from-- like people doing that?

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**MICHELLE CHAFFEE:** I've seen people try to work that out. And actually we have two openings in Scottsbluff, so anybody who wants to transfer over to Scottsbluff, but they're not doing it out of the hospital, so.

**WAYNE:** I was just seeing if I was the only one doing it.

**MICHELLE CHAFFEE:** Yeah.

**WAYNE:** That's really what I was trying to--

**MICHELLE CHAFFEE:** Yeah. One thing-- one thing that I'd like to just say, though, about what was testified to in regards to temporaries and why people are in hospitals so long waiting for payer sources, is because that's a requirement and they-- they get these bills because they're not--

**WAYNE:** Right.

**MICHELLE CHAFFEE:** --paying for what their hospitalization is. That's because long-term care re-- refuses to take them--

**WAYNE:** No, I understand.

**MICHELLE CHAFFEE:** --until the payer source is there, even though, if they would take them, Medicaid pays 90-- three months in retrospect.

**WAYNE:** Right.

**MICHELLE CHAFFEE:** So if you get them into the-- into the nursing home, then they still have three months they can collect.

**WAYNE:** No, no, I understand that. The issue is the temporary, getting them there. And so the other issue is, is those who are in medical-- I mean, literally, I'm going through this right now. I have a-- I mean, we're-- we're-- we're petitioning, and I know you guys are full, but anyway, we'll-- yeah, anyway, thank you.

**MICHELLE CHAFFEE:** Yeah, thank you.

**WAYNE:** If it wasn't Friday, we would keep talking, but it's Friday.

**MICHELLE CHAFFEE:** And I'm not-- I'm not [INAUDIBLE] last.

**WAYNE:** Next opponent.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**TIM HRUZA:** Good evening, Chairman Wayne, members of the Judiciary Committee. My name is Tim Hruza, last name spelled H-r-u-z-a, appearing today in opposition to LB157 on behalf of the Nebraska State Bar Association. I want to be clear that the bill has two component parts. The first part that authorizes the appointment of a temporary guardian for purposes of obtaining benefits or applying for benefits, I don't think we really have an objection to. There are a lot of questions, and I think it was alluded to by one of the testifiers earlier that there are questions about the temporary nature of that and whether it will affect it. But as Mr. Botelho also testified, if you can get an attorney or a family member or a kinship guardian that would be willing to accept an appointment, and these-- a lot of these cases are long term and difficult, but if you can get somebody who might be willing to accept a limited appointment for this purpose, it should be an option, and I think that might open up a lot of avenues, so we're fine with Section 1. The concern is the impact it has on the Office of Public Guardian. To take those cases out from under that case ratio that we discussed in the last bill, clearly a need for this, without question, but those cases are very-- the ones that the Public Guardian is taking and getting right now are very intense, time intensive and difficult cases. The concern is the strain that this would put on them and the ability, if it's not in-- within that case ratio, the-- the effect it would have on the ability to serve those that are more permanent guardianship appointments or more long-term guardianship appointments if these are jumping up in line. With the last minute I think I have, I will just say that we've had good discussions with Senator DeBoer. To some of your questions, Senator Wayne, I think we are open to a discussion about a situation in which an attorney or temporary attorneys, private attorneys might be appointed with some funding that would be available. I do know that happens in some counties right now, paid for at the county expense. I think there are some county court judges that have told me that that happens where they appoint attorneys for these types of cases. But we are open to exploring and communicating and getting more resources to ensure that this-- these issues are addressed. With that, I'll answer any questions and thank you for your time.

**WAYNE:** Thank you. Any questions from the committee? I can't do the clock and ask questions, so we're good. All right, thank you.

**TIM HRUZA:** Thank you.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**WAYNE:** Next opponent. Welcome.

**BRAD MEURRENS:** Good afternoon-- good evening, Senator Wayne and members of the committee. For the record, my name is Brad, B-r-a-d, Meurrens, M-e-u-r-r-e-n-s, and I am the public policy director with Disability Rights Nebraska. We are the designated protection and advocacy organization for persons with disabilities in Nebraska, and I'm here today in opposition to LB157 as currently written. I'll have a-- I'll have a brief statement, given the-- given the time of the hour. We are not dismissive of the situation giving rise to this bill. However, as the protection and advocacy organization, we have a particular interest relative to guardianships and persons with disabilities. As one of the organizations that supported the creation of the Office of Public Guardian, we are also concerned with its efficacy. We would encourage the Legislature to work to explore alternative options. We share and echo the concerns of both the Office of Public Guardian and the-- and the other opponents today. And with that, I would also say that Disability Rights Nebraska stands ready and willing to assist in any way we can in addressing solutions to this particular issue. I'd be happy to answer any questions.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here.

**BRAD MEURRENS:** Thank you.

**WAYNE:** Appreciate the work you do. Next opponent. Anybody testifying in the neutral capacity? As Senator DeBoer comes to close, we have two letters, one in support and one in opposition. Welcome, Senator DeBoer.

**DeBOER:** Thank you, Senator Wayne. Well, we have a big problem. We gotta find a solution for it. I think it's gonna take multitude of different approaches. I think we should investigate doing something more with appointments. That doesn't mean that everybody in Douglas County and Lancaster County with a bar license is going to jump up and try and take as many of these cases as we could possibly give them, but maybe it's an option to try and do something with that for these temporary guardianships. As you heard, I have asked for money to help with staffing over in the Office of Public Guardian. I think we need to take a number of different approaches and, yeah, I'm happy to answer any questions.

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee March 3, 2023

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here. That'll close the hearing on LB50-- LB157 and today's hearings.