whether civil, criminal, administrative of investigative, except an action by or in the right of the limited liability company, by reason of the fact that he is or was a manager, member, employee or agent of the limited liability company, or is or was serving at the request of the limited liability company as a manager, member, employee or agent of another limited liability company, partnership, joint venture, trust or other enterprise, against expenses, including attorneys' fees, judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with the action, suit or proceeding if he acted in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the limited liability company, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, does not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the limited liability company, and that, with respect to any criminal action or proceeding, he had reasonable cause to believe that his conduct was unlawful.

2. A limited liability company may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the limited liability company to procure a judgment in its favor by reason of the fact that he is or was a manager, member, employee or agent of the limited liability company, or

is or was serving at the request of the limited liability company as a manager, member, employee or agent of another limited liability company, corporation, partnership, joint venture, trust or other enterprise against expenses, including amount paid in settlement and attorneys' fees actually and reasonably incurred by him in connection with the defense or settlement of the action or suit if he acted in good faith and in a manner in which he reasonably believed to be in or not opposed to the best interests of the limited liability company. Indemnification may not be made for any claim, issue or matter as to which such a person has been adjudged by a court of competent jurisdiction, after exhaustion of all appeals therefrom, to be liable to the limited liability company or for amounts paid in settlement to the limited liability company, unless and only to the extent that the court in which the action or suit was brought or other court of competent jurisdiction determines upon application that in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such expenses as the court deems proper.

3. To the extent that a manager, member, employee or agent of a limited liability company has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections 1 and 2, or in defense of any claim, issue or manager therein, he must be indemnified by the limited liability company against expenses, including attorneys' fees, actually and reasonably incurred by him in connection with the defense.

4. Any indemnification under subsections 1 and 2, unless ordered by a court or advanced pursuant to subsection 5, must be made by the limited liability company only as authorized in the specific case upon a determination that indemnification of the manager, member, employee or agent is proper in the circumstances. The determination must be made:

(a) By the members;

(b) By a majority vote of a quorum of managers, if the limited liability company has managers, who were not parties to the act, suit or proceeding;

(c) If a majority vote of the managers who were not parties to the act, suit or proceeding so orders, by independent legal counsel in written opinion; or

(d) If the managers who were not parties to the act, suit or proceeding cannot be obtained, by independent legal counsel in a written opinion.

5. The articles of organization and the operating agreement made by the limited liability company may provide that the expenses of members and managers incurred in defending a civil or criminal action, suit or proceeding must be paid by the limited liability company as they are incurred and in advance of the final disposition of the action, suit or proceeding, upon receipt of an undertaking by or on behalf of the manager or member to repay the amount if it is ultimately determined by a court of competent jurisdiction that he is not entitled to be indemnified by the limited liability company. The provisions of this subsection do not affect any rights to advancement of expenses to which limited liability company personnel other than

managers or members may be entitled under any contract or otherwise by law.

6. The indemnification and advancement of expenses authorized in or ordered by a court pursuant to this section:

(a) Does not exclude any other rights to which a person seeking indemnification or advancement of expenses may be entitled under the articles of organization or any operating agreement, vote of members or disinterested managers, if any, or otherwise, for either an action in his official capacity or an action in another capacity while holding his office, except that indemnification, unless ordered by a court pursuant to subsection 2 or for the advancement of expenses made pursuant to subsection 5, may not be made to or on behalf of any member or manager if a final adjudication establishes that his acts or omissions involved intentional misconduct, fraud or a knowing violation of the law and was material to the cause of action.

(b) Continues for a person who has ceased to be a member, manager, employee or agent and inures to the benefit of the heirs, executors and administrators of such a person.

NRS __.047 Insurance and other financial arrangements against liability of members, managers, employees and agents.

1. A limited liability company may purchase and maintain insurance or make other financial arrangements on behalf of any person who is or was a member, manager, employee or agent of the limited liability company, or is or was serving at the request of the limited liability company as a manager, member, employee or agent of another corporation, limited liability company, partnership, joint venture, trust or other enterprise for any

liability asserted against him and liability and expenses incurred by him in his capacity as a manager, member, employee or agent, or arising out of his status as such, whether or not the limited liability company has the authority to indemnify him against such liability and expenses.

2. The other financial arrangements made by the limited liability company pursuant to subsection 1 may include the following:

(a) The creation of a trust fund.

(b) The establishment of a program of self-insurance.

(c) The securing of its obligation of indemnification by granting a security interest or other lien on any assets of the limited liability company.

(d) The establishment of a letter of credit, guaranty or surety.

No financial arrangement made pursuant to this subsection may provide protection for a person adjudged by a court of competent jurisdiction, after exhaustion of all appeals therefrom, to be liable for intentional misconduct, fraud or a knowing violation of law, except with respect to the advancement of expenses or indemnification ordered by a court.

3. Any insurance or other financial arrangement made on behalf of a person pursuant to this section may be provided by the limited liability company or any other person approved by the managers, if any, or by the members, if no managers exist, even if all or part of the other person's membership interest in the limited liability company is owned by the limited liability company.

4. In the absence of fraud:

(a) The decision of the limited liability company as to the propriety of the terms and conditions of any insurance or other financial arrangement made pursuant to this section and the choice of the person to provide the insurance or other financial arrangement is conclusive; and

(b) The insurance or other financial arrangement:

(i) Is not void or voidable; and

(ii) Does not subject any manager, if any, or members, if no managers exist, approving it to personal liability for his action,

even if a manager, if any, or members, if no managers exist, approving the insurance or other financial arrangement is a beneficiary of the insurance or other financial arrangement.

5. A limited liability company or its subsidiary which provides self-insurance for itself or for another affiliated limited liability company pursuant to this section is not subject to the provisions of Title 57 of NRS.

NRS __.050 Name.

1. The words "limited liability company" must be the last words of the name of every limited liability company formed under the provisions of this act and, in addition, the limited liability company name may not:

(a) Contain a word or phrase which indicates or implies that it is organized for a purpose other than one (1) or more of the purposes contained in its articles of organization;

(b) Be the same as, or cannot be distinguished from, the name of a limited liability company, limited partnership or

corporation existing under the laws of this state or a foreign limited liability company, foreign limited partnership, or foreign corporation authorized to transact business in this state, or a name the exclusive right to which is, at the time, reserved in the manner provided under the laws of this state, unless:

(i) The written consent of such other limited liability company or holder of a reserved or registered name to use the same name or a name which cannot be distinguished from the registered name if one or more words are added, altered, or deleted to make the name distinguishable from the reserved or registered name; or

(ii) A certified copy of a final decree of a court of competent jurisdiction establishing the prior right of the applicant to the use of such name in this state,

in which event the prohibition above of subsection 1 do not apply.

2. Omission of the word "limited" or as abbreviated, "Ltd.," in the use of the name of the limited liability company renders any person who participates in the omission, or knowingly acquiesces in it, liable for indebtedness, damage or liability occasioned by the omission.

3. The identification "a limited liability company" must appear after the name of the limited liability company on all correspondence, stationery, checks, invoices and any and all documents and papers executed by the limited liability company.

4. The exclusive right to the use of a name may be reserved by the manner prescribed in NRS 88.325.

NRS __.060 Formation.

Two (2) or more persons may form a limited liability company by signing, verifying and delivering in duplicate to the secretary of state articles of organization for such limited liability company.

NRS __.070 Articles of organization.

1. The articles of organization must set forth:

(a) The name of the limited liability company;

(b) The period of its duration, which may not exceed thirty (30) years from the date of filing with the secretary of state;

(c) The purpose for which the limited liability company is organized;

(d) The address of its principal place of business in the state and the name and business address of the agent for service of process in the state required to be maintained by NRS __.110;

(e) The right, if given, of the members to admit additional members, and the terms and conditions of the admission;

(f) The right, if given, of the remaining members of the limited liability company to continue the business on the death, retirement, resignation, expulsion, bankruptcy or dissolution of a member or occurrence of any other event which terminates the continued membership of a member in the limited liability company;

(g) If the limited liability company is to be managed by a manager or managers, the articles of organization must so state and must set out the names and addresses of such manager or

managers who are to serve as managers until the first annual meeting of members or until their successors are elected and qualify. If the management of a limited liability company is reserved to the members, the names and addresses of the members must be set out in the articles of organization, and the rights, if any, of the members to contract debts on behalf of the limited liability company;

(h) Any other provision, not inconsistent with law, which the members elect to set out in the articles of organization for the regulation of the internal affairs of the limited liability company, including any provisions which under this act are required or permitted to be set out in the operating agreement of the limited liability company.

2. It is not necessary to set out in the articles of organization any of the powers enumerated in this act.

NRS __.080 Signing of articles of organization.

1. The articles of organization required by NRS __.060 to __.090, inclusive, to be filed in the office of the secretary of state, must be executed in the following manner:

(a) Original articles of organization must be signed by all members then existing as named in the articles.

(b) Amended articles of organization which admit new members must be signed by all members, including the new members.

NRS __.090 Filing of Articles of Organization.

Two signed copies of the articles of organization must be filed according to the procedure prescribed by NRS 88.380 for the certificate of limited partnership.

NRS __.100 Effect of endorsement of articles of organization.

1. Upon the endorsement of the articles of organization, the limited liability company is considered organized, and such endorsed articles of organization are rebuttable evidence that all conditions precedent required to be performed by the members have been complied with and that the limited liability company has been legally organized under this act.

2. A limited liability company must not transact business or incur indebtedness, except that which is incidental to its organization or to obtaining subscriptions for or payment of contributions, until the secretary of state has endorsed the articles of organization as prescribed by NRS __.090.

NRS __.105 Notice of existence of limited liability company.

The fact that the articles of organization are on file in the office of the secretary of state is notice that the limited liability company is a limited liability company and is notice of all other facts set forth therein which are required to be set forth in the articles of organization, unless the existence and facts set forth have been rebutted and made a part of a record of any court of competent jurisdiction.

NRS __.110 Records office and agent for service of process to be maintained.

1. Each limited liability company shall have and continuously maintain in this state:

(a) An office which may be, but need not be, the same as its place of business and, at which the records required by NRS

__.115 must be maintained in written form, or in a form which can be converted to written form in a reasonable time.

(b) An agent for service of process, which agent may be either an individual resident in this state whose business office is identical with such records office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical with such records office.

2. Every such agent for service of process must, within 10 days after acceptance of an initial appointment, file a certificate thereof in the office of the secretary of state.

3. Within 30 days after changing the location of his office from one address to another in this state, an agent for service of process must file a certificate with the secretary of state setting forth the names of the limited liability companies represented by the agent, the address at which the agent has maintained the office for each of the limited liability companies, and the new address to which the office is transferred.

NRS __.115 Records required to be kept at office; inspection.

1. Each limited liability company must keep at the office referred to in subsection 1 of NRS __.110 the following:

(a) A current list of the full name and last known business address of each member and manager separately identifying the members in alphabetical order and the managers, if any, in alphabetical order;

(b) A copy of the filed articles of organization and all

amendments thereto, together with executed copies of any powers of attorney pursuant to which any document has been executed;

(c) Copies of the limited liability company's federal, state, and local income tax returns and reports, if any, for the 3 most recent years;

(d) Copies of any then effective written operating agreement and of any financial statements of the limited liability company for the 3 most recent years; and

(e) Unless contained in the articles of organization, a writing setting out:

(i) The amount of cash and a description and statement of the agreed value of the other property or services contributed by each member and which each member has agreed to contribute;

(ii) The items at which or events on the happening of which any additional contributions agreed to be made by each member are to be made;

(iii) Any right of a member to receive, or of a manager to make, distributions to a member which include a return of all or any part of the member's contribution; and

(iv) Any events upon the happening of which the limited liability is to be dissolved and its affairs wound up.

2. Records kept pursuant to this section are subject to inspection and copying at the reasonable request, and at the expenses, of any member during ordinary business hours.

NRS __.120 Resignation of agent for service of process; notice; designation of new agent.

1. The resignation of an agent for service of process, notice, and the designation of new agent must be conducted in the same manner prescribed by NRS 88.332 for limited partnerships.

NRS __.130 Failure to maintain agent for service of process or records office or pay annual fees.

If any limited liability company has failed for thirty (30) days to appoint and maintain an agent for service of process in this state, or has failed for thirty (30) days after change of its records office or agent for service of process to file in the office of the secretary of state a statement of the change, or has failed to pay the fee required by NRS __.330 it is deemed to be transacting business within this state without authority and to have forfeited any franchises, rights or privileges acquired under the laws thereof and the forfeiture shall be made effective in the following manner. The secretary of state must compile a list in the manner as required by NRS 88.405 for limited partnerships and notify said defaulting companies in the manner as required by NRS 88.405(2) for limited partnerships. Unless compliance is made within thirty (30) days of the delivery of notice, the limited liability company is deemed defunct and to have forfeited its filed articles of organization acquired under the laws of this state. Any defunct limited liability company may at any time within one (1) year after the forfeiture of its articles of organization, in the manner as required by NRS 88.410 for limited partnerships, be revived and reinstated, by filing the necessary statement under this act and paying the prescribed fee, together with a penalty of one

hundred dollars ($100.00).

NRS __.140 Liability of members and manager.

Neither the members of a limited liability company nor the managers of a limited liability company managed by a manager or managers are liable under a judgment, decree or order of a court, or in any other manner, for debt, obligation or liability of the limited liability company.

NRS __.150 Service of process.

1. The agent for service of process so appointed by a limited liability company must be an agent of the company upon whom any process, notice or demand required or permitted by law to be served upon the company may be served.

2. Whenever a limited liability company fails to appoint or maintain an agent for service of process in this state, or whenever its agent for service of process cannot with reasonable diligence be found at the records office, then the secretary of state is an agent of the company upon whom any process, notice or demand may be served. Service on the secretary of state of any process, notice or demand shall be made by delivering to and leaving with him, or with any clerk of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the secretary of state, he must immediately cause one (1) of the copies thereof to be forwarded by registered mail addressed to the limited liability company at its registered office. Any service so had on the secretary of state must be returnable in not less than thirty (30) days.

3. The secretary of state must keep a record of all

processes, notices and demands served upon him under this section and shall record therein the time of such service and his action with reference thereto.

4. Nothing herein contained limits or affects the right to serve any process, notice or demand required or permitted by law to be served upon a limited liability company in any other manner now or hereafter permitted by law.

NRS __.160 Contributions to capital.

The contributions to capital of a member to the limited liability company may be in cash, property, or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.

NRS __.170 Management.

Management of the limited liability company is vested in its members in proportion to their contribution to the capital of the limited liability company, as adjusted from time to time to properly reflect any additional contributions or withdrawals by the members. However, if provision is made for it in the articles of organization, management of the limited liability company may be vested in a manager or managers who shall be elected by the members in the manner prescribed by the operating agreement of the limited liability company. If the articles of organization provide for the management of the limited liability company by a manager or managers, they must be elected annually by the members in a manner provided in the operating agreement. The manager or managers must also hold the offices and have the responsibilities accorded to them by the members and set out in the operating agreement.

NRS __.180 Contracting debts.

Except as otherwise provided in this act, no debt shall be contracted or liability incurred by or on behalf of a limited liability company, except by one (1) or more of its managers if management of the limited liability company has been vested by the members in a manager or managers or, if management of the limited liability company is retained by the members, then as provided in the articles of organization.

NRS __.190 Property.

Real and personal property owned or purchased by a limited liability company must be held and owned, and conveyance made, in the limited liability company name. Instruments and documents providing for the acquisition, mortgage or disposition of property of the limited liability company are valid and binding upon the limited liability company if executed by one (1) or more managers of a limited liability company having a manager or managers or as provided by the articles of organization of a limited liability company in which management has been retained by the members.

NRS __.200 Division of profits; impairment of capital.

The limited liability company may, from time to time, divide the profits of its business and distribute the same to the members of the limited liability company upon the basis stipulated in the operating agreement; provided, that after distribution is made, the assets of the limited liability company are in excess of all liabilities of the limited liability company except liabilities to members on account of their contributions.

NRS __.210 Withdrawal or reduction of members' contributions to capital.

1. A member shall not receive out of a limited liability company property any part of his or its contributions to capital until:

(a) All liabilities of the limited liability company, except liabilities to members on account of their contributions to capital, have been paid or there remains property of the limited liability company sufficient to pay them;

(b) The consent of all members is had, unless the return of the contribution to capital may be rightfully demanded as provided in this act;

(c) The articles of organization are cancelled or so amended as to set out the withdrawal or reduction.

2. Subject to the provisions of subsection 1 of this section, a member may rightfully demand the return of his or its contribution:

(a) On the dissolution of the limited liability company; or

(b) After the member has given all members of the limited liability company six (6) months prior notice in writing, if no time is specified in the articles of organization for the dissolution of the limited liability company.

3. In the absence of a statement in the articles of organization to the contrary or the consent of all members of the limited liability company, a member, irrespective of the nature of his or its contribution, has only the right to demand and receive cash in return for his or its contribution to

capital.

4. A member of a limited liability company may petition the district court to order the limited liability company dissolved and its affairs wound up when:

(a) The member rightfully but unsuccessfully has demanded the return of his or its contribution; or

(b) The other liabilities of the limited liability company have not been paid, or the limited liability company property is insufficient for their payment and the member would otherwise be entitled to the return of his or its contribution.

NRS __.220 Liability of member to company.

1. A member is liable to the limited liability company:

(a) For the difference between his or its contributions to capital as actually made and that stated in the articles of organization or operating agreement as having been made; and

(b) For any unpaid contribution to capital which he or it agreed in the articles of organization or operating agreement to make in the future at the time and on the conditions stated in the articles of organization or operating agreement.

2. A member holds as trustee for the limited liability company:

(a) Specific property stated in the articles of organization or operating agreement as contributed by such member, but which was not contributed or which has been wrongfully or erroneously returned; and

(b) Money or other property wrongfully paid or conveyed to such member on account of his or its contribution.

3. The liabilities of a member as set out in this section

can be waived or compromised only by the consent of all members, but a waiver or compromise does not affect the right of a creditor of the limited liability company who extended credit or whose claim arose after the filing and before a cancellation or amendment of the articles of organization or operating agreement, to enforce the liabilities.

4. When a contributor has rightfully received the return in whole or in part of the capital of his or its contribution, the contributor is nevertheless liable to the limited liability company for any sum, not in excess of the return with interest, necessary to discharge its liability to all creditors of the limited liability company who extended credit or whose claims arose before the return.

NRS __.230 Interest in company; transferability of interest.

1. The interest of all members in a limited liability company constitutes the personal estate of the member, and may be transferred or assigned as provided in the operating agreement. However, if all of the other members of the limited liability company other than the member proposing to dispose of his or its interest do not approve of the proposed transfer or assignment by unanimous written consent, the transferee of the member's interest has no right to participate in the management of the business and affairs of the limited liability company or to become a member. The transferee is only entitled to receive the share of profits or other compensation by way of income and the return of contributions, to which that member would otherwise be entitled.

2. A substituted member is a person admitted to all the rights of a member who has died or has assigned his interest in a limited liability company with the approval of all the members of the limited liability company by unanimous written consent. The substituted member has all the rights and powers and is subject to all the restrictions and liabilities of his assignor, except that the substitution of the assignee does not release the assignor from liability to the limited liability under this section.

NRS __.235 Rights of creditor against a member.

On application to a court of competent jurisdiction by an judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the membership interest. This article does not deprive any member of the benefit of any exemption laws applicable to his membership interest.

NRS __.240 Dissolution.

1. A limited liability company organized under this chapter must be dissolved upon the occurrence of any of the following events:

(a) When the period fixed for the duration of the limited liability company expires;

(b) By the unanimous written agreement of all members; or

(c) Upon the death, retirement, resignation, expulsion, bankruptcy, or dissolution of a member or occurrence of any other event which terminates the continued membership of a

member in the limited liability company, unless the business of the limited liability company is continued by the consent of all the remaining members under a right to do so stated in the articles of organization of the limited liability company.

2. As soon as possible following the occurrence of any of the events specified in this section effecting the dissolution of the limited liability company, the limited liability company must execute a statement of intent to dissolve in such form as prescribed by the secretary of state.

NRS __.250 Filing of statement of intent to dissolve.

1. Two signed copies of the statement of intent to dissolve must be delivered to the secretary of state. Unless the secretary of state finds that such statement does not conform to law, he shall, when all fees prescribed by law have been paid:

(a) Endorse on each of such duplicate originals the word "Filed" and the month, day and year of the filing thereof;

(b) File one (1) of the duplicate originals in his office;

(c) Return the other duplicate original to the limited liability company or its representative.

NRS __.260 Effect of filing of statement of intent to dissolve.

Upon the filing by the secretary of state of a statement of intent to dissolve, the limited liability company ceases to carry on its business, except insofar as may be necessary for the winding up of its business, but its separate existence continues until the articles of dissolution have been filed with the secretary of state or until a decree dissolving the limited

liability company has been entered by a court of competent jurisdiction.

NRS __.270 Distribution of assets upon dissolution.

1. In settling accounts after dissolution, the liabilities of the limited liability company are entitled to payment in the following order:

(a) Those to creditors, in the order of priority as provided by law, except those to members of the limited liability company on account of their contributions;

(b) Those to members of the limited liability company in respect of their share of the profits and other compensation by way of income on their contributions; and

(c) Those to members of the limited liability company in respect of their contributions to capital.

2. Subject to any statement in the operating agreement, members share in the limited liability company assets in respect to their claims for capital and in respect to their claims for profits or for compensation by way of income on their contributions, respectively, in proportion to the respective amounts of the claims.

NRS __.280 Articles of dissolution.

1. When all debts, liabilities and obligations have been paid and discharged or adequate provision has been made therefor and all of the remaining property and assets have been distributed to the members, articles of dissolution must be executed in duplicate and verified by the person signing the statement, which statement must set forth:

(a) The name of the limited liability company;

(b) That the secretary of state has theretofore endorsed statement of intent to dissolve the company as "filed" and the date on which such statement was filed;

(c) That all debts, obligations and liabilities have been paid and discharged or that adequate provision has been made therefor;

(d) That all the remaining property and assets have been distributed among its members in accordance with their respective rights and interests;

(e) That there are no suits pending against the company in any court or that adequate provision has been made for the satisfaction of any judgment, order or decree which may be entered against it in any pending suit.

NRS __.290 Filing of articles of dissolution.

1. Two signed copies of such articles of dissolution must be delivered to the secretary of state. Unless the secretary of state finds that such articles of dissolution do not conform to law, he must when all fees and license taxes have been paid as are by law prescribed:

(a) Endorse on each of such duplicate originals the word "Filed" and the month, day and year of the filing thereof;

(b) File one (1) of the duplicate originals in his office;

2. One (1) duplicate original of the articles of dissolution filed by the secretary of state, must be returned to the representative of the dissolved limited liability company. Upon the filing of such articles of dissolution the existence of the company ceases, except for the purpose of suits, other proceedings and appropriate action as provided in this act. The

manager or managers in office at the time of dissolution, or the survivors of them, are thereafter trustees for the members and creditors of the dissolved limited liability company and as such have authority to distribute any company property discovered after dissolution, convey real estate and take such other action as may be necessary on behalf of and in the name of such dissolved limited liability company.

NRS __.300 Cancellation of articles of organization; amendment of articles of organization.

1. The articles of organization must be cancelled by the secretary of state upon filing of the articles of dissolution.

2. The articles of organization must be amended when:

(a) There is a change in the name of the limited liability company;

(b) There is a change in the character of the business of the limited liability company;

(c) There is a false or erroneous statement in the articles of organization;

(d) There is a change in the time as stated in the articles of organization for the dissolution of the limited liability company;

(e) A time is fixed for the dissolution of the limited liability company if no time is specified in the articles of organization; or

(f) The members desire to make a change in any other statement in the articles of organization in order that it shall accurately represent the agreement between them.

3. The form for evidencing an amendment to the articles

of organization of a limited liability company must be in the manner prescribed by NRS 88.355(1) for the amendment of the certificate of limited partnership. The amendment must be signed and sworn to by all members and an amendment adding a new member must be signed also by the member to be added and thereafter, duplicate originals of the amendment must be forwarded to the secretary of state for filing, accompanied by the requisite filing fee.

NRS __.310 Parties to actions.

A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce a member's right against or liability to the limited liability company.

NRS __.320 Waiver of notice.

When, under the provisions of this act or under the provisions of the articles of organization or operating agreement of a limited liability company, notice is required to be given to a member or to a manager of a limited liability company having a manager or managers, a waiver in writing signed by the person or persons entitled to the notice, whether before or after the time stated in it, is equivalent to the giving of notice.

NRS __.330 Fees.

1. The secretary of state must charge and collect for:

(a) Filing the original articles of organization the same fee as required by NRS 88.415(1) for filing a certificate of limited partnership.

(b) For amending the articles of organization, the same

fee as required by NRS 88.415(2) for filing a certificate of amendment of limited partnership or restated certificate of limited partnership.

(c) For filing a statement of intent to dissolve, five dollars ($5.00);

(d) For filing articles of dissolution, and canceling the articles of organization, ten dollars ($10.00);

(e) For filing a statement of change of address of records office or change of the agent for service of process, or both, fifteen dollars ($15.00);

(f) For the corresponding documents for a limited liability company, the same fees as required by NRS 88.415(6) - (11) inclusive;

(g) For processing any filing on an expedited basis within twenty-four hours, payment of an additional one hundred fifty dollars ($100.00) which must be deposited with the treasurer as provided in NRS 225.140(3).

NRS __.340 Unauthorized assumption of powers.

All persons who assume to act as a limited liability company without authority to do so are jointly and severally liable for all debts and liabilities.

NRS __.350 Charge for service of process.

The secretary of state must charge and collect at the time of any service of process on him as agent for service of process of a limited liability company, five dollars ($5.00) which may be recovered as taxable costs by the party to the suit or action causing the service to be made if the party prevails in the suit or action.

NRS __.360 Applicability of provisions to foreign and interstate commerce.

The provisions of this act apply to commerce with foreign nations and among the several states. It is the intention of the Legislature by enactment of the Nevada Limited Liability Company Act that the legal existence of limited liability companies formed under this chapter be recognized beyond the limits of this state and that, subject to any reasonable registration requirements, any such limited liability company transacting business outside this state be granted protection of full faith and credit under Section 1 of Article IV of the Constitution of the United States.

NRS __.370 Conflicting laws; existing rights and liabilities.

This act takes precedence in the event of a conflict with NRS Chapter 88 or other laws. This chapter does not affect a right accrued or established or any liability or penalty incurred, prior to the effective date of this act.

NRS __.380 Foreign Limited Liability Companies.

A foreign limited liability company may register with the secretary of state by complying with the provisions of NRS 88.570 to 88.605, inclusive, which provide for registration of foreign limited partnerships, except:

(a) The provisions of NRS 88.575(7) do not apply; and

(b) Cancellation shall occur by filing articles of dissolution signed by all managers, if any, or by all members, if there are no managers.

NRS __.390 Filing Fees for Foreign Limited Liability

Companies.

The secretary of state must charge and collect for

(a) registration, the same fee as required by NRS __.330(1);

(b) amendment to the registation, the same fee as required by NRS _____.330(b);

(c) cancellation, the same fee as required by NRS ___.330(d);

(d) for all other matters, the same fees as domestic limited liability companies as required by NRS ___.330.

Sp. Services

SPECIAL SERVICES

This office reviewed NRS 225.140 permitting the secretary of state to render special services and charge a fee of up to $50 for them. In addition, we reviewed some of the operations of the secretary of state's office and considered suggestions from both personnel at the secretary of state's office and others for additional services the secretary of state may render to the business and corporate community.

We found that the most important addition to the services the secretary of state can render to the State of Nevada is opening an office in Las Vegas for filing all corporate documents and obtaining copies of all documents on file. The Las Vegas community is now a major metropolitan area with a vibrant business and corporate community. Carson City is over 400 miles away. Documents cannot be shipped between Carson City and Las Vegas in any time less than one day. The fast-moving and fast-growing Las Vegas community should be able to create corporations quickly and obtain corporate documents and certificates with dispatch. This is almost impossible now with the great distance between the secretary of state's sole office in Carson City and Las Vegas.

In addition, the secretary of state's quarters in Carson City are becoming cramped. The restored capitol building is a historical treasure which should be visited by all Nevadan's interested in Nevada's colorful history. The building is also a beautiful one to work in. However, the secretary of state's operations in the building are fast outgrowing the space available. The addition of a Las Vegas office would permit some operations to be moved to Las Vegas and relieve, to some extent, the cramped conditions in Carson City.

A Las Vegas office can be linked to Carson City by computer. Technological advances will soon make it possible to reproduce exactly documents stored on microfilm and on disks in Carson City. Telephone lines would make the communication between the two offices instantaneous. Thus, some operations could be conducted in Las Vegas with telephone and computer links to Carson City permitting Carson City personnel to obtain access to Las Vegas files.

Naturally, such a change cannot be effected by changes to statutory law for which this firm was hired. This can only be accomplished through the budgetary process. However, the time is fast approaching when the failure to have a Las Vegas office will severely hamper the ability of the secretary of state to do his or her job in the 21st Century.

The computer age also makes necessary provisions for filing documents by facsimile machine. Other technologies loom on the horizon, including the storage of an exact replica of documents on magnetic disks and the transmission of the information and images on those disks through telephone lines to computers.

These changes occur so quickly that legislation on particular technologies quickly becomes outmoded and incomplete.

Therefore, we propose to change NRS 78.755 to allow the secretary of state to pass rules, regulations and fee schedules for fax filing and to employ new technology generally. We anticipate the filing fees for documents filed by fax will be the same filing fees as those currently set forth at NRS 78.755 through 78.785. However, the secretary of state should be able to impose an additional fee for filing by fax. The secretary of state should also have the freedom to carefully consider the exact procedures by which fax filing should be accomplished and should be given the authority to pass regulations setting forth those exact procedures.

The state of the art of facsimile machines changes almost daily. Detailed legislation setting forth the kind of machine and procedures for fax filing would be swiftly outmoded by technological changes. Machines now can be engineered to create automatically a follow-up document to each fax, setting forth the telephone number dialed, the telephone number at which the call was received (which might be different thanks to telephone call-forwarding procedures) and the time and date of transmission. The Consultive Committee of International Telegraphy and Telephone of the International Telecommunications Union has set forth standards for fax machines by which speeds are expressed in terms of "bauds". These standards might swiftly change as technology changes. The methods of filing by fax will change in ways that cannot now be contemplated.

All these reasons mean that legislation in this area at this time might be unwise. Therefore, we propose using new NRS 78.755(2) to allow the secretary of state to promulgate regulations pursuant to the Administrative Procedure Act to take account for these technological changes and derive a fee system for them. We believe this makes far more sense than expressly providing in statutes rules for fax filing which might swiftly be outmoded by technological advances.

For an example of rules setting forth the standards for filing documents by fax machine, please review Division VI of the Special Rules of Trial Courts adopted by the Judicial Counsel of California, effective July 1, 1990, Rules 2001 through 2011. These rules establish an experimental fax filing procedure currently used (with minor variations between them) in the Superior Courts of Modoc, Santa Clara and Ventura Counties, the Municipal Courts in Nevada County, Montery County, Oakland-Piedmont and South Bay (Los Angeles), the Visalia Municipal Courts and the Crest Forest Justice Court.

We provide the following changes to NRS 225.140(2)(d) permitting the secretary of state to fix filing fees for fax filings and for the employment of new technology. We also recommend raising the special services fee limit to $100.

NRS 225.150(2)(d)

(d) May charge a reasonable fee, not to exceed [$50] $100, for providing special services including, but not limited to, providing service on the day it is requested or within 24 hours, for filing documents by facsimile machine, or for services created by the employment of new technology.

Finally, we found the secretary of state's office has for many years been examining documents at the request of attorneys and others before the date a transaction must close to determine if the documents may lawfully be filed in the secretary of state's office. The secretary of state has never had the statutory authority to charge a fee for this "pre-clearance" activity. Therefore, we propose new NRS 78.755(14) setting a $100 fee for it.

*CORRECTED PAGE

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY
AND
ASSEMBLY COMMITTEE ON JUDICIARY
Sixty-sixth Session
May 7, 1991

A Joint Senate and Assembly Committee on Judiciary was called to order by Chairman Robert Sader, at 8:10 a.m. on Tuesday, May 7, 1991, in Room 131 of the Legislative Building, Carson City, Nevada. Exhibit A is the Meeting Agenda, Exhibit B is the Attendance Roster.

SENATE MEMBERS PRESENT:

Senator Dina Titus, Chairman	
Senator Ernest E. Adler	Late
Senator Ronald V. Cook	Late
Senator Joseph M. Neal, Jr.	Late
Senator William R. O'Donnell	
Senator R. Hal Smith	Late
Senator Stephanie S. Tyler	Late

ASSEMBLY MEMBERS PRESENT:

Mr. Robert. M. Sader, Chairman	
Mr. Gene T. Porter, Vice Chairman	
Mr. Bernie Anderson	Late
Mr. John W. Bayley	
Mr. John C. Carpenter	
Mr. Joe Elliott	Absent/Excused
Mr. Jim Gibbons	Late/Excused
Mr. William D. Gregory	
Mr. Warren B. Hardy	
Mr. Joseph Johnson	
Mr. John L. Norton	
Mr. William A. Petrak	
Mr. Scott Scherer	
Mr. Wendell P. Williams	

STAFF MEMBERS PRESENT:

Dennis Neilander, Senior Research Analyst
Jeff Ferguson, Research Analyst

OTHERS PRESENT:

Please see attached guest list.

*CORRECTED PAGE

Following roll call, Chairman Sader opened the hearing on the Secretary of State Corporate Study and A.B. 655.

ASSEMBLY BILL NO. 655 - Revises law governing corporations and similar organizations.

Coming forward to make introductory remarks, Cheryl Lau, Nevada Secretary of State, explained the Secretary of State's office had proposed this bill in an effort to streamline corporate law in the state of Nevada, to make Nevada a more favorable place to conduct business and to attract new business into the state. Presently, she reported the Secretary of State's office generated over $6 million in corporation filings and, with the changes proposed in A.B. 655, the Secretary of State's Office would be able to offer more complete, more timely and more up-to-date service. The bill would delete antiquated language, create the option of a limited liability company, make corporation mergers easier and would facilitate the filing of articles of incorporation. Ms. Lau told the committee the Secretary of State's Office would certainly retain the 24-hour expedited service, but enactment of A.B. 655 could reduce the turn-around time to possibly three hours. The bill would open the way for FAX filings and enable a simplified method of creating non-profit corporations.

Ms. Lau then introduced Nevada Attorney General Frankie Sue Del Papa who reviewed the background of Nevada corporate statute. She stated it was important for Nevada to be competitive from the national standpoint in order to remain in the forefront of corporation activity throughout the country and indicated about 18 months ago, the Secretary of State's Office decided to take an in-depth look at the corporate code as this had not been done in this manner before. The firm of Vargas and Bartlett had been chosen to perform this complicated study, to examine corporate laws for outdated, inconsistent, duplicative language, to check over-regulation and to try to make the whole process more efficient. (NOTE: A complete copy of the study performed by the firm of Vargas & Bartlett is available for review in the Legislative Counsel Bureau Research Library. Exhibit C1 is a copy of the cover page.)

Ms. Del Papa commended the firm of Vargas and Bartlett and John Fowler from that firm, as well as the Nevada State Bar for their efforts in bringing the study together. In closing, she said, the Secretary of State's Office had a reputation of being "user friendly" and in order to continue in this role it

was important to give attention to the new corporate proposals in A.B. 655 during the 1991 legislative session.

Cindy Woodgate, Deputy Attorney General speaking for the Secretary of State's Office, told the committee passage of A.B. 655 would help attract more corporations to Nevada which would, in turn, benefit the economy. The points stressed by Ms. Woodgate were:

1. Simplification of filing requirements which made it easier and faster for the clerks to review the documents;

2. A change in checking name availablity. Currently, Ms. Woodgate indicated, the statutes used the term "deceptively similar." Amendments to the language using the term "distinguishable from" would facilitate and shorten review time allowing documents to be processed more quickly;

3. Mergers would be simplified. Currently, a 100-page document presented overwhelming language for a non-attorney clerk, Ms. Woodgate stated. Allowing the use of a simple form showing the basic information could be easily understood by the clerk and thus prove much more efficient;

4. Simplification and more accurate filings. Often a clerk was unsure what section of the law he should file under since there currently were so many sections of non-profit applications. By clarifying and simplifying non-profit applications, paperwork would be processed in a much more timely fashion;

5. New technology would be adopted such as FAX filings; and

6. Ms. Woodgate said they were asking for an increase in "expedite" fees to $100. By doing this they could provide a three-hour turnaround.

Following introductory remarks, John Fowler, partner with the law firm of Vargas and Bartlett, read from his prepared testimony, attached herewith as Exhibit C.

Following his review of Exhibit C, Mr. Fowler explained:

1. They had worked on the repeal of the first-generation takeover statute, the nucleus of which was declared unconstitutional in 1988 by the Nevada Federal District Court. Consequently, after this ruling it was clearly unnecessary to retain the statutes any longer.

2. Provisions had been placed in the statute permitting the articles of incorporation to be a little simpler than now. The first document to be filed in creating a company no longer had to contain as much detail as before. There were less paperwork and fewer items to attend to and this made it easier to create a corporation for the average small business.

3. A statutory change allowed the Secretary of State to file documents so long as the names were "distinguishable," rather than having the clerk determine whether or not the names were "deceptively similar." This had been a difficult decision for anyone to make in the brief view of the name of a corporation.

4. There was simplified statutory terminology.

5. The proposed new language would allow appointment of a custodian by the court if the shareholders and directors were deadlocked and the company could not be run. This had been a hole in Nevada statute which Mr. Fowler believed would become increasingly evident if and when the number of corporations grew.

6. There was language provided for electronic proxies. Mr. Fowler indicated this was an ever-increasing and quite acceptable practice which would be necessary in future electronic battles and transactions.

7. New language allowed the corporation to cease sending notices to shareholders or stockholders if the last two annual meeting notices to the stockholder had been returned to the corporation.

8. The new statutes would allow the Secretary of State's Office to employ new technology and to pass necessary regulations as new technology became available. Mr. Fowler predicted "optical disks" would soon be used to transfer information from computer to computer and he opined this was technology the Secretary of State's Office should be able to use as it arrived.

9. County Clerk filings would be eliminated. This portion of the statute was now outdated by being able to file

by phone, computer and/or FAX machine and by being able to contact Carson City for a readout regarding the status of a particular corporation.

There were major changes to the other chapters, Mr. Fowler explained, and the non-profit corporation law was basically rewritten from scratch to create an entirely new stand-alone non-profit corporation law. There was previously no corporate scheme of any kind for the non-profit corporation, and Mr. Fowler predicted non-profit corporations such as the multi-million dollar non-profit corporation AAA, would become more important in the future. The existing non-profit corporations would be governed by the new law and Mr. Fowler thought there should be very few transition problems.

Mr. Fowler also explained the "Limited Liability Company Act." (See page 16 of Exhibit C).

Mr. Porter questioned whether any limited liability case law had been established in the other four states. Mr. Fowler said he was unaware of any. Mr. Porter then asked Mr. Fowler's assistance in distinguishing between the current corporate format and the limited liability corporate format. This was further discussed between Mr. Porter and Mr. Fowler.

Senator Neal asked where, in the bill, the shareholder participated in formulating the bylaws governing the incorporation. Mr. Fowler said existing statutes provided for the adoption of bylaws by the shareholders and since this had not been changed, it did not appear in the bill.

Senator Neal asked Ms. Woodgate the reason for repeal of NRS 81.90 dealing with the publication of financial statements. Ms. Woodgate told Senator Neal NRS 80.190 only affected foreign corporations and the repeal of this requirement was to make it easier for corporations to come into Nevada. The law currently did not specify how detailed the annual statement had to be and there was no provision for the Secretary of State's Office to regulate this. Senator Neal maintained the requirement had a practical use and asked Ms. Woodgate if they had any mechanism to supply this type of information. Ms. Woodgate replied, "No." The only requirement from the Secretary of State's Office was a yearly list of officers. Nowhere in the corporate statute was there a requirement for financial information, whether it was a Nevada profit corporation or a foreign corporation.

Returning to the discussion of a limited liability company, Senator Cook questioned whether the laws governing the limited liability company would be identical, except for the use of certain terms such as "member" instead of "owner." If they were not an exact mirror, what were the differences? Mr. Fowler said he thought they would basically mirror one another if the articles of organization were drafted properly, except that statute anticipated there would be "members" and if the members so chose there would be a "manager." This was further discussed.

In an effort to clarify the concept of the limited liability company, Senator Cook asked Mr. Fowler if it was his testimony that basically the limited liability company was the same as a corporation except it received partnership treatment for tax purposes. Elaborating for the record, Mr. Fowler referred to the tax case called Larson v. Commissioner. This had set forth four corporate characteristics and ruled that if an organization, regardless of how it was created, whether it was a corporation or technically a partnership, had three of those characteristics, it was deemed a corporation and treated that way by the Internal Revenue Service. The four characteristics were:

1. Continuity of life, which limited liability companies lacked because they were not perpetual, i.e., with a maximum life of 30 years;

2. Centralization of management, which limited liability companies allowed;

3. Limited liability, and limited liability companies also allowed this provision; and

4. Free transferability of interests, which the limited liability company did not permit in the sense there were restrictions on transfer during life and then dissolution upon death.

Therefore, Mr. Fowler continued, two of these four corporate characteristics had been removed in order to make certain in most instances for tax purposes it was as a partnership. Senator Cook then asked if proposed language regarding restrictions on the transfer would operate in the same manner as restrictions on a transfer having to do with a partnership. Mr. Fowler replied, "Yes." As to whether the language was the same, Mr. Fowler said the language was not the same, but the

concept was the same. In general, Mr. Fowler stated, it could be assumed a reasonable court would look at that portion of the limited liability company the same way it looked at a partnership, although he had not made a detailed comparison of a limited liability company and the Uniform Partnership Act to pick up all the nuances and differences. Senator Cook asked if that should be done in order to completely satisfy the issue there were no problems presented with the bill. Mr. Fowler said he did not believe this was necessary because the purpose for doing it was to take advantage of Internal Revenue Code provisions; and they were employing language in a statutory scheme taken in large part from Wyoming which had received favorable treatment by the Internal Revenue Service for tax purposes.

Following further discussion, Senator Tyler asked if there was a plan for disseminating the information to the public, and in particular, the non-profit and small "mom and pop" operators. Ms. Woodgate assured Senator Tyler they would be doing a mailing to all of the non-profit corporations to let them know what was happening, time frame for changes, etc.

Referring to the Governor's Business Activities Tax (BAT) Senator Neal asked what would happen to a company that was switched to a limited liability partnership. Would they have to pay the tax? Mr. Fowler replied he did not know as he had not read the BAT bill to determine whether or not it covered limited liability companies. Chairman Sader asked the Legislative Counsel Research Analyst to let them know what the interplay would be between the current BAT proposals and the corporate entities proposed by A.B. 655.

Senator Neal also asked in what way minority stockholders would be protected in mergers. Recalling past legislative actions, Chairman Sader reminded committee members certain provisions of the statutes enacted in 1987 had been declared unconstitutional. Some of these same statutory provisions had been repealed by the proposed A.B. 655. If these provisions had been in effect in the mid-1980's, Chairman Sader stated they would probably not have seen the problems now being encountered by Harrah's Corporation, Bally's and Caesar's. In these instances, minority stockholders would have been much better protected by the provisions in A.B. 655 than what had been enacted in 1987 and 1989. Discussion followed.

Brief testimony was taken from Ken Woloson of the law firm of Schrect, Jones, Bernhard, Woloson and Godfrey in Las Vegas and a member of the Corporation Subcommittee, a subcommittee of the State Bar Business Law Committee. Accompanying Mr.

Woloson was Douglas Crosley of the law firm of Jones, Jones, Close and Brown in Las Vegas who had also participated in the Corporation Subcommittee. Concerning the business law section, Mr. Woloson said there had been a series of meetings to work out language and consequently, the Vargas and Bartlett report now essentially represented a harmonized view except there had been recommendations to preserve certain rules related to capital structure, stated capital and the ability to pay dividends. This concept had found favor with the majority of the members of the Executive Committee, subject to subsequent agreement of specific language; however, this agreement had not yet been reached.

Mark Goldstein, an attorney with the law firm of Lionel, Sawyer and Collins and appearing on his own behalf, submitted Exhibit D, a copy of his prepared testimony. There were two areas which needed more work, Mr. Goldstein opined; however, he felt the overall effect of the proposed legislation was so positive if it was impossible to find time to address the amendments set out in Exhibit D, his advice was to pass A.B. 655 as written with the understanding that people who wished to speak for investors could return in 1993 and ask for revisions at that time.

Mr. Woloson said he was in attendance primarily as a representative of the State Bar Business Law Section Executive Committee to state for the record the Section's position. In reference to certain sections in A.B. 655, they took no official position other than to point out provisions in the new bill which could, and possibly would, be interpreted to be "anti-takeover" provisions. Mr. Woloson said he thought those provisions were primarily found in the following areas of A.B. 655:

1. The amendment to existing NRS Section 78.120 (as seen on page 27-b of the "Study of Nevada Corporate Law") adding subsection 3, which read, "The selection of a period for the achievement of corporate goals is the responsibility of the directors;"

2. Section 2 of A.B. 655 which dealt with what was referred to as the "other constituency's" concept on the Board of Directors; i.e., is the Board of Directors solely responsible for the shareholders or may a Board of Directors consider other factors in the existence of the corporation?

3. Regarding Sections 43 to 70, the area referred to as a "Business Combination Law," the Business Law Section as an

organization did not recommend either approval or rejection of those sections.

He said they would like to point out if Section 2 remained in the bill and was enacted, the Business Law Section strongly felt the last sentence of Subsection 3 should be retained. Without retaining this section, Mr. Woloson said they felt there was a potential for opening a pandora's box for meritless litigation against corporations.

Ande Engleman, representing the Nevada State Press Association, said she opposed the repeal of NRS 80.190 (Exhibit E) and NRS 80.230 (Exhibit F). Ms. Engleman said, "These public statements are the only piece of public information provided without cost to the people of this state about those corporations using our state for incorporation purposes. In the past, these statements have been utilized to debunk false sales statements, fake offerings and misrepresentations as to profit. When then-Governor Richard Bryan wanted to know what the profits for Humana Hospital were, he compared them to the statement of publications provided to him along with an affidavit of publication by a newspaper for no charge. The Insurance Commissioner has utilized these published statements for comparison to file documents and the cost to the corporation to have these statements published is $25 to $29.50, depending upon which newspaper it goes into. Nevada is well known for its lack of information available about foreign corporations. Unfortunately, a number of foreign corporations are not the most honest. More than a few scams have turned out to be Nevada corporations giving Nevada a national image of being soft on such businesses. It doesn't matter that they're operating elsewhere; Nevada is their home. ...". Ms. Engleman also asked for additional time to study the bill as a whole.

Sam McMullen, representing United Way of Nevada, submitted Exhibit G, and explained the proposals depicted therein.

Representing McLaughlin Association, Martin Lane explained the operation of his firm and stated he would testify neither in favor or opposition to A.B. 655 as they had had no time to analyze the study. They therefore objected to what Mr. Lane referred to as "the unseemly haste" in which the bill had suddenly appeared and been heard. Chairman Sader told Mr. Lane the study had been out since July 1990 and was almost word-for-word a copy of A.B. 655. Mr. Lane reiterated his request to hold the bill in order to allow him more time to analyze the provisions.

Ray Moberg, a manager/partner in the Reno office of the accounting and auditing firm of Ernest and Young, told the committee he supported Mr. Fowler's comments regarding the terms of "par value" and "stated value," and went on to explain his position.

Referring to statements regarding NRS 80.190, Mr. Woloson said he and the Subcommittee strongly recommended this be repealed for the following reasons:

1. Because it was clearly unconstitutional to impose requirements upon foreign corporations which were not imposed upon Nevada corporations; and

2. The requirement imposed was very ambiguous in that the words, "statement of its last calendar year's business" did not truly explain what was to be included in the statement and did not necessarily, by its terms, require solicitation of the information those who had testified suggested it might.

Referring to Ms. Engleman's testimony, Cindy Woodgate explained under NRS 80.190 there was no requirement for that publication to be filed with the Secretary of State's Office; nor did they know when it was published or when it was not published. As to the penalty, the only way for the Secretary of State's Office to determine if the annual statement was published was to have an individual buy every publication from every corporation in the state of Nevada for 365 days of the year, to determine if a company had published its annual statement. If there was no publication, this fact would be made known to the Attorney General's Office for prosecution and levy of the $100/month penalty for each month unpublished. The Secretary of State's Office did not have the personnel to do this. If there was no appetite to repeal this section, Ms. Woodgate asked the Legislature to set up specific guidelines applicable to all corporations.

Clarifying her position, Ms. Engleman reminded the others there were only 30 newspapers in the state of Nevada adjudicated to publish this type of annual statement and the historical use of the statute justified retaining the statutes.

There being no further time for testimony, Chairman Sader indicated the bill would probably be further processed in work session the following week, and the meeting adjourned at 10:10 a.m.

RESPECTFULLY SUBMITTED:

Iris Bellinger

Iris Bellinger, Committee Secretary

APPROVED BY:

Robert M. Sader

Robert Sader, Chairman
Assembly Judiciary Committee

Dina Titus

Dina Titus, Co-Chairman
Senate Judiciary Committee

PREPARED TESTIMONY OF JOHN P. FOWLER IN SUPPORT OF

AB 655, THE CORPORATE LAW BILL

May 7, 1991

I.
INTRODUCTION

I am John P. Fowler, a partner of Vargas & Bartlett of Reno and Las Vegas, Nevada. Pursuant to a contract with the Nevada Secretary of State, on April 15, 1990, Vargas & Bartlett began preparing a study of Nevada corporate law. We were directed to recommend revisions to our corporate laws, both nonprofit and those applicable to business corporations, to make them the most modern and easiest to use in the country. They were reviewed and we suggested changes to NRS Chapter 78 regarding business corporations, Chapter 80 on foreign corporations, Chapters 81 through 86 regulating nonprofit corporations and Chapter 89 regarding professional corporations.

On July 30, 1990, we finished our report and delivered it to the Secretary of State's office. The report suggested major changes to Chapter 78, including the abolition of the concepts of "stated capital" and "par value", new merger statutes, a business combination statute and many other changes. We wrote a complete new nonprofit corporation law and recommended repealing most of the existing out-moded statutes governing nonprofits. We proposed abolishing the so-called "short form" foreign corporation qualification procedure, thereby cutting the red tape required of foreign corporations pursuing certain desirable activities in Nevada, including lending secured by Nevada real estate. We recommend the passage of statutes creating a new business entity, the limited liability company. In addition, we recommended the Nevada Secretary of State be given powers to adapt their office procedures to new technologies, including facsimile machines, and recommended that the Secretary of State be allowed to charge a fee for the preclearance review of documents before filing.

After the study was completed, we continued our review and detected some additional changes we felt were beneficial to our corporate statutes. In addition, I met with representatives of the Secretary of State's office and members of the Corporate Law Subcommittee of the Business Law Committee of the Nevada State Bar in two all-day sessions in January, 1991. As a result of these efforts,

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EXHIBIT C

further revisions were made to the statutes as recommended in the corporate study.

Attached as exhibits to this testimony are the following:

Exhibit 1 - Study of Nevada Corporate Law submitted to the Nevada Secretary of State by Vargas & Bartlett, June 30, 1990;

Exhibit 2 - Changes To Statutes In Corporate Study, February 6, 1991 (summarizing additional changes to the statutes in Chapter 78 and the nonprofit corporation law as a result of meetings with the Corporate Law Subcommittee);

Exhibit 3 - Letter from John P. Fowler dated February 7, 1991, enclosing the above memo.

I will describe the changes to NRS Chapter 78, our business corporation statutes. In addition, I will summarize the new nonprofit corporation law, the changes to Chapter 80 regarding foreign corporations, the repeal of most of the existing nonprofit corporation statutes, the new limited liability company statutes and the revisions to NRS Chapter 89 regarding professional corporations.

II.
AMENDMENTS TO CHAPTER 78 - BUSINESS CORPORATIONS

A. Abolition of Stated Capital, Par Value Stock and Restrictions Based on Those Concepts.

As you may know, almost all corporations have stock with "par value", most often $1.00 par share, but often much smaller, even one one-hundredth of a cent, and sometimes more than $1.00. The "capital" of a corporation is most often simply the sum of the par value of every share of the corporation's stock that is issued and outstanding. NRS 78.270.

The law requires that the corporation issue dividends only from the amount by which its assets exceeds the sum of its liabilities plus capital or out of its net profits from the current year or net profits from the preceding year. NRS 78.290. A director is liable to the corporation, and to its creditors if the corporation dissolves, for the payment of dividends in violation of these rules. NRS 78.300. Capital can be reduced and the "reduction surplus" thus created may be used in certain ways, but only with a number

of restrictions and only if a majority of shareholders vote to approve it. See NRS 78.410 through 78.445.

The concept of "par value" or "stated capital" is as old as the concept of shares in commercial enterprises. The concepts were created in the 19th century to address two perceived evils: First, the problem presented by "watered stock" or the issuance of shares for overvalued property or services rather than for cash. It was thought creditors relied upon a corporation's balance sheet as a public representation of the capital invested in the corporation. If the capital was not substantial property with real value (in other words, if the stock was "watered"), this was viewed as a fraud on creditors. Creditors could sue stockholders and promoters to the extent the value of the property was less than the "stated capital". The par value of the issued and outstanding shares was deemed to be the statement of the capital.

"Par value" or "stated capital" also served a second purpose. It was thought the capital was the absolute minimum of corporate assets which would remain in the corporate coffers to pay creditors.

These concepts no longer recognize reality. Both practitioners and legal scholars have for many years recognized that the concepts of "par value" and "stated capital", and the restrictions based on them, are complex and confusing, and have long since failed to serve their original purposes of protecting creditors. Credit reports, guarantees by the corporations' principals, a comprehensive bankruptcy code and secured lending have all contributed to the irrelevancy of par value and stated capital as creditor protection devices.

In 1980, the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association, the committee that drafts and revises the Model Business Corporation Act, recognized the artificiality and futility of these concepts and abolished them, deleting them from the 1969 version of the Model Business Corporation Act. In 1984, the Committee completely rewrote the Model Business Corporation Act and published it as the Revised Model Business Corporation Act (the "Revised Model Act"). the Revised Model Act completely eliminates these concepts and substitutes a simpler and more flexible structure providing a more realistic protection for the interest of creditors and security holders.

As of November 14, 1989, (as reported by the Model Business Corporation Act Annotated, Chapter 6, p.369), 18

jurisdictions have eliminated the concept of par value. These states are: Alaska, Arkansas, California, Georgia, Hawaii, Illinois, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Montana, New Jersey, New Mexico, Oregon, Tennessee, Virginia and Washington. Many of these states did so in conjunction with their adoption of all or a portion of the Revised Model Act.

This new bill provides that the articles of incorporation must set forth the number of shares the corporation is authorized to issue and, if more than one class of stock is created, the series and number of shares of each series of each class. No longer must the articles contain any statement of par value. No longer are dividends limited so that "capital" is left unimpaired. The corporation may pay dividends in any amount so long as they are not paid while the corporation **is ~~insolvent.~~** The old restrictions on dividends, NRS 78.270, is repealed. Existing statutes setting forth complex restrictions on the ability of a corporation to reduce capital and use the resulting "reduction surplus" to pay stockholders are repealed. See NRS 78.410 - 78.445.

As a result of these changes, the old artificial and clumsy distinctions and restrictions inherent in the "par value" and "stated value" schemes are eliminated. The corporation is not permitted to make "distributions" (a defined term including dividends) if it is insolvent. If the corporation does so, the directors can be held liable for those distributions.

B. The New Business Combination Statutes.

The corporate takeover and "junk bond" excesses of the 1980's taught us that hostile takeovers of corporations can result in vast upheaval for those corporations, their shareholders, their employees, suppliers and the communities where their offices and plants are situated. In order to pay the vast load of debt imposed on some corporations by the takeover battles of the 80's, assets have been sold, factories, closed and workers, if they are still on the payroll, are left wondering who runs the store. Some of the most heavily leveraged companies have filed for bankruptcy.

About 20 states now have "business combination" statutes limiting the ability of the corporation to enter into a "business combination" with a recent acquirer of its stock. The statutes are designed to encourage those wishing to acquire corporations to negotiate with the board of directors of the corporation before attempting to do so. The board of directors will be empowered by another portion

of this bill to consider the interests of employees, suppliers and their communities as well as the long-range prospects of the company when making corporate decisions. Given time permitted by the more measured approach required by the "business combination" statute, the board of directors can then make calm and deliberate long-range decisions which Nevada corporations, and our economy as a whole, most emphatically need.

About 20 states now have statutes limiting the ability of a corporation to enter into a "business combination" with a recent acquirer of its stock. In forming new corporations with which to conduct business, corporate managements now look for states with such statutes. In order to encourage the calm deliberation of takeover offers, to protect Nevada shareholders, workers, suppliers and businesses and their long-range interests and to encourages businesses throughout the country to incorporate in Nevada, we recommend that such a business combination statute be passed as part of this Bill.

The New Business Combination Statute covers those Nevada corporations with 200 or more stockholders which have a class of shares registered under Section 12 of the Securities Exchange Act of 1934. The statute regulates any "business combination" with a "interested stockholder." An "interested stockholder" is any person, or an affiliate of a person, who owns 10% of the voting power of the stock. The "business combinations" with an "interested stockholder" which are regulated include: a merger with the interested stockholder; a sale, lease or exchange of more than 5% of the corporation's assets or more than 10% of its earning power; a transfer or issuance of stock having a market value of more than 5% of the market value of the corporation's shares; a dissolution of the corporation proposed by the interested stockholder; a reclassification, recapitalization or other transaction with the interested stockholder that has the effect of increasing the interested stockholder's proportionate share in any class of voting shares; or a loan from the corporation to the interested stockholder.

The Business Combination Statute prohibits "business combinations" with the "interested stockholder" except those which are approved by the board of directors before the interested stockholder first obtained a 10% ownership interest in the corporation's stock. A business combination with the "interested stockholder" can also take place so long as a majority of the noninterested stockholders approve it or if the common stockholders receive the highest share price the "interested stockholder" paid for the corporation's stock in the previous five years. These

provisions, in effect, require either board approval of a "business combination" or approval of the noninterested stockholders, unless the interested stockholder offers the other stockholders his highest price.

A corporation can opt out of the effect of the Business Combination Statute by so providing in its original articles of incorporation. A corporation can also opt out of these provisions 30 days after the act becomes law by placing such a provision in its bylaws. Finally, they can opt out by amending its articles of incorporation by a vote of majority of the stockholders (excluding the interested stockholder), but such a provision cannot be effective for 18 months.

C. New Merger Statutes.

Rather than revise the old confusing statutes, we elected to draft new ones based on the merger statutes contained in the Revised Model Act. These statutes provide a clear procedural outline with shorter, modernized language.

The basic procedure is the same as before: the directors first adopt and recommend the merger agreement and the stockholders must then adopt it by a majority vote. Special rules allows mergers without a stockholder vote if the articles of incorporation of the surviving corporation are the same as they were before the merger, the stock held by each stockholder is the same as it was before the merger, number of voting shares as a result of the merger increases by 20% or less, and the number of shares of stock entitled to receive dividends increases by not more than 20% as a result of the merger. As provided under existing statutes, a parent corporation owning at least 90% of a subsidiary corporation may merge the sub into itself or itself into the sub by director action, without the participation of the stockholders. The document filed with the Secretary of State will now be called the "Articles of Merger" and must contain only certain minimum items; the remainder of the provisions of the plan of merger do not have to be filed.

The New Merger Statutes recognize a new corporate transaction called a "share exchange". This new procedure allows one corporation to be acquired by another and maintain its separate existence as a subsidiary. The entire stock of one corporation is exchanged for cash or other consideration from another corporation. This mechanism simplifies the formation of holding company systems often used by the holding companies of insurance companies and banks.

Stockholders objecting to either a merger or a share exchange will still have the right to dissent from the merger or from the share exchange and receive, in cash, the "fair value" of their shares as of the time of the merger or the share exchange. However, the procedures for deciding upon the "fair value" stockholders must receive have been simplified and now much more closely follow the normal judicial procedure set forth in the Nevada Rules of Civil Procedure. The existing statutes require a court to appoint three appraisers. Once the appraisers finish their work, if anyone objects, the existing statutes require the same issues must be tried and litigated again before the court. See NRS 78.510. This potential double trial procedure is eliminated and simplified with the new statutes.

D. Standards of Conduct for Directors and Officers.

Existing Nevada law requires the directors and officers to exercise their powers "in good faith and with a view to the interests of the corporation." NRS 78.140. The Bill includes a new statute providing for additional standards by which the conduct of directors and officers must be judged. The Bill allows directors to rely on information, opinions and reports prepared by other directors, CPA's, attorneys and others reasonably believed to have professional or expert competence, so long as the reliance of a director or officer on such reports and opinions is reasonable.

As we all know, the actions of corporate directors and officers in making corporate decisions can drastically effect local communities. The decision to close a plant can mean the loss of many jobs for a community. The decision to open a new plant means many more jobs for the community. Such decisions can effect suppliers and customers of the corporation. These decisions, in turn, can effect tax revenues, can reduce or raise charitable contributions, can effect the very fabric of a community dominated by one or a few major industries.

Thus, the legislatures of many states (including North Carolina, Wisconsin, Indiana, Illinois, Maine, Ohio, Pennsylvania and Arizona) have provided in new statutes that the board of directors can consider corporate constituencies other than the shareholders. The Bill allows directors and officers to consider the interests of the corporations' employees, suppliers, creditors, and customers as well as the economy of the state, the nation and community and other societal considerations. The Bill also allows the directors to consider the long term as well as the short term interests of the corporation and its stockholders when making decisions.

A new section allows directors to consider all of these things when resisting a change or potential change in control of the corporation. When weighing the benefits and problems presented by a potential change in control of the corporation, the directors may also consider whether or not the change of control would leave the corporation insolvent or might, within a reasonable time, result in bankruptcy. This statute allows a corporation to consider more than just tomorrow's stock prices when making corporate decisions. However, the Bill does not require a director to consider all these factors, or even some of them. It merely permits the directors to weigh them, along with other factors, in making their decisions.

E. Miscellaneous.

1. Repeal of "First Generation" Takeover Statutes.

The statutes found at NRS 78.376 through NRS 78.3778, constitute Nevada's "first generation" form of takeover legislation regulating takeover bids. This form of statute regulates the disclosure and timing of takeover bids similar to the Federal Williams Act. However, the most important portions of this statute were declared unconstitutional by the U.S. District Court in Batus, Inc. v. McKay, 684 F.Supp. 637 (D.Nev. 1988). With the protections contained in the existing control shares legislation (NRS 78.378 through 78.3793) and the recommended new "business combinations" statute, these statutes become irrelevant and we recommend their repeal.

2. Articles Require Fewer Provisions.

One of our goals was to make Nevada's corporate law as simple and easy to comply with as possible. We have reduced the number of provisions required to be contained in the articles of incorporation. If this Bill goes into effect, the articles must have only the following matters:

(a) The name of the corporation;

(b) The name and address of the resident agent;

(c) The number of shares and, if more than one class is provided for, a description of that class (or a provision giving the board authority to describe new classes in subsequent filings);

(d) Whether the governing board are called "directors" or "trustees";

(e) The name and addresses of the incorporators.

Under this Bill, no longer must an incorporator state that a corporation has perpetual existence; that is assumed unless something else is provided. No longer must the articles state that the corporation may engage in "any lawful activity"; that is assumed. Finally, no longer must the articles state that the stockholders cannot be assessed by reason of their ownership of stock; that also is assumed.

3. Corporate Names Must be "Distinguishable".

Existing statutes provide that no corporate name can be "deceptively similar" to a proposed corporate name. This requires the Secretary of State's Office to make tough decisions as to whether or not the name is "deceptive". Under the new statutory standard, the names must be "distinguishable". This allows the staff of the Secretary of State's Office to check all of the corporate names to determine if the new name can be distinguished from the old name. If it can, the filing will occur. This will shorten the time for review of corporate names, allowing for faster service at lower cost.

4. Revoking Charter After Failing to File Annual List.

Under the existing statutes, it is unclear exactly when a corporation's charter is revoked when it fails to file its annual list of officers and directors. This is now clarified and the revocation will become effective on the first day of the ninth month following the month on which the annual list of officers and directors must be filed.

5. "Principal Office".

Existing statutes use a confusing terminology describing the address of the person within Nevada authorized to except service of process. He is called the "resident agent" but his office is called variously the "principal place of business", "principal office", or "principal office in this state". The name of the resident agent will be changed to "registered agent", a title used by many other corporate states in their statutes. The term "registered office" will be the name of the registered agent's office and the confusing terminology has been deleted.

6. Appointment of Custodian of Corporation if Stockholders and Directors Deadlock.

Many states have added statutes allowing courts to appoint a custodian of the corporation to run the corporation during a protracted shareholder or director deadlock over the operation of the corporation. A new statute has been inserted providing that a court may appoint such a custodian to continue the business of the corporation during the deadlock.

7. Multiple or Fractional Voting Rights.

A change recommended by the Corporate Law Subcommittee clarifies that shares may carry more than one vote or even less than one vote and the reference to a majority or other proportion of stock in our statutes refers to such majority or other proportion of the votes of this stock.

8. Electronic Proxies.

A new statute based on case law in Pennsylvania and Delaware and a 1990 Delaware statute allows the use of electronic proxy procedures for determining and tabulating proxies during the proxy solicitation efforts of publicly held corporations. As yet, very few states have this provision and it permits companies to experiment to determine the best and most economical procedure for tabulating such electronic proxies.

9. No Stockholder Notice if Two Annual Notices are Returned Undelivered.

A new provision provides that a corporation need no longer send stockholders a notice of the annual stockholders' meeting, or other notices, if two annual stockholder notices are returned to the corporation undelivered. This allows corporations to purge their mailing lists and save money on sending elaborate and expensive proxy materials to stockholders who cannot be found.

10. Adjudication of Claims Against Corporations in Receivership.

An amended statute allows the court in equity to adjudicate claims made against corporations which are in receivership. Existing statutes permit each claimant to demand a jury trial on every single claim. This is extremely inefficient. Such a procedure, if imposed on the receiverships of large corporations with many claims (such as insurance companies), would delay tremendously the final resolution of receivership proceedings.

11. New Technology in the Secretary of State's Office.

A new statute allows the Secretary of State to, generally, use new technology in the performance of the secretary's duties. This general provision will allow the Secretary of State to promulgate rules and regulations allowing filings by facsimile machines and employ other new technologies to streamline her duties.

12. Preclearing Fee.

An amendment permits the Secretary of State to charge a $100.00 fee for "preclearing" or reviewing a document before it is presented for filing. Many large corporate transactions generate complex amendment and merger documents which must be filed with the Secretary of State's office. Very often, the participants ask the Secretary of State to review these complex documents to make sure their form is correct for filing on the date of closing. Up to now, the Secretary of State has not been statutorily permitted to charge a fee for this activity. An amendment permits a fee of $100.00 to be charged for such preclearing activities.

13. No County Clerk Filings.

Existing statutes require copies of almost all corporate documents filed with the Secretary of State to be filed again with the county clerk's offices. In the late Twentieth Century with overnight mailing and expressing of documents, fax machines and much faster communications in general, there is no need to file corporate documents with the county clerk's office for local review. We have eliminated all county clerk filings where we have been able to find them.

III.
FOREIGN CORPORATIONS

Existing NRS 80.240 requires a "short-form" qualification procedure if a foreign corporation performs only limited activities within the State of Nevada. The Revised Model Act provisions on foreign corporations exempt from any qualification many of the same activities requiring "short-form" qualification in Nevada. After a review of "short-form" filings with the Nevada Secretary of State, we found only about 25 such qualifications had been made as of May, 1990. Obviously, many corporations do not feel the necessity of so qualifying. The fee for such limited qualification is only $50.00.

MINUTES OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Sixty-sixth Session
May 21, 1991

The Assembly Committee on Judiciary was called to order by Chairman Robert Sader at 8:12 a.m. on Tuesday, May 21, 1991, in Room 341 of the Legislative Building, Carson City, Nevada. Exhibit A is the Meeting Agenda, Exhibit B is the Attendance Roster.

MEMBERS PRESENT:

Mr. Robert M. Sader, Chairman
Mr. Gene T. Porter, Vice Chairman
Mr. Bernie Anderson
Mr. John W. Bayley
Mr. John C. Carpenter
Mr. Joe Elliott
Mr. Jim Gibbons
Mr. William D. Gregory
Mr. Warren B. Hardy
Mr. Joseph Johnson
Mr. John L. Norton
Mr. William A. Petrak
Mr. Scott Scherer
Mr. Wendell P. Williams

STAFF MEMBERS PRESENT:

Frank Partlow, Research Analyst

OTHERS PRESENT:

John Hawley, Nevada Supreme Court
Dr. Jacqueline Kirkland, Truckee Meadows Community College
Carla R. Leveritt, Board for the Education and Counseling of Displaced Homemakers
Helen Foley, Junior League of Las Vegas
Bob Cavakis, Youth Services Division
Bill Lewis, Chief Probation Officers
Bob Calderone, Youth Services Division
Lorne Malkiewich, Legislative Counsel Bureau
John P. Fowler, Law Firm of Vargas & Bartlett

After the secretary called the roll, Mr. Sader asked for testimony on SJR 2.

might be beneficial on this legislation. He felt if they pursued adding the statement it would be done in the Senate. Mr. Sader mentioned bill drafters did not normally encourage adding legislative intent into the statutes. Mr. Scherer expressed there was some concern about the Indian gaming issue.

ASSEMBLYMAN SCHERER MADE A MOTION TO AMEND AND DO PASS AB 449.

ASSEMBLYMAN ANDERSON SECONDED THE MOTION.

THE MOTION TO AMEND AND DO PASS AB 449 CARRIED UNANIMOUSLY.

SENATE BILL 214 - Ratifies technical corrections made to NRS, Statutes of Nevada 1987 and Statutes of Nevada 1989.

ASSEMBLYMAN SCHERER MADE A MOTION TO DO PASS SB 214.

ASSEMBLYMAN JOHNSON SECONDED THE MOTION.

THE MOTION TO DO PASS SB 214 CARRIED UNANIMOUSLY.

ASSEMBLY BILL 655 - Revises laws governing corporations and similar organizations.

Mr. Gibbons summarized his concerns regarding AB 655 that it would make a significant policy change away from the traditional standards which corporate laws were currently addressed in Nevada. That standard addressed liability first to directors and away from the traditional business practice standard. AB 655 would allow a laundry list of considerations directors could take into view, excluding the traditional business judgment rule. Mr. Gibbons questioned why it was necessary to move away from the long-term standard used as precedence in many court decisions, as well as changing under Section 2, subsection 5, the burden of proof which under AB 655 appeared to favor directors, in a challenge by shareholders from a "preponderance of the evidence" to a more burdensome "clear and convincing" standard. Secondly, Mr. Gibbons stated in the section allowing shareholders to have a right of pre-emption on new issued shares, AB 655 moved away from the traditional "implied right" to one where that right was excluded except if it was specifically mentioned. That was the reverse of the current statutes. He expressed his concern the policy position for Nevada favored business and the corporation over the

shareholders and making shareholders now face a stiffer burden in challenging corporations.

Mr. John P. Fowler, of the law firm of Vargas and Bartlett in Reno and Las Vegas, testified the focus of AB 655 was a result of the takeover battles of the 1980s, which were waged in part in the markets and in part in the courts. When a takeover artist decided to perform a hostile takeover, he made a proposal and if not immediately accepted by the directors he often went directly to the shareholders and tendered an offer for their shares at a certain price. The directors then typically would fight it saying the price offered was far too low, which it usually was. The directors' strategies in either seeking to sell the company at a higher price, or in seeking not to sell the company at all, usually resulted in a lot more money per share for the shareholders if the company was sold. Alternatively, the company ended up in a somewhat different form after having to defend itself against the takeover artist, or the takeover artist would succeed, in which case it was guaranteed the company would be burdened with a tremendous amount of debt. The effects of the takeover battles of the 1980s had not necessarily been pro-shareholder value.

Mr. Fowler particularly mentioned that Section 2 of AB 655 allowed directors to consider other factors. The reason for that was the focus of the American securities markets seemed to be very short-term. Articles had been written stating the short-term thinking of American corporations had caused problems for American industries in numerous markets, whether automobiles, computers, or development of new technology. Focusing on tomorrow's stock price or quarterly results had not necessarily been good for the country. Section 2 allowed directors to consider other factors other than tomorrow's stock price or last quarter versus next quarter's earnings. It allowed the interests of other constituencies to be considered. Subsection 5 of that section provided for a "clear and convincing" evidence standard, which changed the normal evidence standard from "preponderance of the evidence." It raised the burden of proof to some degree when the duties and obligations of a director were being weighed in a court proceeding. Mr. Fowler stated subsections 3 and 4 were really a more critical part of AB 655 than was subsection 5. Subsections 3 and 4 dealt with the other constituency interests which directors could weigh. But subsection 5 provided some additional protection for directors in lawsuits that were often filed as a part of a takeover battle. If a takeover battle went away, the lawsuits did also. The importance

of a lawsuit in protecting shareholders was often subsidiary to the interests of the takeover artist who often filed them, or to the artist's affiliates. Mr. Fowler opined for that reason they had made it a part of the bill, and it was not simply that they wished to change the standard of proof, but it was part and parcel of a program to allow directors to consider other constituency interests and more long-range interests in making corporate decisions.

Mr. Fowler commented it amounted to a basic policy decision for the legislature and whether it felt a corporate board should be somewhat protected from lawsuits when it considered interests other than tomorrow's stock price or last quarter's earnings in making corporate decisions, and could the board look at more long-term interests and consider other constituencies to some extent. He said if the legislature wanted to make the burden of proof the same as it was for all other lawsuits, the guts of the bill would not be too adversely affected. Mr. Fowler reiterated the crucial part of Section 2 were subsections 3 and 4 concerning the board's ability to consider other constituencies.

As to preemptive rights, Mr. Fowler said AB 655 included that change because many other states had done the same thing under the Revised Model Business Corporation Act of 1984. It adopted an opt-in provision with respect to preemptive rights. He explained preemptive rights were a protective device for shareholders that permitted them to maintain their proportionate ownership interest, which was uniquely beneficial in small-held corporations such as family corporations, but was not useful in a publicly-held corporation. It was like cumulative voting in stockholder agreements, and it was useful in maintaining the percentage interest of each person in ownership.

Mr. Fowler said preemptive rights was something that should be carefully considered before being added to the corporate articles because it was uniquely suited to particular types of circumstances. He felt the Model Code had adopted the opt-in version which would, under AB 655, apply to all corporations formed after October 1, 1991, rather than the opt-out in which case it would be in the articles unless specifically stated to not be included. In addition to cumulative voting which allowed a voting scheme to maintain at least some representation on the board of directors for minority shareholders, preemptive rights would be included in that group of measures which could be taken to protect

shareholders in small holding situations. It was a change that a state going through a major overhaul of its corporate statutes tended to adopt in conformance with the Revised Model Act. Mr. Fowler stated that was not a major change because the statutory provision which was recommended (the Model Act approach) protected those rights if included in the articles. He felt "opt-in" was a better approach, but it was not crucial to the bill, even though he believed most jurisdictions were changing to the "opt-in" approach. The recommended amendments to AB 655 (Exhibit G) allowed existing corporations to continue their present scheme of having pre-emptive rights unless specifically excluded in the articles. All corporations formed after October 1, 1991, would be in a scheme whereby they would need to include pre-emptive rights in the articles in order to be governed thereby.

Mr. Johnson expressed his trouble with the policy statement in AB 655 and the necessity of the short-term view which was set by national monetary policy. He understood AB 655 sought to control the short-term view in a singularly protective way by management, acknowleding there had been obvious abuses, but he felt the method AB 655 used to protect against that was poor public policy which he disagreed with. He asked if the bill would be fundamentally damaged if some early sections were deleted.

Mr. Fowler responded AB 655 did many things and that was only one thrust for changes suggested by the corporate study which had been done. He felt shareholders under AB 655 were protected by the same devices they had enjoyed for a long time. As to the policy, there were good arguments to be made on both sides. However, shareholders had the power to vote out management, and it was power that had not been used enough in the past. Mr. Fowler believed in the future it would be used more, because large institutions that owned large blocks of stock in the largely held corporations were starting to understand they could no longer just sell the stock and get out of the company if they did not like management decisions. It was too difficult to sell easily and it affected the market tremendously. Many stockholders were starting to impact management decisions more and more. In that respect the system was self-correcting and the mechanisms were there for shareholders to control management if they chose to do so. In the narrow area of directors' duties and responsibilities, the subject of these legislative measures was the reaction to the use of lawsuits in takeover battles as another tactical device. When the takeover battle was over the lawsuits were dismissed. AB 655 provided some

protection to directors, and especially outside directors because they did not make much money from serving on the boards but usually did it for prestige, to further their own careers, or in retirement, and if they constantly had to risk their personal financial status in lawsuits then qualified people would not be found to fill the position of outside directors. Having good outside directors paying attention to what was going on in a corporation was critical. In order to sue a director, there had to be a substantial wrong committed where he had not used good business judgment in a material way. That was a protection Mr. Fowler thought a director ought to have and was a large part of the thrust behind those sections of AB 655. If Section 2 of AB 655 was deleted entirely, there were many other things the bill still accomplished, but Section 2 was an important section and he personally felt it should be passed.

Mr. Gibbons asked Mr. Fowler to explain what Section 2, subsection 3 on page 2, lines 4 and 5, did and what it prevented, and what other challenges could be raised that were not within the subsection. Mr. Fowler read, "This subsection does not create or authorize any causes of action against the corporation or its directors or officers." He said for instance if the board of directors decided to consider the workers in a factory which it thought it must close, typically as a result of a takeover, subsection 3 allowed the board of directors to consider the interests of the workers in that factory, along with all other considerations. The shareholders could not sue them simply because they considered the interest of the workers. Mr. Fowler said on the other hand, they had not wanted to create the situation where the workers by reason of that section could file an action against the directors because they considered only the interests of the shareholders in the decision to close the factory. The idea was to allow directors to consider other interests but not to provide the other interests another cause of action on which to sue the directors if the decision was to close the factory. The measure allowed a little greater latitude to directors, but did not provide stockholders another reason to sue.

ASSEMBLYMAN GIBBONS MADE A MOTION TO AMEND AND DO PASS AB 655 AS AMENDED, WITH THE FURTHER AMENDMENT TO DELETE SUBSECTION 5 OF SECTION 2.

ASSEMBLYMAN GREGORY SECONDED THE MOTION.

Mr. Petrak expressed concern about Section 2, line 22 on page 1, suggesting the wording be changed to "shall consider" instead of "may consider." Mr. Fowler stated one state had done that and it had been highly criticized in the academic press. That change would require directors to consider other constituency interests, rather than allowing them to do so. The whole idea of the bill was to give the directors the freedom to chose whether they wanted to consider those interests. Some would argue that no interests except the shareholders' should ever be considered, and if they were then the directors should be sued; corporate law in the past had always held that tradition. However, to compel the directors to consider other interests might be construed as considering them to the exclusion of the interests of the shareholders, the owners. Mr. Fowler strongly recommended the wording remain "may consider" to make sure the shareholders interests were properly protected and the directors gave proper consideration to the owners and did not focus exclusively on the interests of other constituencies.

ASSEMBLYMAN PORTER MADE A MOTION TO AMEND THE MAIN MOTION TO AB 655 BY DELETING SECTIONS 275 THROUGH 331 CONCERNING LIMITED-LIABILITY COMPANIES.

Mr. Porter explained Sections 276 through 331 provided all the advantages of a partnership as well as the total shield of doing business in the corporate form. In particular Section 310 on page 17, which summarized, "The members of a limited-liability company and the managers of a limited-liability company managed by a manager or managers are not liable under a judgment, decree or order of court, or in any other manner, for a debt, obligation or liability of the company." He said present corporate law prohibited the use of the corporate vehicle as a shield, and there was also the "alter ego doctrine" that said a person could be responsible for the debts and obligations of the corporation. Mr. Porter disagreed a statute could state that a court could not order a person or entity to be liable in any fashion for any debts, obligations or any liabilities of the company. He was sure people would use this to go out and make a lot of money and never have to pay its debts. Nevada would be only the fourth state in the country to consider the limited-liability company and consequently there was no body of case law yet developed. He was concerned with making Nevada a testing ground, especially with the knowledge of some businesses that had chosen to locate in Nevada in the past.

ASSEMBLYMAN JOHNSON SECONDED THE MOTION.

Mr. Fowler responded a limited-liability company would have the advantages of a partnership for tax purposes and some of the advantages of corporations for state law purposes, the most important of which was the limited liability of its owners and managers. Corporations provided limited liability for their stockholders, and most often shareholders were not liable for the debts of the company. Shareholders might lose their investment, but they could not be sued and their assets were not subject to any judgment against the company. Section 310 of AB 655 provided the same immunity to the limited-liability company. Mr. Fowler said even though the liability portion was worded differently than that for corporations, he did not believe it provided any additional protection over what corporations now possessed under the law. Equal protections for limited-liability companies and corporations had been the intent in drafting AB 655. He saw no reason the "alter ego doctrine" could not be applied to the limited-liability companies and no reason why the corporate veil could not be pierced if the entity was ignored in the fashion done in corporations. Even though piercing the corporate veil was difficult to prove, there was very good case law in that area in Nevada. Mr. Fowler opined those same standards would end up applying to limited-liability companies, but no one would know until some case law had developed. He asserted the limited liability protection in Section 310 was extremely important and was one reason for establishing the limited-liability company.

Mr. Porter pointed out the names had merely been changed: shareholders became members and directors became managers. Under Section 310 the immunity had been extended to everyone, directors, shareholders and everyone involved in the company, and further, everyone had immunity from the arm of the court. That was not the case in present corporate law. Mr. Fowler pointed out the section stated they were "not liable under a judgment, decree, or order of court, for any debts, obligations or liabilities of the company," which was exactly present corporate law. Mr. Porter asked Mr. Fowler if it was his testimony that a court of competent jurisdiction in Nevada could not under any circumstances order a director or shareholder to be liable for the debt of the corporation? Mr. Fowler responded, "No, because you have the alter-ego doctrine which is piercing the corporate veil." He declared the same statement, in effect, was contained in Chapter 78 of NRS with respect to shareholders, although different wording was used. The alter-ego doctrine could be used to circumvent the statutes under certain limited circumstances. Mr. Porter

summarized Mr. Fowler's testimony to mean the wording in Section 310 did not change the alter-ego doctrine despite the fact it specifically said a court could not order a member, shareholder, or director to do anything. Mr. Fowler stated he could not answer 100 percent either way because there was no case law.

Mr. Sader intervened to opine that conceptually, the alter-ego doctrine or piercing the corporate veil philosophically found the corporation was not a corporation, that it had instead been handled as the alter-ego of the persons owning the corporation. Therefore it was not a corporation and the owners were liable for the debts. He felt that was entirely consistent with Section 310. In a limited-liability company the members and managers were not liable, the same as in a corporation where the directors, shareholders and officers were not liable. But if there was not a company because there was an alter-ego, and because the corporate veil had been pierced, then the owners and managers were personally liable. Mr. Fowler emphasized that was exactly the statement of doctrine the courts used. If the corporation's formalities and existence were persistently ignored, then it really was not a corporation. He opined there was no reason the same principle would not be applicable to a limited-liability company, and felt a court would agree.

Mr. Sader stated his opposition to the motion, saying he did not feel there was any change in current policy by creating the limited-liability company and that alter-egos and piercing the corporate veil could still be used as defenses. The limited-liability company was a very helpful tool to combine the concepts of partnerships and corporations which allowed new types of business entities without changing relationships to third party creditors.

Mr. Johnson agreed with Mr. Porter the absence of case law in the area of limited-liability companies raised many questions. He understood the arguments for establishing the mechanism, but felt Nevada should wait and possibly address it in the future, and enacting it now was premature.

Mr. Scherer asked if it was believed the availability of limited-liability companies would bring additional companies to Nevada. Mr. Fowler answered he felt that would happen because it provided an additional vehicle which would allow those who wished to form a company to chose a Nevada venue because of the choice of a limited-

liability company or a corporation. Fees would be collected by the Secretary of State for limited-liability companies as they were for corporations.

Mr. Norton mentioned his entire career was spent in economic business development, and after reviewing AB 655 and limited-liability companies, felt it would help bring more diversified companies to Nevada.

THE MOTION TO AMEND THE MAIN MOTION TO AB 655 TO DELETE SECTIONS 275 THROUGH 331 PERTAINING TO LIMITED-LIABILITY COMPANIES FAILED FOR LACK OF A MAJORITY. VOTING YES WERE ASSEMBLYMEN GREGORY, JOHNSON AND PORTER. VOTING NO WERE ASSEMBLYMEN ANDERSON, BAYLEY, CARPENTER, ELLIOTT, GIBBONS, HARDY, NORTON, PETRAK, SCHERER, AND SADER. ASSEMBLYMAN WILLIAMS WAS ABSENT.

THE MOTION TO AMEND AND DO PASS AB 655 AS AMENDED, WITH THE FURTHER AMENDMENT TO DELETE SUBSECTION 5 OF SECTION 2 CARRIED BY A MAJORITY OF THOSE PRESENT. VOTING NO WAS ASSEMBLYMAN PORTER; ASSEMBLYMAN WILLIAMS WAS ABSENT.

ASSEMBLY BILL 715 - Restricts expenditure of money appropriated to counties for special supervision programs.

Mr. Sader mentioned no one from the counties had been available to testify the previous day on AB 715, but since that time representatives of the Nevada Association of Counties, Clark County and Washoe County, had all said there was no opposition to the bill.

ASSEMBLYMAN ANDERSON MADE A MOTION TO DO PASS AB 715.

ASSEMBLYMAN PETRAK SECONDED THE MOTION.

THE MOTION TO DO PASS AB 715 CARRIED UNANIMOUSLY BY THOSE PRESENT.

MEMORANDUM

To: Senate Judiciary Committee

From: John P. Fowler, Chair,
Executive Committee, Business Law Section, State Bar of Nevada

Re: Recommendations for Legislation regarding business law statutes for the 1999 Nevada Legislature - Senate Bill 61

Date: February 3, 1999

The Business Law Section Executive Committee recommends certain changes be made to certain statutes affecting the practice of real estate law, corporate law, and the law governing limited liability companies and limited partnerships. The Board of Governors, State Bar of Nevada, has endorsed these proposals.

1. NRS 278.590 - Permitting the Sale of Real Property with Closing Contingent on Recording Subdivision Map - Section 106 of S.B. 61.

NRS 278.590 provides, in pertinent part: "it is unlawful for any person to contract to sell, to sell or to transfer any subdivision or any part thereof, or land divided pursuant to a parcel map . . . until the required map thereof, in full compliance with the appropriate provisions of NRS 278.010 to 278.630, inclusive, . . . has been recorded. . ." This statute, read literally, forbids buyer and seller of a parcel of real property from even contracting to do so unless a map has been recorded.

Common practice in the real estate industry provides that a buyer who wishes to purchase a portion of the sellers property for residential, commercial or industrial development enter into an agreement that sets up an escrow for the sale and purchase of the target property. As a condition to closing, the seller will cooperate with the buyer to subdivide the property pursuant to a recorded subdivision map. The map process must usually be completed and recorded before the property sale closes. In this way, the seller runs the risk that the property will be unable to run the regulatory gauntlet to the goal of recording a subdivision map. The buyer will perform and pay for all the necessary work to obtain a subdivision map. Thus, the buyer risks the costs of obtaining the map but not the cost of the real property itself.

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EXHIBIT D 08

We believe the parties should be able to allocate the risks in this way. The current Nevada statutory wording, however, technically forbids this allocation of risk between the private parties. The suggested change to NRS 278.590 allows the parties to contract to sell a parcel of unparcelled real property provided that the map is recorded before closing.

2. NRS 113.070 - Consolidating Real Estate Disclosure Documents - Section 105 of S.B. 61.

As presently written, NRS 113.070 (applicable only in Clark County) requires two separate disclosures regarding future land use. NRS 113.070 requires that the initial purchaser of a residence receive a disclosure document at the time he or she signs the sales agreement. The disclosure document must contain a copy of the gaming enterprise district map and the location of the nearest gaming enterprise district. NRS 113.070 (4) requires a separate disclosure statement disclosing to the buyer the zoning designations in the master plan regarding land use for adjoining parcels of land.

The suggested amendment to NRS 113.070 simply changes the wording of the statute so that both kinds of disclosures can occur in the same disclosure document.

There are several other technical changes. Under the existing statute the gaming information must be updated every four (4) months but the zoning and general plan information must be updated every six (6) months. We have changed the statute so that both kinds of information must be updated every six (6) months. However, a quarterly update would work out just as well. Our only point is that the update period required be the same.

3. NRS 14.020 and 14.030 - Requirement for Resident Agent Made the Same as NRS Chapter 80 - Sections 103 and 104 of S.B. 61.

NRS 14. 020 requires every foreign "incorporated company or association, . . . corporation, limited liability company, . . . limited partnership and municipal corporation" which owns property or does business in Nevada to keep a resident agent here. However, the requirement that every such foreign person "owning property" in Nevada obtain a resident agent is inconsistent with NRS 80.050 (1) (i) which specifically exempts foreign corporations which only own property in Nevada from the requirement of qualification. The qualification process requires a registration with the Secretary of State's office and the maintenance of a resident agent.

The statutory changes to NRS 14.020 deletes the words "owning property" from the statute. Merely the passive act of owning property will no longer require having a resident agent in the state. In addition, the resident agent is for the first time specifically required to reside or be located in Nevada.

4. Distinguishable Names Statutes - Domestic and Foreign Qualified Entity Loses Its Name Only When Charter is Revoked - Sections 51, 56, 71, 75, 80 and 82 of S.B. 61.

Each Chapter of Title 7 of the NRS dealing with corporations, foreign corporations, limited liability companies, partnerships, etc. contains a statute requiring that the name of the entity must be distinguishable from all the other names of entities whose names are on file with the Secretary of State's office. The wording of these statutes requiring distinguishable names would be changed so that the names must be distinguished from those names which have been reserved pursuant to the applicable Nevada statutes.

Late in the last session, the statutes were changed so that the names become available when a corporation is "for any other reason no longer in good standing in this state". Nevada's statutes require that each entity on file with the Secretary of State's office file an annual list of officers, directors, manager, etc. and pay an $85.00 filing fee. Entities which fail to file such lists before the end of the anniversary month of its original filing are no longer in good standing. Nine (9) months later, their charter or permission to do business in Nevada is "revoked". During the nine (9) month period, the Secretary of State is required to contact the company, tell them their list has not been filed on time and urge proper filing.

Unfortunately, the Secretary of State has found that under the wording imposed by last session's bill, entities which have inadvertently failed to file their annual list on time can lose their names during the 9 month period before their charters are revoked. Others can "hijack" their names. The loss of a name is a penalty which certainly does not fit the crime. All of the statutes in all of the Title 7 Chapters dealing with the issue should be changed so that the charter must actually be terminated nine (9) months after the due date for the annual list before they risk losing their names.

The statutes involved are NRS 78.039, 78.185, 82.096, 86.171, 87.450, and 88.320.

5. Change of Resident Agent - Sections 57, 70 and 77 of S.B. 61.

NRS 78.110, 80.070 and 86.235 allow the corporation, foreign corporation and limited liability company, respectively, to change their registered offices and their resident agents. However, they cannot change their registered offices in Nevada without changing their resident agents since those offices are the offices of their resident agent. Thus, the language regarding registered offices is deleted from these statutes.

6. NRS 78.138 - Response to Hilton Hotel Corp. vs. ITT Corp., 978 F. Supp. 1342 (D. Nev. 1997) - Sections 48 and 54 of S.B. 61.

The members of the Business Law Section Executive Committee agreed with the result that the Federal District Court reached in *Hilton Hotel Corp. v. ITT*, 978 F.Supp. 1342 (D.Nev. 1997) ("*Hilton II*") by which the Court enjoined ITT's restructuring proposal. However, these members objected to the method by which the *Hilton II* Court reached its result limiting the applicability of

the presumption granted directors by the "business judgment rule" in threatened take-over situations. Thus, the Executive Committee of the Section proposes to make changes to NRS 78.138. The reason for the proposed changes requires a bit of explanation.

In *Hilton II*, ITT had reacted to the take-over proposal by Hilton Hotels Corp. by proposing to split ITT into three separate corporations. The largest of the three corporations would have been ITT Destinations, containing ITT's hotel and gaming business, accounting for 93% of ITT's assets. The two other entities would take ITT's technical schools (ITT Educational Services) and ITT's yellow pages division (ITT World Directories). The Board of Directors of ITT Destinations would consist of ITT's then-existing Board but with staggered terms. That is, the new corporation's Board would be divided into three classes, with each class of directors serving a term of three years, one class to be elected each year. A stockholder vote of 80% would have been required to remove directors without cause or to repeal the classified board provision. If no change was made, ITT's Board could have been ejected at the 1997 Annual Meeting. The restructuring plan was to take place before ITT's 1997 Annual Meeting and without obtaining approval of the plan by ITT's shareholders.

The business judgment rule is a presumption granted to the actions of a board of directors in the normal course of events. This presumption states that officers and directors are presumed to act in good faith, on an informed basis and in the honest belief that the action taken is in the best interest of the corporation. Ordinarily, a Court will not disturb the business decisions of a board of directors if they can be attributed to any rational business purpose.

Delaware case law has decided that inherent conflicts of interest arise when boards of directors respond to takeover attempts. Boards of directors are deemed to have too much of an interest in preserving their own positions to be given the presumption that they acted in good faith and in the honest belief they are acting in the best interests of the corporation. In those situations, before the board will be granted the benefits of the presumptions in the "business judgment rule", the Court must find, first, that there was a real threat to corporate policy and effectiveness and, second, that the response was reasonable to the threat posed. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc,* 506 A.2d 173 (Del. 1986). The *Hilton II* Court applied this heightened standard of review in takeover situations not withstanding NRS 78.138 allowing directors to consider (i) the interest of groups other than stockholders (employees, suppliers, creditors, customers, etc.), and (ii) the long term as well as short term interests of the Corporation.

In reading the *Hilton II* case, it is clear the Court was very concerned about the effect that ITT's restructuring plan would have had on the effective voting rights of the stockholders. Without the plan, a stockholder's meeting was to be held late 1997 at which time the stockholders could refuse to re-elect the existing board. With the restructuring plan, the stockholders of the surviving corporation with 93% if the assets of the old corporation (and all of the hotel and gaming assets) could vote for only one-third of the members of the board at the 1997 annual meeting. The Court found that this response to the take-over threat purposely disenfranchised ITT's stockholders, upsetting the extremely important power relationship between the directors and the stockholders.

The revised statutory language of NRS 78.138 preserves the application of the business judgment rule even in takeover situations. However, "When the directors and officers take actions to resist a change or potential change in control of the corporation which impede the right of stockholders to vote for or remove directors" a higher standard applies to the board's actions. This higher standard requires that, before obtaining the benefits of the business judgment rule, the directors must first prove that they had reasonable grounds to believe that a threat to corporate policy and effectiveness exists and that the action taken impeding the exercise of stockholder voting rights is reasonable in relation to the threat posed. Only once the board proves those elements, can the business judgment rule presumptions run in their favor.

In summary, the members of the Executive Committee agree with the *Hilton II* Court's emphasis on the importance of the stockholder franchise. They believe the Court's action in enjoining the ITT restructuring plan was correct because the plan did infringe on the powers of the stockholders to remove directors under the circumstances. However, the Executive Committee believes the decision contained language which could be interpreted too broadly and wish to clarify Nevada law by changing NRS 78.138. If actions taken in response to takeover threats do not involve the disenfranchisement of stockholders, the directors should obtain the benefits of the business judgment rule without first having to establish (i) that management had reasonable grounds to believe a danger existed to the corporation, and (ii) that the response to the takeover danger was reasonable.

The Legislative Counsel Bureau divided NRS 78.138 into two separate sections. Section 54 of S.B. 61 contains the bulk of old NRS 78.138. Subsection 1 of Section 54 of S.B. 61 contains the existing 78.138 (1) which establishes the duties a director owes to his or her corporation. New subsection 3 of 78.138 (Section 54 (3)) establishes the presumption known as the "Business Judgment Rule". Section 48 of S.B. 61 clearly applies that presumption to directors in takeover situations.

However, if directors resist takeovers in ways which impede the right of stockholders to vote for directors, then the directors must first establish that they have reasonable grounds to take the actions they do and that the actions taken are reasonable. If those facts are found, the directors have the benefit of the "Business Judgment Rule" with respect to the actions taken. Section 48 (2) of S.B. 61.

7. NRS 78.335 - Removal of Directors and Cumulative Voting - Section 61 of S.B. 61.

Another case highlighted problems with one of our statutes regarding the removal of directors and cumulative voting. In *Computer Associates International, Inc. vs. Computer Sciences Corporation*, a U.S. District Court case filed in Las Vegas, one of the major issues was the removal of all of the directors when a corporation has cumulative voting. NRS 78.335 provides that any director can be removed by a 2/3 stockholder's vote. However, a special rule governs the removal of directors when a corporation has cumulative voting. As you may remember, cumulative voting is the system whereby each stockholder has the number of votes in electing directors equal to the

MINUTES OF THE MEETING OF THE ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-First Session
May 30, 2001

The Committee on Judiciarywas called to order at 7:55 a.m. on Wednesday, May 30, 2001. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada. Portions of the meeting were simultaneously videoconferenced in Room 4401 of the Grant Sawyer Office Building, Las Vegas. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr.	Bernie Anderson, Chairman
Mr.	Mark Manendo, Vice Chairman
Mrs.	Sharron Angle
Mr.	Greg Brower
Ms.	Barbara Buckley
Mr.	John Carpenter
Mr.	Jerry Claborn
Mr.	Tom Collins
Mr.	Don Gustavson
Mrs.	Ellen Koivisto
Ms.	Kathy McClain
Mr.	Dennis Nolan
Mr.	John Oceguera
Ms.	Genie Ohrenschall

GUEST LEGISLATORS PRESENT:

Senator Maurice Washington, Washoe Senate District 2
Senator Valerie Wiener, Clark Senate District 3
Senator Mark James, Clark Senate District 8
Speaker Richard Perkins, Assembly District 23
Assemblyman David Goldwater, Assembly District 10

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Risa B. Lang, Committee Counsel
Deborah Rengler, Committee Secretary

OTHERS PRESENT:

Dean Heller, Secretary of State
Renee Lacey, Chief Deputy Secretary of State
Judge Scott Jordan, Second Judicial District Court, Family Division
Leonard Pugh, Director, Washoe County Department of Juvenile Services
Madelyn Shipman, Assistant District Attorney, Civil Division, Washoe County District Attorney; Legislative Representative, Nevada District Attorney's Association
John Morrow, Chief Deputy, Washoe County Public Defender
Dorothy Nash Holmes, Special Assistant to the Director, Department of Prisons
Glen Whorton, Chief, Classification & Planning, Department of Prisons
Steve Barr, Nevada Corrections Association
Clay Thomas, Deputy Chief, Division of Parole and Probation, Department of Motor Vehicles and Public Safety (DMV&PS)
Kirby Burgess, Director, Clark County Family and Youth Services
Willie Smith, Deputy Administrator for Youth Corrections, Division of Child and Family Services
Jan Gilbert, Progressive Leadership Alliance of Nevada (PLAN)
Bobbie Gang, Lobbyist, Nevada Women's Lobby
Dr. Jane Foraker-Thompson, Religious Alliance in Nevada (RAIN) and Episcopal Diocese of Nevada
Gary Crews, Legislative Auditor, Legislative Counsel Bureau, Audit Division
Rocky Cooper, Legislative Auditor, Legislative Counsel Bureau, Audit Division
Dr. Ted D'Amico, Medical Director, Department of Prisons
Rex Reed, PhD., Medical Administrator, Department of Prisons
Michael Bonner, representing self
James Bilbray, representing self
Kenneth Lange, Executive Director, Nevada State Education Association
Derek Rowley, Corporate Services Center
John Olive, President, Nevada Association of Listed Resident Agents (NALRA)
Rose McKinney-James, Clark County School District
Bob Crowell, Nevada Trial Lawyers Association (NTLA)
Bill Bradley, Nevada Trial Lawyers Association (NTLA)
Pat Cashill, Nevada Trial Lawyers Association (NTLA)
Danny Thompson, Executive Secretary-Treasurer, Nevada State American Federation of Labor-Congress of Industrial Organization (AFL-CIO)
Dave Howard, Reno-Sparks Chamber of Commerce
Kami Dempsey, Director, Government Affairs, Las Vegas Chamber of Commerce
Sam McMullen, Las Vegas Chamber of Commerce and the Retail Association of Nevada
Mary Lau, Executive Director, Retail Association of Nevada
Ray Bacon, Nevada Manufacturers Association

Chairman Anderson made opening remarks and noted a quorum was present.

Chairman Anderson opened the hearing on S.B. 137.

Senate Bill 137: **Increases number of district judges in second and eighth judicial** districts. **(BDR 1-521)**

Judge Scott Jordan, Second Judicial District Court, Family Division, spoke in favor of S.B. 137. Judge Jordan submitted statistics (Exhibit C) from the court indicating a dramatic increase in the number of family court cases; the numbers alone justified the need for a new judge.

Chairman Anderson said there were currently 11 judges in the Second Judicial District Court and S.B. 137 would increase that number to 12. Of that 12; four were Family Court judges. Chairman Anderson read information from the Administrative Office of the Court's Annual Report, quoting statistics in Nevada for the Eighth Judicial District Court in comparison to the Second Judicial District Court.

Assemblyman Carpenter asked what had caused the substantial increase in juvenile filings. Judge Jordan said the growth in population of the county was the main contributor to that increase.

Leonard Pugh, Director, Washoe County Department of Juvenile Services, said since 1990 Washoe County had experienced approximately a 181 percent increase in person-related crimes and a 280 percent increase in other crimes. There were more juveniles under drug testing clauses, house arrest, and search clauses. Because juveniles were being held accountable for those offenses, it had resulted in higher levels of supervision and an increase in court time. Chairman Anderson said the increase was a result of previous legislation that allowed intervention at earlier stages. Mr. Pugh said that while the number of petitions being filed was increasing, since 1995 the commitment rate to state institutions had decreased significantly. Chairman Anderson said it was better to have more judges that cost less than the long-term cost of incarceration and the creation of lifetime criminals; it would actually result in a cost-savings.

Madelyn Shipman, Assistant District Attorney, Civil Division, Washoe County District Attorney, and Legislative Representative for the Nevada District Attorney's Association, spoke in support of S.B. 137. She said that while the cost of the judge was a state responsibility, Washoe County was ready to assume the cost of the support staff and space requirements. Chairman Anderson said there was also an "overcrowded" court facility question to be dealt with in Washoe County, namely, would court space be shared. Ms. Shipman said county management was aware of the current status and would have space available by January 2003. Judge Jordan said a committee was already impaneled made up of court representatives, general services, and county representatives to resolve the problem.

John Morrow, Chief Deputy, Washoe County Public Defender, spoke in favor of S.B. 137. He supervised the Family Court Division of the Public Defender's Office in Washoe County. The overcrowding problem in Family Court was having an impact on dealing with the families. Having another judge would help the families and "do good things" for them as far as getting cases in and out of the system quickly.

Chairman Anderson entertained a motion of do pass for S.B. 137.

ASSEMBLYWOMAN ANGLE MOVED TO DO PASS S.B. 137.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

Chairman Anderson noted S.B. 137 was already referred to the Assembly Committee on Ways and Means.

MOTION PASSED WITH MRS. KOIVISTO, MR. NOLAN AND MS. BUCKLEY ABSENT FROM THE VOTE.

Chairman Anderson opened the hearing on S.B. 193.

Senate Bill 193: Makes various changes concerning department of prisons. (BDR 16-311)

Dorothy Nash Holmes, Special Assistant to the Director, Department of Prisons, said a joint introduction of S.B. 193 was made on March 12, 2001. Ms. Holmes said there were four highlights:

1. Changed the name of Department of Prisons to Department of Corrections. Nevada was the last "state in the union" that used the "Department of Prisons," which had disqualified Nevada from some federal funds.
2. Created an offender management division using funds from an existing vacant and highly paid psychiatrist position. The offender management division would manage and coordinate all programming. There would be no fiscal impact; it would actually result in an $11,000 savings over the biennium.
3. Established a facilities orientation training in the prisons, teaching the officers how to do their basic job.
4. Implemented structured living, using a disciplined progressive opportunities approach, and unit management, a widely accepted management tool in corrections.

Chairman Anderson said S.B. 193 would go to the Assembly Committee on Ways and Means.

Glen Whorton, Chief, Classification & Planning, Department of Prisons, and Steve Barr, Nevada Corrections Association, were available for questions.

Chairman Anderson asked for questions from the committee members and further testimony. There being none, he closed the hearing on S.B. 193 and entertained a do pass motion.

ASSEMBLYWOMAN ANGLE MOVED TO DO PASS S.B. 193.

ASSEMBLYMAN GUSTAVSON SECONDED THE MOTION.

MOTION PASSED WITH MRS. KOIVISTO, MR. NOLAN, AND MS. BUCKLEY ABSENT FROM THE VOTE.

Chairman Anderson said he would present S.B. 137 on the Assembly floor.

Chairman Anderson asked Assemblyman Collins to present S.B. 193 on the Assembly floor.

Chairman Anderson opened the hearing on S.B. 194 and acknowledged Senator Maurice Washington, Washoe County Senatorial District 2.

Senate Bill 194: **Makes changes pertaining to interstate compacts for supervision of** offenders. **(BDR 16-107)**

Senator Washington said S.B. 194 was a bill for the Division of Parole and Probation (P&P) that had been worked on for the past 18 months. It provided for the ratification of the old interstate compact, under which Nevada was currently operating, for the supervision and movement of adult offenders from one jurisdiction to another. The current interstate compact had not been ratified in 50 years. The compact set up an interstate commission for adult supervision; it organized, operated, and set up rules of authority; and set up select members from the state council which might be non-voting members to

include governors, legislators, state judges, attorneys general, and/or victims of crime. The ratification of that interstate compact must be completed by 35 states; 21 states had already ratified the new interstate compact. The interstate compact was necessary to enable Nevada to transfer offenders to or accept offenders from other states; it would give Nevada a voice on the commission. The Division of Parole and Probation (P&P) needed S.B. 194; the appropriation would be referred to the Assembly Committee on Ways and Means.

Chairman Anderson asked what was the policy question being addressed and how did it compare or change what was currently being done. Would Nevada surrender authority by complying with that compact?

Senator Washington said Nevada would not surrender any authority. Nevada could actually negate the compact by passing legislation that would exempt Nevada from the interstate compact. Nevada would maintain its jurisdictional authority as the state of Nevada. The interstate compact allowed Nevada an advantage in negotiating disputes and ratifying resolutions and preempted the federal government from taking over the supervision of adult offenders, including their movement from one state to another.

Chairman Anderson asked what the advantage would be to have a state senator and assemblyman sit on the commission. Would it become more political than administrative in nature? Senator Washington said the advantage to sitting on the commission would be to review the public policy and bring back to the legislative body new rules or issues that might be of concern. It would give Nevada a voice and a vote. Chairman Anderson said it was his understanding that the Chairman of the Senate Committee on Judiciary preferred that a common commission look at all such judicial questions, rather than working piecemeal.

Senator Washington said the interstate compact was already in existence, and Nevada was abiding by that interstate compact. S.B. 194 ratified that compact with new provisions to deal with the "new sophistication of mobilization and movement" of adult offenders. It allowed P&P to know the whereabouts of adult offenders and from what state they came. If they re-offended, it would give Nevada the jurisdiction, the power, and the authority to send the re-offenders back to their state of origin. It would be wise and prudent to have a legislator serve on the state council.

Chairman Anderson said Article 14 of the compact detailed the binding effect of the compact on other laws; "the compact had the force and effect of statutory law and take precedence over conflicting state law." Chairman Anderson was concerned that the compact could "override the actions of state law." Was there "prolonged discussion" in the Senate over that issue?

Senator Washington said there was a "long dialogue and concern" about the ratification of the compact and if it would supercede state authority. To assure that was not the case, the bill was amended to say the Nevada Constitution would supercede any rules or regulations promulgated by the commission. Senator Washington had served twice with the Council of State Governments (CSG) concerning the issue. Provisions were adjusted in the compact to make sure that states still had the ultimate authority regarding the operation, implementation, and the use of the compact. Nevada was currently a part of the compact. Regardless of whether or not Nevada decided to ratify the compact, after the 35th state adopted the compact, Nevada would be bound by it anyway.

Assemblywoman Ohrenschall asked what was the point of having non-voting members on the commission. She asked Senator Washington to clarify why Nevada would be bound by the compact after the other 35 states ratified it.

Chairman Anderson clarified that Nevada was currently participating with the interstate compact, even though Nevada had not formally adopted the statutory conditions. Senator Washington said Nevada was part of the old compact. Chairman Anderson said if S.B. 194 moved forward, Nevada would continue doing what it had been doing. Senator Washington agreed.

Clay Thomas, Deputy Chief, Division of Parole and Probation (P&P), Department of Motor Vehicles and Public Safety (DMV&PS), said the state of Nevada was in compliance with the current interstate compact that had existed since 1937. S.B. 194 would ratify the contract that would hold all states to a "level playing field." It would ensure there was consistency with the interstate compact and addressing of public safety issues for individuals who traveled into or from Nevada. Nevada currently had a 2-to-1 ratio of offenders leaving Nevada compared to those entering Nevada. There were 2,303 supervised offenders outside of Nevada compared to 1,085 individuals who transferred into Nevada from other states.

Assemblywoman Ohrenschall asked for clarification regarding whether Nevada could drop out of the interstate compact. Mr. Thomas said there was always the potential to drop out, but Nevada would then have no voice of authority and could become a dumping ground for offenders, without any recourse for the state.

Chairman Anderson clarified that because Nevada was part of the compact, Nevada did not retain the supervision expense for those offenders transferred to other states, and Nevada could charge those offenders coming into Nevada for their supervision. Before any individuals were transferred in or out of Nevada, paperwork was exchanged detailing supervision requirements and any special conditions ordered by the states.

Chairman Anderson asked how a state could send an individual into Nevada without Nevada authorities knowing it. Mr. Thomas said there was an obligation to register, but under the existing compact, there were no sanctions against a state that failed to comply with the compact. With the ratification of the new compact, a state that willfully ignored the compact would be held accountable. Mr. Thomas recounted the Nevada request and transfer process and paperwork.

Chairman Anderson asked if there were any questions from committee members. There being none, he entertained a motion to do pass S.B. 194.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO DO PASS S.B. 194.

ASSEMBLYWOMAN ANGLE SECONDED THE MOTION.

MOTION PASSED WITH MRS. KOIVISTO, MR. NOLAN, AND MS. BUCKLEY ABSENT FROM THE VOTE.

Chairman Anderson asked Assemblywoman Ohrenschall to present the bill on the Assembly floor.

Chairman Anderson opened the hearing on S.B. 232.

Senate Bill 232: **Provides for collection of information on economic background of each** child **referred to system of juvenile justice and requires each juvenile probation department** to **determine whether children of racial or ethnic minorities and children from** economically **disadvantaged homes are receiving disparate treatment in system of juvenile** justice. **(BDR 5-573)**

Senator Valerie Wiener, Clark County Senatorial District 3, presented S.B. 232, one of four bills requested by the A.C.R. 13 Interim Study Committee on Juvenile Justice, which she had the privilege to Chair during the last interim. S.B. 232 proposed to expand the existing information collected by the juvenile courts and juvenile probation to include data on the juvenile's economic background. To eliminate a large fiscal note, local juvenile probation departments would analyze the information collected to determine whether children of racial or ethnic minorities and children from economically disadvantaged homes were receiving disparate treatment in the juvenile justice system. Based on the information, departments would develop appropriate recommendations to address any such disparate treatment. The results of their analysis and recommendations would be submitted to the Division of Child and Family Services (DCFS). Once the DCFS had received the counties' reports, those reports would be compiled into a single publication.

Senator Wiener submitted letters from Ms. Willie Smith, Deputy Administrator, Youth Correctional Services, Division of Child and Family Services (Exhibit D), and from Kirby Burgess, Director, Department of Family and Youth Services (Exhibit E), both supporting S.B. 232.

Senator Wiener said the issue was very important to both the A.C.R. 57 (1997-1998) and A.C.R. 13 (1999-2000) Interim Committees on Juvenile Justice. It was agreed that the legislature should take steps to address that concern, especially as it impacted the juvenile justice system, young people, families, and communities.

Chairman Anderson said the bill applied to counties with over 400,000 in population or counties with under 100,000 in population. As such, what happened to Washoe County? Mr. Pugh replied that Washoe County had a probation department within its juvenile services; Washoe County considered themselves a local juvenile probation department because it was one of their divisions.

Mr. Burgess said Clark County Family and Youth Services had a probation division within their agency and they were ready to participate in the process. It should be noted that the information was not being collected to place blame; rather, it was an effort to keep youth out of the system. A recent report by a national consultant said that Clark County was doing a better job of keeping ethnic minority youth out of the juvenile justice system. That data would help determine what was being done and why it was done.

Chairman Anderson asked how current information was being gathered and analyzed. Mr. Burgess said Clark County had a computer system called "Family Tracks" that collected data on every child that entered the juvenile justice system. With a "tweak" to the system, the data required for S.B. 232 could be analyzed. Chairman Anderson asked how it was anticipated that the courts would get involved in the purpose of the legislation. Mr. Burgess said they currently tracked a youth upon entry into the juvenile justice system, at the detention facility, during the filing of the petition by the juvenile division of the District Attorney's Office in Clark County, as well as at all court hearings and dispositions. Chairman Anderson clarified that Mr. Burgess had taken that upon himself; the courts were not doing it for him. Mr. Burgess said his department had a good partnership with the court system, and every court action was captured for analysis.

Mr. Pugh said in Washoe County every court order was entered into the juvenile system and included when a petition was filed, what actions were taken on that petition, and what the ultimate court action was. All of that data could be retrieved. Washoe County did not currently collect the economic background on juveniles, and it might be difficult to get the parents to disclose that information. Washoe County did track minorities in the referrals to the department. Statistics included juveniles booked in the detention centers, detained at the detention centers, and committed to the state training centers. Mr. Pugh

felt the legislation was important and said Washoe County had volunteered existing resources and was adding resources to implement the provisions of S.B. 232.

Assemblyman Carpenter asked what information would be considered when collecting data on economic background. Mr. Pugh said he understood an amendment to the original bill listed the economic data to be collected. It was important to make sure that those families that could not provide certain levels of supervision or lived in lower socioeconomic areas where the crime rates were higher were not treated any differently than those who had stable, higher income homes. Mr. Burgess said income guidelines could be used as a factor. Assemblyman Carpenter said he felt "things were being taken too far" that might interfere with doing programs for the children. Income should not matter as it related to the programs. If the children had the same problems and the same needs, the side issues were not needed.

Chairman Anderson said economic diversity of the juvenile population, relative to their access to the system, had been discussed, and there had been a number of pieces of legislation that dealt with juvenile rights. Senator Wiener said that juveniles and their access to the system had been a consideration. She believed that while gathering data, if it were discovered that there was a substantial disproportionate number of children in the system from very low socioeconomic backgrounds, some of the preventative programs could be geared toward those neighborhoods and populations. The law already required that information, except economic background, be provided to the state.

Willie Smith, Deputy Administrator for Youth Corrections, Division of Child and Family Services, said she wanted to address Assemblyman Carpenter's question. Currently, except for economic background information, all the data that was needed to make determinations was available along with the information as to what services the youth were receiving when they came through the system. She believed the data collection would make sure that all children got the services they needed. Ms. Smith said the state employee who was responsible for working on the data was paid by federal dollars, and that individual would continue to assist with the responsibility for that data.

Assemblyman Carpenter said he wanted to make sure that what was "viewed as an evil" was not cured by allowing the children to fall through the cracks. He emphasized that "all" children needed to be taken care of. Mr. Pugh agreed with Assemblyman Carpenter, and there was no intention to exclude anyone from receiving any service. Mr. Pugh believed prevention programs, available to anyone within the community and focused at keeping children out of the system, would benefit everyone in the community.

Assemblywoman Ohrenschall asked for clarification as to whether more information was being gathered about the juveniles than had been gathered before. Senator Wiener said the state already substantial data on each juvenile collected by the local authorities, and the economic background information would be in addition to that data. For purposes of analysis, there would be three substantial components: ethnic, racial, and economic background. Assemblywoman Ohrenschall asked if that information would be used for any other purpose or only for the study. Senator Wiener said it really was not just a study; rather, it was a way of doing business. It would include collecting data, doing an analysis, developing recommendations, and passing the information to the state where a statewide report would be compiled. Assemblywoman Ohrenschall asked if there was any chance that the information could be used to prove a "family was too poor." Senator Wiener said that was not the intent of S.B. 232; it was to gather data to keep children out of the system. Mr. Pugh said he dealt with the delinquency court, which did not deal with custody issues.

Chairman Anderson made comments regarding the lack of statistical information from the courts on a regular basis. Having that information would backup the intention to keep children out of the prison system. Chairman Anderson did not propose to put the prison system out of business; he just would like

it to have a smaller population. Ms. Smith said the intent was to obtain information in order to make better decisions.

Jan Gilbert, Progressive Leadership Alliance of Nevada (PLAN), said she supported S.B. 232. She felt it would be a tool for planning, prevention, and services, and it would benefit all the communities.

Bobbie Gang, Lobbyist, Nevada Women's Lobby, said she supported S.B. 232.

Dr. Jane Foraker-Thompson, Religious Alliance in Nevada (RAIN) and Episcopal Diocese of Nevada, said she supported S.B. 232.

Chairman Anderson closed the hearing on S.B. 232 and entertained a motion to do pass S.B. 232.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO DO PASS S.B. 232.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

Assemblyman Gustavson said he did not believe the economic background information needed to be collected, and he indicated he would vote against S.B. 232.

Chairman Anderson asked that the motion be withdrawn.

ASSEMBLYWOMAN OHRENSCHALL WITHDREW THE MOTION TO DO PASS S.B. 232.

ASSEMBLYMAN CARPENTER WITHDREW THE SECOND.

Chairman Anderson opened the hearing on S.B. 241.

Senate Bill 241: **Revises provisions relating to determination of whether certain** offenders **constitute menace to health, safety or morals of others. (BDR 1**6-435)

Gary Crews, Legislative Auditor, Legislative Counsel Bureau, Audit Division, said in the first week of the current legislative session, he presented an audit report on the Department of Prisons Sex Offender Certification Panel. An executive summary of that report was submitted to the committee (Exhibit F). Problems had been identified and reported to the Assembly Committee on Judiciary. Recommendations were made regarding revision of statutes to address who should be responsible for the program, who would be responsible to appoint members to the certification panel, and what the qualifications of those members should be. A Bill Draft Request (BDR) was submitted with Department of Prison language, but the Audit Division's concerns were addressed.

Rocky Cooper, Legislative Auditor, Legislative Counsel Bureau, Audit Division, said he was available for questions.

Assemblyman Carpenter asked for clarification on Section 1, specifically, how the observation would be carried out. What was involved in certifying that a prisoner had been under observation? Mr. Crews said the Department of Prisons should answer that question.

Chairman Anderson asked if a subsequent audit was planned for that department as part of the regular

scheduled audits. Mr. Crews said every two years there was a risk assessment of all state government agencies, identifying each department's goals for the next two years. It would be based on a number of factors. Mr. Crews believed he would return to do another audit.

Chairman Anderson acknowledged Rex Reed, PhD., Medical Administrator, Department of Prisons. Dr. Ted D'Amico, Medical Director, Department of Prisons, joined Dr. Reed at the witness table. Chairman Anderson said there was concern in the change of behavior of the Department of Prisons in their implementation of the new provisions for supervision of sex offenders. Dr. D'Amico said a sex offender program had already been started in Lovelock. The program identified 400 individuals, who were offered the program and were currently participating in the program. The program at Lovelock was scheduled to last approximately one year. A maintenance program had been established in southern Nevada with 200 individuals. The total number of sex offenders in the system at the time was 1,500.

Assemblyman Nolan said a bill had been passed out of the committee requiring treatment for sex offenders. Because the bill had a fiscal note, it was in the Assembly Committee on Ways and Means. That bill made the treatment mandatory, and Assemblyman Nolan asked why the mandatory provision was taken out of S.B. 241. Dr. D'Amico replied someone told him it had been taken out, but that was hearsay. Dr. D'Amico felt it was an important factor for the bill; however, whether it was in or out, the program would still be run, and it was expected to be very effective.

Chairman Anderson said the fiscal note was $13,754 for S.B. 241. That was not a part of the discussion, since Judiciary was a policy committee not a money committee, and S.B. 241 would go to the Assembly Committee on Ways and Means. Assemblyman Nolan was not concerned with the fiscal note. He was concerned with the process where inmates may not be identified as sex offenders, not participate in treatment programs, and be released without any treatment.

Dr. Reed said the fiscal note for S.B. 241 was for the Department of Prisons. The Division of Mental Health also had a fiscal note. Dr. Reed had spoken with the Legislative Counsel Bureau that should have submitted an impact statement.

Chairman Anderson said the fiscal note was not the concern. S.B. 241 was proposing a cleaner process, which would hold the prison system more clearly responsible for "ascertaining the condition of sex offenders." Dr. D'Amico said the new emphasis was toward care and programs, and some very reliable outside federal funding sources were being developed. Dr. D'Amico felt it was important that the Department of Prisons accepted ownership of the program in order to create procedures and protocols. Chairman Anderson noted there was another fiscal note to cover expenses for the State Motor Pool.

Chairman Anderson closed the hearing on S.B. 241 and entertained a motion to do pass S.B. 241.

ASSEMBLYMAN NOLAN MOVED TO DO PASS S.B. 241.

ASSEMBLYMAN GUSTAVSON SECONDED THE MOTION.

Assemblyman Carpenter said it was very important that all that could be done was done. It was important to make the best possible decision using highly qualified people to conduct the evaluations. Assemblyman Carpenter felt the language in S.B. 241 made it a good piece of legislation. Chairman Anderson agreed that with the audit recommendations and the new direction of the Department of Prisons, S.B. 241 was a strong step forward that would include better follow-through on the issue.

MOTION PASSED WITH MS. BUCKLEY, MR. COLLINS, AND MS. McCLAIN

ABSENT FROM THE VOTE.

Chairman Anderson asked Mr. Nolan to present the bill on the Assembly floor.

Chairman Anderson entertained a motion to do pass S.B. 232.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO DO PASS S.B. 232.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

Assemblyman Gustavson repeated his opposition to the bill saying he did not believe there was a need to collect more information. Assemblyman Carpenter said that collecting information, handled in the correct manner, would be a positive step.

A ROLL CALL VOTE WAS CALLED AND THE MOTION PASSED 10-2 WITH MS. ANGLE AND MR. GUSTAVSON VOTING NO, AND MS. BUCKLEY AND MR. COLLINS ABSENT FROM THE VOTE.

Chairman Anderson recessed the meeting at 9:39 a.m.

Chairman Anderson reconvened the meeting at 10:04 a.m., opened the hearing on S.B. 577 and acknowledged Senator Mark James, Clark County Senatorial District 8.

Senate Bill 577: **Revises statutory liability of corporate stockholders, directors and officers** and **increases fees for filing certain documents with secretary of state. (BDR 7-1547)**

Senator James said legislation had been processed each session updating and upgrading to ensure that Nevada's corporate laws were the best, the most inviting for business, the fairest, and the most equitable in the country. Senator James gave a brief description of what had happened over the last couple of years in corporate law. It had been a rare occasion when the fees were increased for Secretary of States transactions, the last raise in fees being in 1989. The fee increases in S.B. 577 were modest increases. The intent was to guarantee that Nevada was the "domicile of choice" for corporations around the country. Work was accomplished with the S.C.R. 19 Interim Committee of the Seventieth Session, with recommendations resulting in a number of bills that had been processed through the Senate Committee on Judiciary. Senator James believed S.B. 577 would generate approximately $30 million in the biennium for the General Fund budget. Senator James reported it was the Governor's desire to utilize these funds to assist in providing raises to the teachers in Nevada.

Senator James said S.B. 577 would accomplish many purposes. He highlighted a number of provisions of the bill and additional key data:

1. Schedule of fees
2. Liabilities of those who serve as directors of corporations as seen in the doctrine of alter ego or piercing the corporate veil
3. 172,000 corporations in Nevada
4. 35,000 bankruptcies last year in Nevada
5. Adherence to the corporate fiction
6. Required corporate formalities

Chairman Anderson interrupted Senator James and indicated that Risa Lang, Committee Counsel, had

prepared an *Explanation of Senate Bill No.* 577 (Exhibit G). Nick Anthony, Committee Policy Analyst, had prepared a summary on the *Polaris v. Kaplan* Nevada Supreme Court Case (Exhibit H).

Senator James made closing remarks, noting that a Senate amendment deleted the wording, "clear and convincing evidence" leaving the evidence standard at "preponderance of evidence" to show liability under the statute.

Senator James submitted the following exhibits without testimony:
Exhibit I – Video from Senate Judiciary Hearing May 22, 2001
Exhibit J – Letter from S. Craig Tompkins, a director of a number of public companies, in support of S.B. 577

Assemblywoman Buckley said she supported the provisions of the bill that increased the fees. As far as the liability provisions, she had lots of questions. In Section 1, where it said a court determined the issues, was it the intent to eliminate the right to a jury trial? Senator James said that was not the intent. Assemblywoman Buckley asked if it was the intent to take the decision away from a jury and place it in the hands of a judge. Senator James said S.B. 577 did not do that. Assemblywoman Buckley reported there had been some legal opinions to the contrary.

Assemblywoman Buckley called attention to provisions applying to the alter ego doctrine and added, "Why would we want to change a good law that said justice was to be the determining factor?" Senator James said many creditors would also require a personal guarantee in addition to a corporate guarantee. Fraud was not allowed; otherwise there was a predictable rule. That was justice. Assemblywoman Buckley believed "justice" was in the first version that came out of the Judiciary Committee.

Assemblyman Brower agreed with Assemblywoman Buckley's comments, but he was concerned about any lawsuit that might be prohibited as a result of S.B. 577. Senator James countered S.B. 577 prohibited no type of lawsuit.

Assemblyman Oceguera asked why the corporate veil was not predictable. Senator James said the Nevada Supreme Court case in 1987 set the standard, and hundreds of cases had been decided applying that standard.

Assemblywoman Ohrenschall noted the Polaris decision proved that corporate fiction was utilized to "sanction fraud or promote injustice." Did that mean there would be immunity unless fraud could be proven? Senator James said S.B. 577 did not provide immunity. The lower courts required proving fraud, while the higher courts only required proof of injustice. Assemblywoman Ohrenschall felt S.B. 577 would "raise the bar" from not needing to demonstrate fraud to absolutely proving fraud. Senator James agreed. Assemblywoman Ohrenschall asked if S.B. 577 eliminated gross negligence or wanton and woeful disregard, standards that came close but were not fraud. Senator James said the liability was to a third party, and they would need to show fraud.

Chairman Anderson noted he had received a conflict notice affecting S.B. 51 that made various changes pertaining to business associations and increased fees for document corrections.

Dean Heller, Secretary of State, said he wanted to read the conflict notice and return an explanation of the conflicts. He did not see it as a major conflict or that it should hold up the bill, but he was willing to work with the committee to resolve any conflicts. Chairman Anderson wanted assurance that the dollars were generated as intended; the Legal Division would compare S.B. 51 and S.B. 577. Mr. Heller said there were new articles in S.B. 51 that were not included in S.B. 577. Ms. Lang said there were three

substantive conflicts that would need to be resolved; otherwise S.B. 51 and S.B. 577 would be made consistent.

Michael Bonner, an attorney in Las Vegas, was asked by Senator James to speak on the advantages of corporations choosing Nevada as their domicile. That involved comparing the Nevada statutes to the Delaware statutes. S.B. 577 clarified issues and strengthened protections as detailed in *Nevada* Revised Statutes (NRS) 78.307. Mr. Bonner suggested that the language "promote injustice" should be deleted.

James Bilbray, former Senator, Chairman of the Senate Committee on Taxation and practicing attorney, had represented clients and sat on public boards where suing directors was used by many people as a method to recover what was perceived as wrong doings. If Nevada wanted more businesses to come into the state, benefits must be offered; protections for the directors was such a benefit.

Assemblyman Carpenter asked if Delaware had in their law what Nevada wanted to put into their statutes. Mr. Bonner said Delaware had a similar version of liability protection; however, Nevada provisions were better.

Assemblywoman Ohrenschall disclosed she was a director of a number of Nevada corporations, and she had assisted in creating many incorporations. Despite that, she would participate and vote.

Kenneth Lange, Executive Director, Nevada State Education Association, spoke in support of S.B. 577.

Chairman Anderson recessed the meeting at 10:56 a.m. to go to the Assembly floor session. The meeting would reconvene at 4:00 p.m. to continue testimony on S.B. 577.

Chairman Anderson reconvened the meeting at 4:15 p.m., made opening remarks, and noted a quorum was present. Chairman Anderson continued the hearing on S.B. 577.

Derek Rowley, President, Corporate Services Center, spoke in favor of S.B. 577.
Mr. Rowley voiced concern over rumored changes that could strip the indemnification provisions from the bill, making it a special interest amendment in favor of one or two groups.

Chairman Anderson declared such allegations were not allowed, and he asked who had made such accusations. Special interest legislation was not done. Chairman Anderson took personal affront at Mr. Rowley's remarks and voiced concern about his further testimony.

Mr. Rowley continued his testimony. He said the indemnification provisions were vital to making the package work. Mr. Rowley said Nevada was not for sale with the bill, the bill did not prevent criminal prosecution of corporate officers or directors, the bill did not prevent personal liability of corporate officers or directors where fraud existed, and the bill did not prevent individuals from holding corporations responsible for damages incurred. What the bill would do was codify the existing Nevada legal decisions and add a new level of predictability to Nevada's corporate statutes.

Mr. Rowley said there was a liability crisis in the country today. The indemnification provisions of S.B. 577 should be kept whether the fees were increased or not. Mr. Rowley believed there were misconceptions that the corporate filings were stable and the revenues from these filings were predictable. The truth was that corporate filings were a barometer of the economy. While an 8 percent annual growth in corporations was estimated by the Secretary of State's office, Nevada experienced a negative growth through the first quarter of 2001. It was not understood how price-sensitive the incorporation industry was today. There was a great deal of competition for new incorporation, and the

ease of the Internet made it simple for price comparison from state to state, service for service. Mr. Rowley said he supported S.B. 577 as written, but he could not support S.B. 577 if the indemnification provisions were removed.

Chairman Anderson said S.B. 577 provided an opportunity to take case law and put it into the relevant statute. He asked if that would be objectionable. Mr. Rowley said it would not necessarily be objectionable. In the effort to promote or market Nevada for business purposes, his company was pleased with the current provisions. The impact of the increased fees was unknown; however, to justify those fees, he believed an additional benefit was needed to keep Nevada at the forefront of the incorporation industry.

Assemblywoman Buckley asked if Wyoming had recently raised their fees. Mr. Rowley said Wyoming raised their renewal fees, creating a $40 increase over the original incorporation fees. Assemblywoman Buckley verified that S.B. 577 did not increase the renewal fees. Mr. Rowley agreed. Since the increase in revenue was based on an increase in new corporate filings, it would be necessary to "sell" Nevada on a continuing, on-going basis in order to generate the revenues.

Chairman Anderson asked Mr. Rowley if he was familiar with the *Polaris v.* Kaplan case. Mr. Rowley said he had only read a summary of the case.

Assemblyman Carpenter asked what kind of corporation would be concerned over a $50 difference in fees. Mr. Rowley said the typical "mom and pop" operation or "people with a good idea" made up a vast majority of the Nevada corporations. They were very conscientious about costs, running their business on a shoestring; they were people with a dream.

Assemblyman Brower said there seemed to be a disconnect between "the stick" of increased fees and "the carrot" of the liability law. Mr. Rowley said the language in Section 1 stabilized the expectation of companies regarding indemnification, and it did not change anything the courts were not already enforcing. Section 3, subsection 7, was very important. Assemblyman Brower then asked what the pitch or "the hook" would be when marketing Nevada. Mr. Rowley said he would pitch low fees and costs, the Nevada tax structure, liability protection, and indemnification provisions. The liability protection was a big deal for individuals.

Chairman Anderson said it was clear there was concern about retaining Section 3, subsection 7, as a crucial provision of the bill, and no other additions were needed for the bill. Mr. Rowley had no other concerns about the bill as long as the indemnification provisions were retained in the law.

Assemblyman Carpenter asked if Mr. Rowley had been talking about income tax laws. Mr. Rowley said he was talking about the lack of a state corporate income tax. Assemblyman Carpenter asked if Wyoming had a state corporate income tax. Mr. Rowley replied Wyoming did not. Assemblyman Carpenter asked if Delaware had a state corporate income tax. Mr. Rowley said Delaware had a state corporate income tax of 8.7 percent.

Assemblyman Collins asked what it would cost Nevada if people went to Wyoming to incorporate. Mr. Rowley said the way the bill was currently written, it was not significant if Nevada lost a large number of corporations to Wyoming. An individual who took a corporation to "domesticate" in Wyoming could do so for approximately $200, and Wyoming had provisions in their law that allowed that corporation to carry its corporate history with it as if it had always existed in Wyoming.

Chairman Anderson asked Mr. Rowley if his company would recommend more corporations in

Wyoming over Nevada if the fees increased. Mr. Rowley said his sale staff did not make that decision; they provided the information, and the decision was left up to the customer. Chairman Anderson asked if the "mom and pop" corporations understood the indemnification provisions that Mr. Rowley was trying to protect. Mr. Rowley said they might not have a full understanding of those provisions, which was even more reason to have those provisions in place.

John Olive, President, Nevada Association of Listed Resident Agents (NALRA), represented 35 resident agent companies that collectively represented 50,000 to 55,000 corporations organized within the state of Nevada. Mr. Olive spoke in support of S.B. 577. The value of codifying case law would allow prospective incorporators to assess the likelihood of success in defending themselves in a case in which they might be drawn in as defendants. Mr. Olive said that the indemnification extension would essentially substitute for the lack of heritage of corporate jurisprudence until the business court had sufficient case law to provide a similar depth of jurisprudence as seen in Delaware.

Chairman Anderson asked how the bill would impact the resident agent industry. Mr. Olive said a study was done at the Advanced Research Institute at University of Nevada, Las Vegas to project the impact of the proposed $500 franchise fee. It was determined that the franchise fee would have precipitated an estimated 80 percent exodus of corporations from the state of Nevada. The study would need to be revised with the increase of fees to reflect their impact; it was estimated there would be some reduction in the number of corporations being formed. Chairman Anderson queried, that by offering the limited liability as provided in S.B. 577, how many additional companies would be attracted to Nevada. Mr. Olive quoted growth projections of 12 to 15 percent.

Assemblyman Brower stated Section 2, page 2, would eliminate a current statutory provision that allowed a corporation to include in its Articles of Incorporation certain liability limiting provisions. Mr. Olive agreed. Assemblyman Brower said Section 3, subsection 7, page 3, addressed the same issue, only making it automatic. Mr. Olive agreed. Assemblyman Brower said the bill would then achieve the same result as current law; it would not be a substantive change in the law. The real issue addressed by the bill would then be the alter ego doctrine in Section 1. Mr. Olive said Section 3, subsection 7, might seem redundant with Section 2, but it was the same spirit as Section 1 that codified current case law; Mr. Olive agreed with Assemblyman Brower's assessment of the bill.

Rose McKinney-James, Clark County School District, offered "unqualified" support for S.B. 577. Ms. McKinney-James believed the funding from the bill would be used for salaries for teachers and to fund those programs and services that had been curtailed.

Bob Crowell, Nevada Trial Lawyers Association (NTLA), supported the fee and funding mechanism set forth in S.B. 577, but was concerned about the corporate immunity. S.B. 577 changed the corporate immunity statutes in Nevada in three ways:

1. Codified the alter ego doctrine or piercing the corporate veil, by changing the case law with respect to proof required to pierce the corporate veil.
2. Extended the officers' and directors' immunity currently in Nevada law to other individuals.
3. Shortened the statute of limitations for bringing actions against officers and directors from three years to two years.

Bill Bradley, Nevada Trial Lawyers Association (NTLA), posed a scenario involving Chairman Anderson and Assemblyman Carpenter for purposes of explaining the ramifications of forming and operating a corporation in Nevada, and, unfortunately, of experiencing fraud in their dealings with another corporation.

Pat Cashill, Nevada Trial Lawyers Association (NTLA), said Nevada had 44 years of corporate case law going back to 1957. The key to the judicial history in Nevada on that issue was the court took the position that there was no fixed criteria to use the alter ego doctrine to pierce the corporate veil. The Polaris decision talked about a number of factors that "would sanction fraud or promote injustice" and could lead to piercing the corporate veil:

1. Under-capitalization
2. Co-mingling of funds
3. Unauthorized diversion of funds
4. Treatment of corporate assets as individual's own
5. Failure to observe corporate formalities

Mr. Cashill went on to suggest language retentions and deletions in S.B. 577. He was "gravely" concerned and believed it would be bad social policy to enact the bill as written.

Chairman Anderson asked how the "Bubba and the Cowboy" corporation would be affected if S.B. 577 was enacted. Mr. Bradley agreed the corporation would be left "holding the stick." The importance of the Polaris decision (Exhibit K) was seen where the Supreme Court elected to follow the "promote injustice" standard. Trying to prove fraud was an extremely tough burden; fraud was a state of mind, and it was tough to prove a state of mind. Mr. Bradley believed it was important to amend S.B. 577 to include the language "or promote injustice."

Assemblyman Brower asked why a criteria "less than fraud" would be allowed to be used as the standard to pierce the corporate veil. Mr. Crowell said it was difficult to articulate what constituted fraud or the various circumstances that might lead to or give rise to an injustice sufficient to pierce the corporate veil. He believed the Supreme Court answered that question on page 3, Section [2][3] of Exhibit K where it stated, "It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice." The Polaris decision continued on the top of page 4 of Exhibit K, "There is no litmus test for determining when the corporate fiction should be disregarded; the result depends on the circumstances of each case." Mr. Bradley said there were circumstances where it "may not be fraud," but you knew it was wrong. Assemblyman Brower said, "If it walks, talks, and swims like fraud you should be able to prove fraud."

Assemblyman Collins reminded the committee to look at the bigger issue of S.B. 577. Was the issue to deal with the Polaris decision or find money for the teachers? Mr. Bradley was in support of funding teacher salaries; however, it was not necessary to significantly change a strong 50-year judicial doctrine in order to accommodate that fee increase. That was why NTLA was offering an amendment.

Assemblyman Manendo asked if S.B. 577 had been in place a couple of years ago, how would that have affected the "Harley Harmon incident" in southern Nevada? Mr. Cashill said the current language in Section 3, subsection 7, page 3, provided immunity to officers or directors for any action committed as an officer or director. He did not believe it was the intent to extend immunity "that far." Mr. Cashill suggested some "limiting" language should be inserted that would limit the immunity to corporate activities in a legitimate sense. Mr. Bradley said Section 3, subsection 7, stated, "unless otherwise provided in NRS…" and that included mortgage and securities issues; there was some protection because it referred to existing provisions in the NRS. Without an amendment, Section 3, subsection 7, would eliminate third party damages, and that was not the intent. Mr. Cashill said there was an inconsistency between existing law in Section 2 that limited the liability and Section 3, subsection 7 that seemed to extend unlimited immunity.

Assemblywoman Buckley asked, when viewing the issue of fraud versus injustice, what definition of fraud would be used if the language of S.B. 577 was approved. Would it be the common law definition of fraud or the definition in NRS 42.001? Mr. Cashill said in the case *Lubey v.* Barba the common law definition was used as a standard. He did not know whether the statute or the common law definition would apply in any case. Assemblywoman Buckley said perpetrators of fraud could "get away with it" by saying there was "no intentional misrepresentation" to deprive a creditor. Mr. Cashill agreed.

Assemblyman Brower disagreed, saying he believed, in a case of "looting the corporation," fraud could be proven. Assemblyman Brower said Section 3, subsection 7, did not give unlimited immunity because it said, "unless it was proven there was fraud, intention misconduct or known violation of the law." Mr. Crowell disagreed with Assemblyman Brower and submitted an amendment (Exhibit M) that clarified a director could not be shielded from liability for acts outside the corporation, which left intact the rights of a third party.

Chairman Anderson asked for an explanation of the Loomis letter (Exhibit L). Mr. Cashill recalled the circumstances of the case and subsequent judgment against Lange Financial Corporation. The Loomis family had great difficulty collecting the judgment amount, but was able to use the alter ego doctrine to reach through numerous corporate shells to reach the assets of the corporation in order the satisfy the judgment.

Mr. Crowell made closing statements regarding the proposed amendment (Exhibit M) from the NTLA. It included five sections:

1. Rewrote Section 1 using language drawn directly from the Polaris decision.
2. Amended language in Section 3, subsection 7, to clarify that the immunity from liability extended to an officer or director only "to the corporation or its stockholders" and to include the word "or" when listing the two actions that might cause liability.
3. Changed the effective date language to include "shall apply to claims that arise after October 1, 2001" in Section 59, subsection 2(b).
4. Changed Section 8 to restore the statute of limitations to three years.
5. Deleted Section 55 since legislative intent should not be a part of the bill.

Chairman Anderson asked if the proposed amendment (Exhibit M) had been shared with Senator James. Mr. Cashill said they "talked."

Assemblyman Oceguera asked for clarification from Mr. Bradley concerning comments made relating to Section 2, and to Section 3, subsection 7. Mr. Bradley reiterated the changes as outlined in the NTLA proposed amendment (Exhibit M).

Assemblyman Carpenter said on page 3, line 21, the NTLA proposed to delete "unless it is proven that," and asked why would the NTLA want that taken out. Mr. Bradley said that was a typo; it was their intent to retain that language.

Chairman Anderson clarified the language of the proposed amendment and asked the NTLA to submit a clean copy with any additional changes.

Danny Thompson, Executive Secretary-Treasurer, Nevada State American Federation of Labor-Congress of Industrial Organization (AFL-CIO), said Clark County had a critical need for 1,200 new teachers in 2001-2002, but they had only been able to recruit 500. Mr. Thompson shared statistics regarding high school dropouts, prison inmates, low teacher salaries, portable classrooms, and lack of books. The problem could not wait; it needed to be solved in the current session. The problem was not going away!

Dave Howard, Reno-Sparks Chamber of Commerce, spoke in support of S.B. 577 with some reservations; he felt the bill did not do enough. Although it was believed that the bill was written to attract new corporations to Nevada, no one had discussed attrition if the economy "goes down the dumps;" there was no guarantee that the economy would continue to encourage growth. And even though Mr. Crowell said the bill would not be retroactive, Mr. Howard felt the provisions of the bill would also apply to those who were already incorporated.

Kami Dempsey, Director, Government Affairs, Las Vegas Chamber of Commerce, spoke in support of S.B. 577 as written. She said it was a first step to finding a solution to help teachers obtain a salary increase without negatively impacting the economy and disproportionately hurting small businesses. The Las Vegas Chamber of Commerce and the business community recently completed a position paper outlining their intention to work during the interim to find a tax package that would fulfill the state's financial needs over the next ten years.

Sam McMullen, Las Vegas Chamber of Commerce and the Retail Association of Nevada, said S.B. 577 contained a very serious issue. Mr. McMullen spoke in support of the bill, but he did not believe it needed an amendment. He reiterated his commitment to work during the interim on a package to be presented to the legislature at the Seventy-Second Session. Mr. McMullen said the bill had been looked at from both sides, as defendants and as plaintiffs, and he believed it to be a fair statement of the law, one that needed to be secured and passed in its current form. He said the real issue was sanctioning fraud; promoting justice was vague and too broad.

Chairman Anderson asked if Mr. McMullen had heard the testimony of the Secretary of State regarding the conflicts between S.B. 51 and S.B. 577. Mr. McMullen said he did not have a problem with conflict amendments; he did have a problem with changing the bill as written. Chairman Anderson stated there were time factors in the bill that may have led to a misunderstanding of the real intent of the bill. Mr. McMullen said he had no problems with the effective date of the law relating to claims. Chairman Anderson asked if Mr. McMullen participated in the drafting of the bill. Mr. McMullen said he had not.

Assemblyman Collins reiterated his question related to the "real issue" under discussion. Was it a test or was it a precedent with strings? Mr. Collins asked, "Are we doing the right thing?" Mr. McMullen said the real question should be, "How do we guarantee that we actually get out of this bill what we said we were going to get out of it?" In order to increase fees, new provisions were necessary to drive revenue, to secure it, and to expand it in the future.

Assemblywoman Buckley verified the fees that would increase and those that would remain the same. It was good to be a business-friendly state; it was good for the economy. She questioned why an $80 increase required the kind of immunity provisions that could hurt other Nevada businesses? Mr. McMullen did not believe those immunity provisions would hurt any existing Nevada businesses; they were good for Nevada business. In his judgment, he did not think the trade was $80 for those provisions; rather, it was a resolution of budget issues, a marketing tool, and a clarification of current law.

Assemblyman Brower said he did not see the linkage between the fee increase and the change in policy. Regardless of whether the fees were increased, the proposed change in the law was a good policy change for Nevada. Mr. McMullen confirmed that would be good for Nevada. What people wanted most of all was to know what the rules of law were. It would be good for new corporations and would be clarification for existing corporations.

Chairman Anderson asked if Delaware or any other state had similar provisions. Why not take case law

and put that into statutory provision? Mr. McMullen said Delaware did have more case law to rely on, but that might not be the question. It was easy for Delaware to attract corporations, especially on the east coast. Nevada needed to create a better attraction for corporations.

Chairman Anderson said the advantage of case law was that once it was on the books, it was there. Like common law, you could continue to make reference to it as it continued to evolve. Case law became a much more reliable predictor of behavior in a litigant society. Mr. McMullen disagreed. The issue was whether or not the stream of revenue was secured. Out-of-state corporations did not want case law to be a determining factor, as they could be the next case. Those corporations wanted to know that the rules were secure. Chairman Anderson said the question was then whether public policy should be put at-risk to fund education. Mr. McMullen did not think there was any risk; it was a clear statement of the policy.

Mary Lau, Executive Director, Retail Association of Nevada, said the issue of increased fees had been brought forward previously without result, and now that issue was being revisited.

Chairman Anderson asked for further testimony. There being none, he announced the committee would be recessed until 9:30 a.m. tomorrow morning. The testimony phase was at an end. The committee was waiting for additional information from the Legal Division regarding the fiscal impact and those sections in conflict.

Assemblywoman Koivisto asked, if it was such good policy, why had it never come up before. The question was discussed among committee members. Chairman Anderson queried about an interim committee study done by Senator James. Assemblyman Brower was not aware of any Bill Draft Request (BDR) recommendation nor did he recall it being a discussion topic at any of the meetings. Assemblyman Manendo said the interim study committee broke into several panels, and the issue was not raised on his panel.

Ray Bacon, Nevada Manufacturers Association, said during the Business Law Committee, chaired by Mr. Taylor, discussed adding certainty to the law in two separate subcommittees. Mr. Bacon did not recall that specific issue being discussed.

Mr. McMullen said those types of issues were discussed, but until raising fees became a viable option, the counterbalance of those provisions was not necessary.

Chairman Anderson recessed the meeting at 6:46 p.m. until 9:30 a.m. the next morning.

Chairman Anderson reconvened the meeting at 10:00 a.m., the following day, made opening remarks, and noted a quorum was present. Discussion of S.B. 577 resumed.

Chairman Anderson drew attention to a letter from the Secretary of State's office (Exhibit N) that was submitted in response to the request made by the committee. The letter brought clarity to the provisions of S.B. 577 as to when the various sections would apply and why there were different dates for implementation.

Chairman Anderson announced a short recess to handle trouble with the Internet connection; the meeting reconvened in three minutes.

Renee Lacey, Chief Deputy, Secretary of State, said currently initial lists were currently not required for LLCs, LPs, and entities other than corporations; they only filed annual lists. S.B. 51 would require them to submit initial lists, resulting in the need for additional staff in order to maintain the 10-day money-

back guarantee.

Chairman Anderson cautioned that conflicts might exist between S.B. 51 and S.B. 577 that would require amendments to make them consistent. As such, the dollar amounts currently in S.B. 577 might not be in the final draft. Mr. Lacey said that issue had been discussed with the Legal Division that would be preparing the amendment. Ms. Lang said S.B. 51 had already been enrolled, but would be amended to be consistent with S.B. 577.

Assemblywoman Buckley said the appropriation in Section 58 seemed excessive. Ms. Lacey said new positions had been discussed with the Fiscal Division, and most would come out of the Special Services Funds. The request to use those Special Services Funds for technology or positions in the office had to go through the Interim Finance Committee. The appropriation in Section 58 came from the portion that went into the Special Services Fund and not from the portion of the increased fees that would go to the General Fund to assist the teachers. Anything over $2 million that remained in the Special Services Fund at the end of the fiscal year went to the General Fund. The appropriation also included estimated funding for leased space. The additional staff, besides reviewing forms and preparing for the new services and the additional review required by the new services, would also staff a counter service that would provide a 2-hour and 24-hour expedited document service.

Assemblywoman Buckley asked why that funding had not been included in the separate bill where the new services were proposed and the new staff was requested. Ms. Lacey said requiring the new lists for LLCs and LPs was a new service not previously proposed. The Secretary of State's budget had been closed; 20 new positions were requested, and the Assembly Committee on Ways and Means approved 12. The Committee on Ways and Means asked the Secretary of State's Office to obtain funding for the remaining staff through S.B. 577 since the additional staff would be needed for the proposed services in the bill.

Assemblyman Manendo asked why the proposed amendment by the NTLA was approved by the Senate Judiciary Committee and then was taken out. Chairman Anderson verified that the proposed amendments presented to the committee were the same amendments that had been presented in the Senate. Mr. Crowell said the amendment presented in the Senate had been slightly different; it had been passed and then reconsidered the next day. He did not know why. Chairman Anderson requested that the amendment be redrafted, with a clean copy provided to the committee. Mr. Crowell submitted a new copy of the proposed amendment (Exhibit O) for the committee's consideration.

Chairman Anderson recessed the meeting at 10:26 a.m. to be reconvened upon the call of the Chair. There being no further business on that day, the meeting was adjourned at 2:30 p.m.

RESPECTFULLY SUBMITTED:

Deborah Rengler
Committee Secretary

APPROVED BY:

_____

Assemblyman Bernie Anderson, Chairman

DATE:_____

MINUTES OF THE MEETING OF THE ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-First Session
May 30, 2001

The Committee on Judiciarywas called to order at 7:55 a.m. on Wednesday, May 30, 2001. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada. Portions of the meeting were simultaneously videoconferenced in Room 4401 of the Grant Sawyer Office Building, Las Vegas. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr.	Bernie Anderson, Chairman
Mr.	Mark Manendo, Vice Chairman
Mrs.	Sharron Angle
Mr.	Greg Brower
Ms.	Barbara Buckley
Mr.	John Carpenter
Mr.	Jerry Claborn
Mr.	Tom Collins
Mr.	Don Gustavson
Mrs.	Ellen Koivisto
Ms.	Kathy McClain
Mr.	Dennis Nolan
Mr.	John Oceguera
Ms.	Genie Ohrenschall

GUEST LEGISLATORS PRESENT:

Senator Maurice Washington, Washoe Senate District 2
Senator Valerie Wiener, Clark Senate District 3
Senator Mark James, Clark Senate District 8
Speaker Richard Perkins, Assembly District 23
Assemblyman David Goldwater, Assembly District 10

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Risa B. Lang, Committee Counsel
Deborah Rengler, Committee Secretary

OTHERS PRESENT:

Dean Heller, Secretary of State
Renee Lacey, Chief Deputy Secretary of State
Judge Scott Jordan, Second Judicial District Court, Family Division
Leonard Pugh, Director, Washoe County Department of Juvenile Services
Madelyn Shipman, Assistant District Attorney, Civil Division, Washoe County District Attorney; Legislative Representative, Nevada District Attorney's Association
John Morrow, Chief Deputy, Washoe County Public Defender
Dorothy Nash Holmes, Special Assistant to the Director, Department of Prisons
Glen Whorton, Chief, Classification & Planning, Department of Prisons
Steve Barr, Nevada Corrections Association
Clay Thomas, Deputy Chief, Division of Parole and Probation, Department of Motor Vehicles and Public Safety (DMV&PS)
Kirby Burgess, Director, Clark County Family and Youth Services
Willie Smith, Deputy Administrator for Youth Corrections, Division of Child and Family Services
Jan Gilbert, Progressive Leadership Alliance of Nevada (PLAN)
Bobbie Gang, Lobbyist, Nevada Women's Lobby
Dr. Jane Foraker-Thompson, Religious Alliance in Nevada (RAIN) and Episcopal Diocese of Nevada
Gary Crews, Legislative Auditor, Legislative Counsel Bureau, Audit Division
Rocky Cooper, Legislative Auditor, Legislative Counsel Bureau, Audit Division
Dr. Ted D'Amico, Medical Director, Department of Prisons
Rex Reed, PhD., Medical Administrator, Department of Prisons
Michael Bonner, representing self
James Bilbray, representing self
Kenneth Lange, Executive Director, Nevada State Education Association
Derek Rowley, Corporate Services Center
John Olive, President, Nevada Association of Listed Resident Agents (NALRA)
Rose McKinney-James, Clark County School District
Bob Crowell, Nevada Trial Lawyers Association (NTLA)
Bill Bradley, Nevada Trial Lawyers Association (NTLA)
Pat Cashill, Nevada Trial Lawyers Association (NTLA)
Danny Thompson, Executive Secretary-Treasurer, Nevada State American Federation of Labor-Congress of Industrial Organization (AFL-CIO)
Dave Howard, Reno-Sparks Chamber of Commerce
Kami Dempsey, Director, Government Affairs, Las Vegas Chamber of Commerce
Sam McMullen, Las Vegas Chamber of Commerce and the Retail Association of Nevada
Mary Lau, Executive Director, Retail Association of Nevada
Ray Bacon, Nevada Manufacturers Association

Chairman Anderson made opening remarks and noted a quorum was present.

Chairman Anderson opened the hearing on S.B. 137.

Senate Bill 137: **Increases number of district judges in second and eighth judicial** districts. **(BDR 1-521)**

Judge Scott Jordan, Second Judicial District Court, Family Division, spoke in favor of S.B. 137. Judge Jordan submitted statistics (Exhibit C) from the court indicating a dramatic increase in the number of family court cases; the numbers alone justified the need for a new judge.

Chairman Anderson said there were currently 11 judges in the Second Judicial District Court and S.B. 137 would increase that number to 12. Of that 12; four were Family Court judges. Chairman Anderson read information from the Administrative Office of the Court's Annual Report, quoting statistics in Nevada for the Eighth Judicial District Court in comparison to the Second Judicial District Court.

Assemblyman Carpenter asked what had caused the substantial increase in juvenile filings. Judge Jordan said the growth in population of the county was the main contributor to that increase.

Leonard Pugh, Director, Washoe County Department of Juvenile Services, said since 1990 Washoe County had experienced approximately a 181 percent increase in person-related crimes and a 280 percent increase in other crimes. There were more juveniles under drug testing clauses, house arrest, and search clauses. Because juveniles were being held accountable for those offenses, it had resulted in higher levels of supervision and an increase in court time. Chairman Anderson said the increase was a result of previous legislation that allowed intervention at earlier stages. Mr. Pugh said that while the number of petitions being filed was increasing, since 1995 the commitment rate to state institutions had decreased significantly. Chairman Anderson said it was better to have more judges that cost less than the long-term cost of incarceration and the creation of lifetime criminals; it would actually result in a cost-savings.

Madelyn Shipman, Assistant District Attorney, Civil Division, Washoe County District Attorney, and Legislative Representative for the Nevada District Attorney's Association, spoke in support of S.B. 137. She said that while the cost of the judge was a state responsibility, Washoe County was ready to assume the cost of the support staff and space requirements. Chairman Anderson said there was also an "overcrowded" court facility question to be dealt with in Washoe County, namely, would court space be shared. Ms. Shipman said county management was aware of the current status and would have space available by January 2003. Judge Jordan said a committee was already impaneled made up of court representatives, general services, and county representatives to resolve the problem.

John Morrow, Chief Deputy, Washoe County Public Defender, spoke in favor of S.B. 137. He supervised the Family Court Division of the Public Defender's Office in Washoe County. The overcrowding problem in Family Court was having an impact on dealing with the families. Having another judge would help the families and "do good things" for them as far as getting cases in and out of the system quickly.

Chairman Anderson entertained a motion of do pass for S.B. 137.

ASSEMBLYWOMAN ANGLE MOVED TO DO PASS S.B. 137.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

Chairman Anderson noted S.B. 137 was already referred to the Assembly Committee on Ways and Means.

MOTION PASSED WITH MRS. KOIVISTO, MR. NOLAN AND MS. BUCKLEY ABSENT FROM THE VOTE.

Chairman Anderson opened the hearing on S.B. 193.

Senate Bill 193: Makes various changes concerning department of prisons. (BDR 16-311)

Dorothy Nash Holmes, Special Assistant to the Director, Department of Prisons, said a joint introduction of S.B. 193 was made on March 12, 2001. Ms. Holmes said there were four highlights:

1. Changed the name of Department of Prisons to Department of Corrections. Nevada was the last "state in the union" that used the "Department of Prisons," which had disqualified Nevada from some federal funds.
2. Created an offender management division using funds from an existing vacant and highly paid psychiatrist position. The offender management division would manage and coordinate all programming. There would be no fiscal impact; it would actually result in an $11,000 savings over the biennium.
3. Established a facilities orientation training in the prisons, teaching the officers how to do their basic job.
4. Implemented structured living, using a disciplined progressive opportunities approach, and unit management, a widely accepted management tool in corrections.

Chairman Anderson said S.B. 193 would go to the Assembly Committee on Ways and Means.

Glen Whorton, Chief, Classification & Planning, Department of Prisons, and Steve Barr, Nevada Corrections Association, were available for questions.

Chairman Anderson asked for questions from the committee members and further testimony. There being none, he closed the hearing on S.B. 193 and entertained a do pass motion.

ASSEMBLYWOMAN ANGLE MOVED TO DO PASS S.B. 193.

ASSEMBLYMAN GUSTAVSON SECONDED THE MOTION.

MOTION PASSED WITH MRS. KOIVISTO, MR. NOLAN, AND MS. BUCKLEY ABSENT FROM THE VOTE.

Chairman Anderson said he would present S.B. 137 on the Assembly floor.

Chairman Anderson asked Assemblyman Collins to present S.B. 193 on the Assembly floor.

Chairman Anderson opened the hearing on S.B. 194 and acknowledged Senator Maurice Washington, Washoe County Senatorial District 2.

Senate Bill 194: **Makes changes pertaining to interstate compacts for supervision of** offenders. **(BDR 16-107)**

Senator Washington said S.B. 194 was a bill for the Division of Parole and Probation (P&P) that had been worked on for the past 18 months. It provided for the ratification of the old interstate compact, under which Nevada was currently operating, for the supervision and movement of adult offenders from one jurisdiction to another. The current interstate compact had not been ratified in 50 years. The compact set up an interstate commission for adult supervision; it organized, operated, and set up rules of authority; and set up select members from the state council which might be non-voting members to

include governors, legislators, state judges, attorneys general, and/or victims of crime. The ratification of that interstate compact must be completed by 35 states; 21 states had already ratified the new interstate compact. The interstate compact was necessary to enable Nevada to transfer offenders to or accept offenders from other states; it would give Nevada a voice on the commission. The Division of Parole and Probation (P&P) needed S.B. 194; the appropriation would be referred to the Assembly Committee on Ways and Means.

Chairman Anderson asked what was the policy question being addressed and how did it compare or change what was currently being done. Would Nevada surrender authority by complying with that compact?

Senator Washington said Nevada would not surrender any authority. Nevada could actually negate the compact by passing legislation that would exempt Nevada from the interstate compact. Nevada would maintain its jurisdictional authority as the state of Nevada. The interstate compact allowed Nevada an advantage in negotiating disputes and ratifying resolutions and preempted the federal government from taking over the supervision of adult offenders, including their movement from one state to another.

Chairman Anderson asked what the advantage would be to have a state senator and assemblyman sit on the commission. Would it become more political than administrative in nature? Senator Washington said the advantage to sitting on the commission would be to review the public policy and bring back to the legislative body new rules or issues that might be of concern. It would give Nevada a voice and a vote. Chairman Anderson said it was his understanding that the Chairman of the Senate Committee on Judiciary preferred that a common commission look at all such judicial questions, rather than working piecemeal.

Senator Washington said the interstate compact was already in existence, and Nevada was abiding by that interstate compact. S.B. 194 ratified that compact with new provisions to deal with the "new sophistication of mobilization and movement" of adult offenders. It allowed P&P to know the whereabouts of adult offenders and from what state they came. If they re-offended, it would give Nevada the jurisdiction, the power, and the authority to send the re-offenders back to their state of origin. It would be wise and prudent to have a legislator serve on the state council.

Chairman Anderson said Article 14 of the compact detailed the binding effect of the compact on other laws; "the compact had the force and effect of statutory law and take precedence over conflicting state law." Chairman Anderson was concerned that the compact could "override the actions of state law." Was there "prolonged discussion" in the Senate over that issue?

Senator Washington said there was a "long dialogue and concern" about the ratification of the compact and if it would supercede state authority. To assure that was not the case, the bill was amended to say the Nevada Constitution would supercede any rules or regulations promulgated by the commission. Senator Washington had served twice with the Council of State Governments (CSG) concerning the issue. Provisions were adjusted in the compact to make sure that states still had the ultimate authority regarding the operation, implementation, and the use of the compact. Nevada was currently a part of the compact. Regardless of whether or not Nevada decided to ratify the compact, after the 35th state adopted the compact, Nevada would be bound by it anyway.

Assemblywoman Ohrenschall asked what was the point of having non-voting members on the commission. She asked Senator Washington to clarify why Nevada would be bound by the compact after the other 35 states ratified it.

Chairman Anderson clarified that Nevada was currently participating with the interstate compact, even though Nevada had not formally adopted the statutory conditions. Senator Washington said Nevada was part of the old compact. Chairman Anderson said if S.B. 194 moved forward, Nevada would continue doing what it had been doing. Senator Washington agreed.

Clay Thomas, Deputy Chief, Division of Parole and Probation (P&P), Department of Motor Vehicles and Public Safety (DMV&PS), said the state of Nevada was in compliance with the current interstate compact that had existed since 1937. S.B. 194 would ratify the contract that would hold all states to a "level playing field." It would ensure there was consistency with the interstate compact and addressing of public safety issues for individuals who traveled into or from Nevada. Nevada currently had a 2-to-1 ratio of offenders leaving Nevada compared to those entering Nevada. There were 2,303 supervised offenders outside of Nevada compared to 1,085 individuals who transferred into Nevada from other states.

Assemblywoman Ohrenschall asked for clarification regarding whether Nevada could drop out of the interstate compact. Mr. Thomas said there was always the potential to drop out, but Nevada would then have no voice of authority and could become a dumping ground for offenders, without any recourse for the state.

Chairman Anderson clarified that because Nevada was part of the compact, Nevada did not retain the supervision expense for those offenders transferred to other states, and Nevada could charge those offenders coming into Nevada for their supervision. Before any individuals were transferred in or out of Nevada, paperwork was exchanged detailing supervision requirements and any special conditions ordered by the states.

Chairman Anderson asked how a state could send an individual into Nevada without Nevada authorities knowing it. Mr. Thomas said there was an obligation to register, but under the existing compact, there were no sanctions against a state that failed to comply with the compact. With the ratification of the new compact, a state that willfully ignored the compact would be held accountable. Mr. Thomas recounted the Nevada request and transfer process and paperwork.

Chairman Anderson asked if there were any questions from committee members. There being none, he entertained a motion to do pass S.B. 194.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO DO PASS S.B. 194.

ASSEMBLYWOMAN ANGLE SECONDED THE MOTION.

MOTION PASSED WITH MRS. KOIVISTO, MR. NOLAN, AND MS. BUCKLEY ABSENT FROM THE VOTE.

Chairman Anderson asked Assemblywoman Ohrenschall to present the bill on the Assembly floor.

Chairman Anderson opened the hearing on S.B. 232.

Senate Bill 232: **Provides for collection of information on economic background of each** child **referred to system of juvenile justice and requires each juvenile probation department** to **determine whether children of racial or ethnic minorities and children from** economically **disadvantaged homes are receiving disparate treatment in system of juvenile** justice. **(BDR 5-573)**

Senator Valerie Wiener, Clark County Senatorial District 3, presented S.B. 232, one of four bills requested by the A.C.R. 13 Interim Study Committee on Juvenile Justice, which she had the privilege to Chair during the last interim. S.B. 232 proposed to expand the existing information collected by the juvenile courts and juvenile probation to include data on the juvenile's economic background. To eliminate a large fiscal note, local juvenile probation departments would analyze the information collected to determine whether children of racial or ethnic minorities and children from economically disadvantaged homes were receiving disparate treatment in the juvenile justice system. Based on the information, departments would develop appropriate recommendations to address any such disparate treatment. The results of their analysis and recommendations would be submitted to the Division of Child and Family Services (DCFS). Once the DCFS had received the counties' reports, those reports would be compiled into a single publication.

Senator Wiener submitted letters from Ms. Willie Smith, Deputy Administrator, Youth Correctional Services, Division of Child and Family Services (Exhibit D), and from Kirby Burgess, Director, Department of Family and Youth Services (Exhibit E), both supporting S.B. 232.

Senator Wiener said the issue was very important to both the A.C.R. 57 (1997-1998) and A.C.R. 13 (1999-2000) Interim Committees on Juvenile Justice. It was agreed that the legislature should take steps to address that concern, especially as it impacted the juvenile justice system, young people, families, and communities.

Chairman Anderson said the bill applied to counties with over 400,000 in population or counties with under 100,000 in population. As such, what happened to Washoe County? Mr. Pugh replied that Washoe County had a probation department within its juvenile services; Washoe County considered themselves a local juvenile probation department because it was one of their divisions.

Mr. Burgess said Clark County Family and Youth Services had a probation division within their agency and they were ready to participate in the process. It should be noted that the information was not being collected to place blame; rather, it was an effort to keep youth out of the system. A recent report by a national consultant said that Clark County was doing a better job of keeping ethnic minority youth out of the juvenile justice system. That data would help determine what was being done and why it was done.

Chairman Anderson asked how current information was being gathered and analyzed. Mr. Burgess said Clark County had a computer system called "Family Tracks" that collected data on every child that entered the juvenile justice system. With a "tweak" to the system, the data required for S.B. 232 could be analyzed. Chairman Anderson asked how it was anticipated that the courts would get involved in the purpose of the legislation. Mr. Burgess said they currently tracked a youth upon entry into the juvenile justice system, at the detention facility, during the filing of the petition by the juvenile division of the District Attorney's Office in Clark County, as well as at all court hearings and dispositions. Chairman Anderson clarified that Mr. Burgess had taken that upon himself; the courts were not doing it for him. Mr. Burgess said his department had a good partnership with the court system, and every court action was captured for analysis.

Mr. Pugh said in Washoe County every court order was entered into the juvenile system and included when a petition was filed, what actions were taken on that petition, and what the ultimate court action was. All of that data could be retrieved. Washoe County did not currently collect the economic background on juveniles, and it might be difficult to get the parents to disclose that information. Washoe County did track minorities in the referrals to the department. Statistics included juveniles booked in the detention centers, detained at the detention centers, and committed to the state training centers. Mr. Pugh

felt the legislation was important and said Washoe County had volunteered existing resources and was adding resources to implement the provisions of S.B. 232.

Assemblyman Carpenter asked what information would be considered when collecting data on economic background. Mr. Pugh said he understood an amendment to the original bill listed the economic data to be collected. It was important to make sure that those families that could not provide certain levels of supervision or lived in lower socioeconomic areas where the crime rates were higher were not treated any differently than those who had stable, higher income homes. Mr. Burgess said income guidelines could be used as a factor. Assemblyman Carpenter said he felt "things were being taken too far" that might interfere with doing programs for the children. Income should not matter as it related to the programs. If the children had the same problems and the same needs, the side issues were not needed.

Chairman Anderson said economic diversity of the juvenile population, relative to their access to the system, had been discussed, and there had been a number of pieces of legislation that dealt with juvenile rights. Senator Wiener said that juveniles and their access to the system had been a consideration. She believed that while gathering data, if it were discovered that there was a substantial disproportionate number of children in the system from very low socioeconomic backgrounds, some of the preventative programs could be geared toward those neighborhoods and populations. The law already required that information, except economic background, be provided to the state.

Willie Smith, Deputy Administrator for Youth Corrections, Division of Child and Family Services, said she wanted to address Assemblyman Carpenter's question. Currently, except for economic background information, all the data that was needed to make determinations was available along with the information as to what services the youth were receiving when they came through the system. She believed the data collection would make sure that all children got the services they needed. Ms. Smith said the state employee who was responsible for working on the data was paid by federal dollars, and that individual would continue to assist with the responsibility for that data.

Assemblyman Carpenter said he wanted to make sure that what was "viewed as an evil" was not cured by allowing the children to fall through the cracks. He emphasized that "all" children needed to be taken care of. Mr. Pugh agreed with Assemblyman Carpenter, and there was no intention to exclude anyone from receiving any service. Mr. Pugh believed prevention programs, available to anyone within the community and focused at keeping children out of the system, would benefit everyone in the community.

Assemblywoman Ohrenschall asked for clarification as to whether more information was being gathered about the juveniles than had been gathered before. Senator Wiener said the state already substantial data on each juvenile collected by the local authorities, and the economic background information would be in addition to that data. For purposes of analysis, there would be three substantial components: ethnic, racial, and economic background. Assemblywoman Ohrenschall asked if that information would be used for any other purpose or only for the study. Senator Wiener said it really was not just a study; rather, it was a way of doing business. It would include collecting data, doing an analysis, developing recommendations, and passing the information to the state where a statewide report would be compiled. Assemblywoman Ohrenschall asked if there was any chance that the information could be used to prove a "family was too poor." Senator Wiener said that was not the intent of S.B. 232; it was to gather data to keep children out of the system. Mr. Pugh said he dealt with the delinquency court, which did not deal with custody issues.

Chairman Anderson made comments regarding the lack of statistical information from the courts on a regular basis. Having that information would backup the intention to keep children out of the prison system. Chairman Anderson did not propose to put the prison system out of business; he just would like

it to have a smaller population. Ms. Smith said the intent was to obtain information in order to make better decisions.

Jan Gilbert, Progressive Leadership Alliance of Nevada (PLAN), said she supported S.B. 232. She felt it would be a tool for planning, prevention, and services, and it would benefit all the communities.

Bobbie Gang, Lobbyist, Nevada Women's Lobby, said she supported S.B. 232.

Dr. Jane Foraker-Thompson, Religious Alliance in Nevada (RAIN) and Episcopal Diocese of Nevada, said she supported S.B. 232.

Chairman Anderson closed the hearing on S.B. 232 and entertained a motion to do pass S.B. 232.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO DO PASS S.B. 232.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

Assemblyman Gustavson said he did not believe the economic background information needed to be collected, and he indicated he would vote against S.B. 232.

Chairman Anderson asked that the motion be withdrawn.

ASSEMBLYWOMAN OHRENSCHALL WITHDREW THE MOTION TO DO PASS S.B. 232.

ASSEMBLYMAN CARPENTER WITHDREW THE SECOND.

Chairman Anderson opened the hearing on S.B. 241.

Senate Bill 241: **Revises provisions relating to determination of whether certain** offenders **constitute menace to health, safety or morals of others. (BDR 1**6-435)

Gary Crews, Legislative Auditor, Legislative Counsel Bureau, Audit Division, said in the first week of the current legislative session, he presented an audit report on the Department of Prisons Sex Offender Certification Panel. An executive summary of that report was submitted to the committee (Exhibit F). Problems had been identified and reported to the Assembly Committee on Judiciary. Recommendations were made regarding revision of statutes to address who should be responsible for the program, who would be responsible to appoint members to the certification panel, and what the qualifications of those members should be. A Bill Draft Request (BDR) was submitted with Department of Prison language, but the Audit Division's concerns were addressed.

Rocky Cooper, Legislative Auditor, Legislative Counsel Bureau, Audit Division, said he was available for questions.

Assemblyman Carpenter asked for clarification on Section 1, specifically, how the observation would be carried out. What was involved in certifying that a prisoner had been under observation? Mr. Crews said the Department of Prisons should answer that question.

Chairman Anderson asked if a subsequent audit was planned for that department as part of the regular

scheduled audits. Mr. Crews said every two years there was a risk assessment of all state government agencies, identifying each department's goals for the next two years. It would be based on a number of factors. Mr. Crews believed he would return to do another audit.

Chairman Anderson acknowledged Rex Reed, PhD., Medical Administrator, Department of Prisons. Dr. Ted D'Amico, Medical Director, Department of Prisons, joined Dr. Reed at the witness table. Chairman Anderson said there was concern in the change of behavior of the Department of Prisons in their implementation of the new provisions for supervision of sex offenders. Dr. D'Amico said a sex offender program had already been started in Lovelock. The program identified 400 individuals, who were offered the program and were currently participating in the program. The program at Lovelock was scheduled to last approximately one year. A maintenance program had been established in southern Nevada with 200 individuals. The total number of sex offenders in the system at the time was 1,500.

Assemblyman Nolan said a bill had been passed out of the committee requiring treatment for sex offenders. Because the bill had a fiscal note, it was in the Assembly Committee on Ways and Means. That bill made the treatment mandatory, and Assemblyman Nolan asked why the mandatory provision was taken out of S.B. 241. Dr. D'Amico replied someone told him it had been taken out, but that was hearsay. Dr. D'Amico felt it was an important factor for the bill; however, whether it was in or out, the program would still be run, and it was expected to be very effective.

Chairman Anderson said the fiscal note was $13,754 for S.B. 241. That was not a part of the discussion, since Judiciary was a policy committee not a money committee, and S.B. 241 would go to the Assembly Committee on Ways and Means. Assemblyman Nolan was not concerned with the fiscal note. He was concerned with the process where inmates may not be identified as sex offenders, not participate in treatment programs, and be released without any treatment.

Dr. Reed said the fiscal note for S.B. 241 was for the Department of Prisons. The Division of Mental Health also had a fiscal note. Dr. Reed had spoken with the Legislative Counsel Bureau that should have submitted an impact statement.

Chairman Anderson said the fiscal note was not the concern. S.B. 241 was proposing a cleaner process, which would hold the prison system more clearly responsible for "ascertaining the condition of sex offenders." Dr. D'Amico said the new emphasis was toward care and programs, and some very reliable outside federal funding sources were being developed. Dr. D'Amico felt it was important that the Department of Prisons accepted ownership of the program in order to create procedures and protocols. Chairman Anderson noted there was another fiscal note to cover expenses for the State Motor Pool.

Chairman Anderson closed the hearing on S.B. 241 and entertained a motion to do pass S.B. 241.

ASSEMBLYMAN NOLAN MOVED TO DO PASS S.B. 241.

ASSEMBLYMAN GUSTAVSON SECONDED THE MOTION.

Assemblyman Carpenter said it was very important that all that could be done was done. It was important to make the best possible decision using highly qualified people to conduct the evaluations. Assemblyman Carpenter felt the language in S.B. 241 made it a good piece of legislation. Chairman Anderson agreed that with the audit recommendations and the new direction of the Department of Prisons, S.B. 241 was a strong step forward that would include better follow-through on the issue.

MOTION PASSED WITH MS. BUCKLEY, MR. COLLINS, AND MS. McCLAIN

ABSENT FROM THE VOTE.

Chairman Anderson asked Mr. Nolan to present the bill on the Assembly floor.

Chairman Anderson entertained a motion to do pass S.B. 232.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO DO PASS S.B. 232.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

Assemblyman Gustavson repeated his opposition to the bill saying he did not believe there was a need to collect more information. Assemblyman Carpenter said that collecting information, handled in the correct manner, would be a positive step.

A ROLL CALL VOTE WAS CALLED AND THE MOTION PASSED 10-2 WITH MS. ANGLE AND MR. GUSTAVSON VOTING NO, AND MS. BUCKLEY AND MR. COLLINS ABSENT FROM THE VOTE.

Chairman Anderson recessed the meeting at 9:39 a.m.

Chairman Anderson reconvened the meeting at 10:04 a.m., opened the hearing on S.B. 577 and acknowledged Senator Mark James, Clark County Senatorial District 8.

Senate Bill 577: **Revises statutory liability of corporate stockholders, directors and officers** and **increases fees for filing certain documents with secretary of state. (BDR 7-1547)**

Senator James said legislation had been processed each session updating and upgrading to ensure that Nevada's corporate laws were the best, the most inviting for business, the fairest, and the most equitable in the country. Senator James gave a brief description of what had happened over the last couple of years in corporate law. It had been a rare occasion when the fees were increased for Secretary of States transactions, the last raise in fees being in 1989. The fee increases in S.B. 577 were modest increases. The intent was to guarantee that Nevada was the "domicile of choice" for corporations around the country. Work was accomplished with the S.C.R. 19 Interim Committee of the Seventieth Session, with recommendations resulting in a number of bills that had been processed through the Senate Committee on Judiciary. Senator James believed S.B. 577 would generate approximately $30 million in the biennium for the General Fund budget. Senator James reported it was the Governor's desire to utilize these funds to assist in providing raises to the teachers in Nevada.

Senator James said S.B. 577 would accomplish many purposes. He highlighted a number of provisions of the bill and additional key data:

1. Schedule of fees
2. Liabilities of those who serve as directors of corporations as seen in the doctrine of alter ego or piercing the corporate veil
3. 172,000 corporations in Nevada
4. 35,000 bankruptcies last year in Nevada
5. Adherence to the corporate fiction
6. Required corporate formalities

Chairman Anderson interrupted Senator James and indicated that Risa Lang, Committee Counsel, had

prepared an *Explanation of Senate Bill No.* 577 (Exhibit G). Nick Anthony, Committee Policy Analyst, had prepared a summary on the *Polaris v. Kaplan* Nevada Supreme Court Case (Exhibit H).

Senator James made closing remarks, noting that a Senate amendment deleted the wording, "clear and convincing evidence" leaving the evidence standard at "preponderance of evidence" to show liability under the statute.

Senator James submitted the following exhibits without testimony:
Exhibit I – Video from Senate Judiciary Hearing May 22, 2001
Exhibit J – Letter from S. Craig Tompkins, a director of a number of public companies, in support of S.B. 577

Assemblywoman Buckley said she supported the provisions of the bill that increased the fees. As far as the liability provisions, she had lots of questions. In Section 1, where it said a court determined the issues, was it the intent to eliminate the right to a jury trial? Senator James said that was not the intent. Assemblywoman Buckley asked if it was the intent to take the decision away from a jury and place it in the hands of a judge. Senator James said S.B. 577 did not do that. Assemblywoman Buckley reported there had been some legal opinions to the contrary.

Assemblywoman Buckley called attention to provisions applying to the alter ego doctrine and added, "Why would we want to change a good law that said justice was to be the determining factor?" Senator James said many creditors would also require a personal guarantee in addition to a corporate guarantee. Fraud was not allowed; otherwise there was a predictable rule. That was justice. Assemblywoman Buckley believed "justice" was in the first version that came out of the Judiciary Committee.

Assemblyman Brower agreed with Assemblywoman Buckley's comments, but he was concerned about any lawsuit that might be prohibited as a result of S.B. 577. Senator James countered S.B. 577 prohibited no type of lawsuit.

Assemblyman Oceguera asked why the corporate veil was not predictable. Senator James said the Nevada Supreme Court case in 1987 set the standard, and hundreds of cases had been decided applying that standard.

Assemblywoman Ohrenschall noted the Polaris decision proved that corporate fiction was utilized to "sanction fraud or promote injustice." Did that mean there would be immunity unless fraud could be proven? Senator James said S.B. 577 did not provide immunity. The lower courts required proving fraud, while the higher courts only required proof of injustice. Assemblywoman Ohrenschall felt S.B. 577 would "raise the bar" from not needing to demonstrate fraud to absolutely proving fraud. Senator James agreed. Assemblywoman Ohrenschall asked if S.B. 577 eliminated gross negligence or wanton and woeful disregard, standards that came close but were not fraud. Senator James said the liability was to a third party, and they would need to show fraud.

Chairman Anderson noted he had received a conflict notice affecting S.B. 51 that made various changes pertaining to business associations and increased fees for document corrections.

Dean Heller, Secretary of State, said he wanted to read the conflict notice and return an explanation of the conflicts. He did not see it as a major conflict or that it should hold up the bill, but he was willing to work with the committee to resolve any conflicts. Chairman Anderson wanted assurance that the dollars were generated as intended; the Legal Division would compare S.B. 51 and S.B. 577. Mr. Heller said there were new articles in S.B. 51 that were not included in S.B. 577. Ms. Lang said there were three

substantive conflicts that would need to be resolved; otherwise S.B. 51 and S.B. 577 would be made consistent.

Michael Bonner, an attorney in Las Vegas, was asked by Senator James to speak on the advantages of corporations choosing Nevada as their domicile. That involved comparing the Nevada statutes to the Delaware statutes. S.B. 577 clarified issues and strengthened protections as detailed in *Nevada* Revised Statutes (NRS) 78.307. Mr. Bonner suggested that the language "promote injustice" should be deleted.

James Bilbray, former Senator, Chairman of the Senate Committee on Taxation and practicing attorney, had represented clients and sat on public boards where suing directors was used by many people as a method to recover what was perceived as wrong doings. If Nevada wanted more businesses to come into the state, benefits must be offered; protections for the directors was such a benefit.

Assemblyman Carpenter asked if Delaware had in their law what Nevada wanted to put into their statutes. Mr. Bonner said Delaware had a similar version of liability protection; however, Nevada provisions were better.

Assemblywoman Ohrenschall disclosed she was a director of a number of Nevada corporations, and she had assisted in creating many incorporations. Despite that, she would participate and vote.

Kenneth Lange, Executive Director, Nevada State Education Association, spoke in support of S.B. 577.

Chairman Anderson recessed the meeting at 10:56 a.m. to go to the Assembly floor session. The meeting would reconvene at 4:00 p.m. to continue testimony on S.B. 577.

Chairman Anderson reconvened the meeting at 4:15 p.m., made opening remarks, and noted a quorum was present. Chairman Anderson continued the hearing on S.B. 577.

Derek Rowley, President, Corporate Services Center, spoke in favor of S.B. 577.
Mr. Rowley voiced concern over rumored changes that could strip the indemnification provisions from the bill, making it a special interest amendment in favor of one or two groups.

Chairman Anderson declared such allegations were not allowed, and he asked who had made such accusations. Special interest legislation was not done. Chairman Anderson took personal affront at Mr. Rowley's remarks and voiced concern about his further testimony.

Mr. Rowley continued his testimony. He said the indemnification provisions were vital to making the package work. Mr. Rowley said Nevada was not for sale with the bill, the bill did not prevent criminal prosecution of corporate officers or directors, the bill did not prevent personal liability of corporate officers or directors where fraud existed, and the bill did not prevent individuals from holding corporations responsible for damages incurred. What the bill would do was codify the existing Nevada legal decisions and add a new level of predictability to Nevada's corporate statutes.

Mr. Rowley said there was a liability crisis in the country today. The indemnification provisions of S.B. 577 should be kept whether the fees were increased or not. Mr. Rowley believed there were misconceptions that the corporate filings were stable and the revenues from these filings were predictable. The truth was that corporate filings were a barometer of the economy. While an 8 percent annual growth in corporations was estimated by the Secretary of State's office, Nevada experienced a negative growth through the first quarter of 2001. It was not understood how price-sensitive the incorporation industry was today. There was a great deal of competition for new incorporation, and the

ease of the Internet made it simple for price comparison from state to state, service for service. Mr. Rowley said he supported S.B. 577 as written, but he could not support S.B. 577 if the indemnification provisions were removed.

Chairman Anderson said S.B. 577 provided an opportunity to take case law and put it into the relevant statute. He asked if that would be objectionable. Mr. Rowley said it would not necessarily be objectionable. In the effort to promote or market Nevada for business purposes, his company was pleased with the current provisions. The impact of the increased fees was unknown; however, to justify those fees, he believed an additional benefit was needed to keep Nevada at the forefront of the incorporation industry.

Assemblywoman Buckley asked if Wyoming had recently raised their fees. Mr. Rowley said Wyoming raised their renewal fees, creating a $40 increase over the original incorporation fees. Assemblywoman Buckley verified that S.B. 577 did not increase the renewal fees. Mr. Rowley agreed. Since the increase in revenue was based on an increase in new corporate filings, it would be necessary to "sell" Nevada on a continuing, on-going basis in order to generate the revenues.

Chairman Anderson asked Mr. Rowley if he was familiar with the *Polaris v.* Kaplan case. Mr. Rowley said he had only read a summary of the case.

Assemblyman Carpenter asked what kind of corporation would be concerned over a $50 difference in fees. Mr. Rowley said the typical "mom and pop" operation or "people with a good idea" made up a vast majority of the Nevada corporations. They were very conscientious about costs, running their business on a shoestring; they were people with a dream.

Assemblyman Brower said there seemed to be a disconnect between "the stick" of increased fees and "the carrot" of the liability law. Mr. Rowley said the language in Section 1 stabilized the expectation of companies regarding indemnification, and it did not change anything the courts were not already enforcing. Section 3, subsection 7, was very important. Assemblyman Brower then asked what the pitch or "the hook" would be when marketing Nevada. Mr. Rowley said he would pitch low fees and costs, the Nevada tax structure, liability protection, and indemnification provisions. The liability protection was a big deal for individuals.

Chairman Anderson said it was clear there was concern about retaining Section 3, subsection 7, as a crucial provision of the bill, and no other additions were needed for the bill. Mr. Rowley had no other concerns about the bill as long as the indemnification provisions were retained in the law.

Assemblyman Carpenter asked if Mr. Rowley had been talking about income tax laws. Mr. Rowley said he was talking about the lack of a state corporate income tax. Assemblyman Carpenter asked if Wyoming had a state corporate income tax. Mr. Rowley replied Wyoming did not. Assemblyman Carpenter asked if Delaware had a state corporate income tax. Mr. Rowley said Delaware had a state corporate income tax of 8.7 percent.

Assemblyman Collins asked what it would cost Nevada if people went to Wyoming to incorporate. Mr. Rowley said the way the bill was currently written, it was not significant if Nevada lost a large number of corporations to Wyoming. An individual who took a corporation to "domesticate" in Wyoming could do so for approximately $200, and Wyoming had provisions in their law that allowed that corporation to carry its corporate history with it as if it had always existed in Wyoming.

Chairman Anderson asked Mr. Rowley if his company would recommend more corporations in

Wyoming over Nevada if the fees increased. Mr. Rowley said his sale staff did not make that decision; they provided the information, and the decision was left up to the customer. Chairman Anderson asked if the "mom and pop" corporations understood the indemnification provisions that Mr. Rowley was trying to protect. Mr. Rowley said they might not have a full understanding of those provisions, which was even more reason to have those provisions in place.

John Olive, President, Nevada Association of Listed Resident Agents (NALRA), represented 35 resident agent companies that collectively represented 50,000 to 55,000 corporations organized within the state of Nevada. Mr. Olive spoke in support of S.B. 577. The value of codifying case law would allow prospective incorporators to assess the likelihood of success in defending themselves in a case in which they might be drawn in as defendants. Mr. Olive said that the indemnification extension would essentially substitute for the lack of heritage of corporate jurisprudence until the business court had sufficient case law to provide a similar depth of jurisprudence as seen in Delaware.

Chairman Anderson asked how the bill would impact the resident agent industry. Mr. Olive said a study was done at the Advanced Research Institute at University of Nevada, Las Vegas to project the impact of the proposed $500 franchise fee. It was determined that the franchise fee would have precipitated an estimated 80 percent exodus of corporations from the state of Nevada. The study would need to be revised with the increase of fees to reflect their impact; it was estimated there would be some reduction in the number of corporations being formed. Chairman Anderson queried, that by offering the limited liability as provided in S.B. 577, how many additional companies would be attracted to Nevada. Mr. Olive quoted growth projections of 12 to 15 percent.

Assemblyman Brower stated Section 2, page 2, would eliminate a current statutory provision that allowed a corporation to include in its Articles of Incorporation certain liability limiting provisions. Mr. Olive agreed. Assemblyman Brower said Section 3, subsection 7, page 3, addressed the same issue, only making it automatic. Mr. Olive agreed. Assemblyman Brower said the bill would then achieve the same result as current law; it would not be a substantive change in the law. The real issue addressed by the bill would then be the alter ego doctrine in Section 1. Mr. Olive said Section 3, subsection 7, might seem redundant with Section 2, but it was the same spirit as Section 1 that codified current case law; Mr. Olive agreed with Assemblyman Brower's assessment of the bill.

Rose McKinney-James, Clark County School District, offered "unqualified" support for S.B. 577. Ms. McKinney-James believed the funding from the bill would be used for salaries for teachers and to fund those programs and services that had been curtailed.

Bob Crowell, Nevada Trial Lawyers Association (NTLA), supported the fee and funding mechanism set forth in S.B. 577, but was concerned about the corporate immunity. S.B. 577 changed the corporate immunity statutes in Nevada in three ways:

1. Codified the alter ego doctrine or piercing the corporate veil, by changing the case law with respect to proof required to pierce the corporate veil.
2. Extended the officers' and directors' immunity currently in Nevada law to other individuals.
3. Shortened the statute of limitations for bringing actions against officers and directors from three years to two years.

Bill Bradley, Nevada Trial Lawyers Association (NTLA), posed a scenario involving Chairman Anderson and Assemblyman Carpenter for purposes of explaining the ramifications of forming and operating a corporation in Nevada, and, unfortunately, of experiencing fraud in their dealings with another corporation.

Pat Cashill, Nevada Trial Lawyers Association (NTLA), said Nevada had 44 years of corporate case law going back to 1957. The key to the judicial history in Nevada on that issue was the court took the position that there was no fixed criteria to use the alter ego doctrine to pierce the corporate veil. The Polaris decision talked about a number of factors that "would sanction fraud or promote injustice" and could lead to piercing the corporate veil:

1. Under-capitalization
2. Co-mingling of funds
3. Unauthorized diversion of funds
4. Treatment of corporate assets as individual's own
5. Failure to observe corporate formalities

Mr. Cashill went on to suggest language retentions and deletions in S.B. 577. He was "gravely" concerned and believed it would be bad social policy to enact the bill as written.

Chairman Anderson asked how the "Bubba and the Cowboy" corporation would be affected if S.B. 577 was enacted. Mr. Bradley agreed the corporation would be left "holding the stick." The importance of the Polaris decision (Exhibit K) was seen where the Supreme Court elected to follow the "promote injustice" standard. Trying to prove fraud was an extremely tough burden; fraud was a state of mind, and it was tough to prove a state of mind. Mr. Bradley believed it was important to amend S.B. 577 to include the language "or promote injustice."

Assemblyman Brower asked why a criteria "less than fraud" would be allowed to be used as the standard to pierce the corporate veil. Mr. Crowell said it was difficult to articulate what constituted fraud or the various circumstances that might lead to or give rise to an injustice sufficient to pierce the corporate veil. He believed the Supreme Court answered that question on page 3, Section [2][3] of Exhibit K where it stated, "It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice." The Polaris decision continued on the top of page 4 of Exhibit K, "There is no litmus test for determining when the corporate fiction should be disregarded; the result depends on the circumstances of each case." Mr. Bradley said there were circumstances where it "may not be fraud," but you knew it was wrong. Assemblyman Brower said, "If it walks, talks, and swims like fraud you should be able to prove fraud."

Assemblyman Collins reminded the committee to look at the bigger issue of S.B. 577. Was the issue to deal with the Polaris decision or find money for the teachers? Mr. Bradley was in support of funding teacher salaries; however, it was not necessary to significantly change a strong 50-year judicial doctrine in order to accommodate that fee increase. That was why NTLA was offering an amendment.

Assemblyman Manendo asked if S.B. 577 had been in place a couple of years ago, how would that have affected the "Harley Harmon incident" in southern Nevada? Mr. Cashill said the current language in Section 3, subsection 7, page 3, provided immunity to officers or directors for any action committed as an officer or director. He did not believe it was the intent to extend immunity "that far." Mr. Cashill suggested some "limiting" language should be inserted that would limit the immunity to corporate activities in a legitimate sense. Mr. Bradley said Section 3, subsection 7, stated, "unless otherwise provided in NRS…" and that included mortgage and securities issues; there was some protection because it referred to existing provisions in the NRS. Without an amendment, Section 3, subsection 7, would eliminate third party damages, and that was not the intent. Mr. Cashill said there was an inconsistency between existing law in Section 2 that limited the liability and Section 3, subsection 7 that seemed to extend unlimited immunity.

Assemblywoman Buckley asked, when viewing the issue of fraud versus injustice, what definition of fraud would be used if the language of S.B. 577 was approved. Would it be the common law definition of fraud or the definition in NRS 42.001? Mr. Cashill said in the case *Lubey v.* Barba the common law definition was used as a standard. He did not know whether the statute or the common law definition would apply in any case. Assemblywoman Buckley said perpetrators of fraud could "get away with it" by saying there was "no intentional misrepresentation" to deprive a creditor. Mr. Cashill agreed.

Assemblyman Brower disagreed, saying he believed, in a case of "looting the corporation," fraud could be proven. Assemblyman Brower said Section 3, subsection 7, did not give unlimited immunity because it said, "unless it was proven there was fraud, intention misconduct or known violation of the law." Mr. Crowell disagreed with Assemblyman Brower and submitted an amendment (Exhibit M) that clarified a director could not be shielded from liability for acts outside the corporation, which left intact the rights of a third party.

Chairman Anderson asked for an explanation of the Loomis letter (Exhibit L). Mr. Cashill recalled the circumstances of the case and subsequent judgment against Lange Financial Corporation. The Loomis family had great difficulty collecting the judgment amount, but was able to use the alter ego doctrine to reach through numerous corporate shells to reach the assets of the corporation in order the satisfy the judgment.

Mr. Crowell made closing statements regarding the proposed amendment (Exhibit M) from the NTLA. It included five sections:

1. Rewrote Section 1 using language drawn directly from the Polaris decision.
2. Amended language in Section 3, subsection 7, to clarify that the immunity from liability extended to an officer or director only "to the corporation or its stockholders" and to include the word "or" when listing the two actions that might cause liability.
3. Changed the effective date language to include "shall apply to claims that arise after October 1, 2001" in Section 59, subsection 2(b).
4. Changed Section 8 to restore the statute of limitations to three years.
5. Deleted Section 55 since legislative intent should not be a part of the bill.

Chairman Anderson asked if the proposed amendment (Exhibit M) had been shared with Senator James. Mr. Cashill said they "talked."

Assemblyman Oceguera asked for clarification from Mr. Bradley concerning comments made relating to Section 2, and to Section 3, subsection 7. Mr. Bradley reiterated the changes as outlined in the NTLA proposed amendment (Exhibit M).

Assemblyman Carpenter said on page 3, line 21, the NTLA proposed to delete "unless it is proven that," and asked why would the NTLA want that taken out. Mr. Bradley said that was a typo; it was their intent to retain that language.

Chairman Anderson clarified the language of the proposed amendment and asked the NTLA to submit a clean copy with any additional changes.

Danny Thompson, Executive Secretary-Treasurer, Nevada State American Federation of Labor-Congress of Industrial Organization (AFL-CIO), said Clark County had a critical need for 1,200 new teachers in 2001-2002, but they had only been able to recruit 500. Mr. Thompson shared statistics regarding high school dropouts, prison inmates, low teacher salaries, portable classrooms, and lack of books. The problem could not wait; it needed to be solved in the current session. The problem was not going away!

Dave Howard, Reno-Sparks Chamber of Commerce, spoke in support of S.B. 577 with some reservations; he felt the bill did not do enough. Although it was believed that the bill was written to attract new corporations to Nevada, no one had discussed attrition if the economy "goes down the dumps;" there was no guarantee that the economy would continue to encourage growth. And even though Mr. Crowell said the bill would not be retroactive, Mr. Howard felt the provisions of the bill would also apply to those who were already incorporated.

Kami Dempsey, Director, Government Affairs, Las Vegas Chamber of Commerce, spoke in support of S.B. 577 as written. She said it was a first step to finding a solution to help teachers obtain a salary increase without negatively impacting the economy and disproportionately hurting small businesses. The Las Vegas Chamber of Commerce and the business community recently completed a position paper outlining their intention to work during the interim to find a tax package that would fulfill the state's financial needs over the next ten years.

Sam McMullen, Las Vegas Chamber of Commerce and the Retail Association of Nevada, said S.B. 577 contained a very serious issue. Mr. McMullen spoke in support of the bill, but he did not believe it needed an amendment. He reiterated his commitment to work during the interim on a package to be presented to the legislature at the Seventy-Second Session. Mr. McMullen said the bill had been looked at from both sides, as defendants and as plaintiffs, and he believed it to be a fair statement of the law, one that needed to be secured and passed in its current form. He said the real issue was sanctioning fraud; promoting justice was vague and too broad.

Chairman Anderson asked if Mr. McMullen had heard the testimony of the Secretary of State regarding the conflicts between S.B. 51 and S.B. 577. Mr. McMullen said he did not have a problem with conflict amendments; he did have a problem with changing the bill as written. Chairman Anderson stated there were time factors in the bill that may have led to a misunderstanding of the real intent of the bill. Mr. McMullen said he had no problems with the effective date of the law relating to claims. Chairman Anderson asked if Mr. McMullen participated in the drafting of the bill. Mr. McMullen said he had not.

Assemblyman Collins reiterated his question related to the "real issue" under discussion. Was it a test or was it a precedent with strings? Mr. Collins asked, "Are we doing the right thing?" Mr. McMullen said the real question should be, "How do we guarantee that we actually get out of this bill what we said we were going to get out of it?" In order to increase fees, new provisions were necessary to drive revenue, to secure it, and to expand it in the future.

Assemblywoman Buckley verified the fees that would increase and those that would remain the same. It was good to be a business-friendly state; it was good for the economy. She questioned why an $80 increase required the kind of immunity provisions that could hurt other Nevada businesses? Mr. McMullen did not believe those immunity provisions would hurt any existing Nevada businesses; they were good for Nevada business. In his judgment, he did not think the trade was $80 for those provisions; rather, it was a resolution of budget issues, a marketing tool, and a clarification of current law.

Assemblyman Brower said he did not see the linkage between the fee increase and the change in policy. Regardless of whether the fees were increased, the proposed change in the law was a good policy change for Nevada. Mr. McMullen confirmed that would be good for Nevada. What people wanted most of all was to know what the rules of law were. It would be good for new corporations and would be clarification for existing corporations.

Chairman Anderson asked if Delaware or any other state had similar provisions. Why not take case law

and put that into statutory provision? Mr. McMullen said Delaware did have more case law to rely on, but that might not be the question. It was easy for Delaware to attract corporations, especially on the east coast. Nevada needed to create a better attraction for corporations.

Chairman Anderson said the advantage of case law was that once it was on the books, it was there. Like common law, you could continue to make reference to it as it continued to evolve. Case law became a much more reliable predictor of behavior in a litigant society. Mr. McMullen disagreed. The issue was whether or not the stream of revenue was secured. Out-of-state corporations did not want case law to be a determining factor, as they could be the next case. Those corporations wanted to know that the rules were secure. Chairman Anderson said the question was then whether public policy should be put at-risk to fund education. Mr. McMullen did not think there was any risk; it was a clear statement of the policy.

Mary Lau, Executive Director, Retail Association of Nevada, said the issue of increased fees had been brought forward previously without result, and now that issue was being revisited.

Chairman Anderson asked for further testimony. There being none, he announced the committee would be recessed until 9:30 a.m. tomorrow morning. The testimony phase was at an end. The committee was waiting for additional information from the Legal Division regarding the fiscal impact and those sections in conflict.

Assemblywoman Koivisto asked, if it was such good policy, why had it never come up before. The question was discussed among committee members. Chairman Anderson queried about an interim committee study done by Senator James. Assemblyman Brower was not aware of any Bill Draft Request (BDR) recommendation nor did he recall it being a discussion topic at any of the meetings. Assemblyman Manendo said the interim study committee broke into several panels, and the issue was not raised on his panel.

Ray Bacon, Nevada Manufacturers Association, said during the Business Law Committee, chaired by Mr. Taylor, discussed adding certainty to the law in two separate subcommittees. Mr. Bacon did not recall that specific issue being discussed.

Mr. McMullen said those types of issues were discussed, but until raising fees became a viable option, the counterbalance of those provisions was not necessary.

Chairman Anderson recessed the meeting at 6:46 p.m. until 9:30 a.m. the next morning.

Chairman Anderson reconvened the meeting at 10:00 a.m., the following day, made opening remarks, and noted a quorum was present. Discussion of S.B. 577 resumed.

Chairman Anderson drew attention to a letter from the Secretary of State's office (Exhibit N) that was submitted in response to the request made by the committee. The letter brought clarity to the provisions of S.B. 577 as to when the various sections would apply and why there were different dates for implementation.

Chairman Anderson announced a short recess to handle trouble with the Internet connection; the meeting reconvened in three minutes.

Renee Lacey, Chief Deputy, Secretary of State, said currently initial lists were currently not required for LLCs, LPs, and entities other than corporations; they only filed annual lists. S.B. 51 would require them to submit initial lists, resulting in the need for additional staff in order to maintain the 10-day money-

back guarantee.

Chairman Anderson cautioned that conflicts might exist between S.B. 51 and S.B. 577 that would require amendments to make them consistent. As such, the dollar amounts currently in S.B. 577 might not be in the final draft. Mr. Lacey said that issue had been discussed with the Legal Division that would be preparing the amendment. Ms. Lang said S.B. 51 had already been enrolled, but would be amended to be consistent with S.B. 577.

Assemblywoman Buckley said the appropriation in Section 58 seemed excessive. Ms. Lacey said new positions had been discussed with the Fiscal Division, and most would come out of the Special Services Funds. The request to use those Special Services Funds for technology or positions in the office had to go through the Interim Finance Committee. The appropriation in Section 58 came from the portion that went into the Special Services Fund and not from the portion of the increased fees that would go to the General Fund to assist the teachers. Anything over $2 million that remained in the Special Services Fund at the end of the fiscal year went to the General Fund. The appropriation also included estimated funding for leased space. The additional staff, besides reviewing forms and preparing for the new services and the additional review required by the new services, would also staff a counter service that would provide a 2-hour and 24-hour expedited document service.

Assemblywoman Buckley asked why that funding had not been included in the separate bill where the new services were proposed and the new staff was requested. Ms. Lacey said requiring the new lists for LLCs and LPs was a new service not previously proposed. The Secretary of State's budget had been closed; 20 new positions were requested, and the Assembly Committee on Ways and Means approved 12. The Committee on Ways and Means asked the Secretary of State's Office to obtain funding for the remaining staff through S.B. 577 since the additional staff would be needed for the proposed services in the bill.

Assemblyman Manendo asked why the proposed amendment by the NTLA was approved by the Senate Judiciary Committee and then was taken out. Chairman Anderson verified that the proposed amendments presented to the committee were the same amendments that had been presented in the Senate. Mr. Crowell said the amendment presented in the Senate had been slightly different; it had been passed and then reconsidered the next day. He did not know why. Chairman Anderson requested that the amendment be redrafted, with a clean copy provided to the committee. Mr. Crowell submitted a new copy of the proposed amendment (Exhibit O) for the committee's consideration.

Chairman Anderson recessed the meeting at 10:26 a.m. to be reconvened upon the call of the Chair. There being no further business on that day, the meeting was adjourned at 2:30 p.m.

RESPECTFULLY SUBMITTED:

Deborah Rengler
Committee Secretary

APPROVED BY:

_____

Assemblyman Bernie Anderson, Chairman

DATE:_____

SAC

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DISTRICT COURT

CLARK COUNTY, NEVADA

WYNN RESORTS, LIMITED, a Nevada Corporation, Plaintiff, vs. KAZUO OKADA, an individual, ARUZE USA, INC., a Nevada corporation, and UNIVERSAL ENTERTAINMENT CORP., a Japanese corporation, Defendants. AND ALL RELATED CLAIMS	Case No.: A-12-656710-B Dept. No.: XI **SECOND AMENDED COMPLAINT** **(Request for Business Court Assignment Pursuant to EDCR 1.61(a))** **(Exempt from Arbitration – Declaratory Relief Requested)**

Plaintiff Wynn Resorts, Limited ("Wynn Resorts" or "the Company"), by and through its undersigned counsel, hereby files the above-captioned Second Amended Complaint:

NATURE OF THE ACTION

This is an action for breach of fiduciary duty and related offenses committed against Wynn Resorts by one of its former directors, Kazuo Okada, and his affiliates. Beginning in 2010, Wynn Resorts began to uncover evidence that Mr. Okada, his companies, and their associates were engaged in unethical, unlawful, and potentially criminal activities in the Philippines in connection with the development of a casino resort in that country. The evidence raised substantial questions as to Mr. Okada's probity and his suitability to be associated with a corporation in the casino gaming industry. Because of this, Mr. Okada's business activities in the Philippines posed an ongoing and potentially significant risk for Wynn Resorts' existing and potential future gaming licenses.

When confronted with the mounting evidence of his wrongdoing, however, Mr. Okada was evasive, and tried to conceal his misconduct from Wynn Resorts and its Board — a clear breach of Mr. Okada's duty to make a full and fair disclosure to the Company of all facts that materially affect its rights and interests. Mr. Okada also consistently refused to take steps to address Wynn Resorts' concerns, either by shutting down his Philippine project or by severing his ties with Wynn Resorts. By engaging in the wrongful conduct alleged herein while associated with Wynn Resorts, failing to make full and fair disclosure to the Company and his fellow directors about the factual circumstances surrounding his business activities in the Philippines, and refusing to act to protect the Company's rights and interests when called upon to do so, Mr. Okada breached his fiduciary duties to Wynn Resorts.

In view of Mr. Okada's inaction and his and his counsel's refusal to cooperate with the Company's investigations or provide any explanation for the troubling evidence that had been presented to them by the Company and its attorneys, in the fall of 2011, the Compliance Committee of Wynn Resorts retained former Director of the Federal Bureau of Investigation, Louis J. Freeh, to conduct a comprehensive investigation of Mr. Okada's business activities in the Philippines and their potential impact on Wynn Resorts' interests. As discussed in his written

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report to the Board (attached as Exhibit 1), Mr. Freeh uncovered substantial evidence of gross improprieties by Mr. Okada and his agents, including evidence that Mr. Okada had made a series of payments to the Philippine gaming regulators with direct responsibility for overseeing Mr. Okada's development project. Based on these findings, and upon the advice of two independent gaming experts, the Board exercised its authority under the Wynn Resorts Articles of Incorporation to declare Mr. Okada and his affiliates unsuitable and to redeem the Wynn Resorts stock held by a company that Mr. Okada controlled. In addition to seeking damages for Mr. Okada's breaches of fiduciary duty, Wynn Resorts seeks a declaration from this Court that the Board's actions in this regard were lawful in all respects.

PARTIES AND RELEVANT PERSONS/ENTITIES

1. Plaintiff Wynn Resorts is and was at all times relevant hereto a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in the State of Nevada. Wynn Resorts is publicly traded on NASDAQ.

2. Wynn Resorts is a world class developer of destination resort casinos. Wynn Resorts owns resort casinos through its wholly owned subsidiary Wynn Las Vegas, LLC ("Wynn Las Vegas") and through its majority owned subsidiary Wynn Macau, Limited ("Wynn Macau").

3. Wynn Las Vegas operates the Wynn Las Vegas and Encore resort casinos in Las Vegas, Nevada.

4. Wynn Macau is a Cayman Islands company that is publicly traded on the Hong Kong Stock Exchange. Wynn Macau operates the Wynn Macau and Encore at Wynn Macau resort casinos in Macau through its wholly owned subsidiary, Wynn Resorts (Macau), S.A., a company organized and existing under the laws of Macau Special Administrative Region of the People's Republic of China.

5. Defendant Mr. Okada is and was at all times relevant hereto a citizen of Japan and a member of the Board of Directors of Wynn Resorts. During the relevant period, Mr. Okada served multiple roles with Wynn Resorts and its affiliated companies. In addition to serving as a Wynn Resorts director, until February 24, 2012, Mr. Okada was a member of the Board of

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Directors of Wynn Macau, and, until February 18, 2012, he controlled a shareholder that owned approximately 19.66% of Wynn Resorts. Moreover, between October 2002 and November 2011, Mr. Okada served as Vice Chairman of Wynn Resorts. On February 21, 2013, Mr. Okada resigned as a director of Wynn Resorts, one day before a scheduled special meeting of Wynn Resorts' stockholders that had been called to consider and vote on a proposal to remove Mr. Okada from the Board. The special meeting was held as scheduled, and the removal proposal was approved by 99.6% of the shares voted at the special meeting.

6. Defendant Aruze USA, Inc. ("Aruze USA") is and was at all times relevant hereto a corporation organized and existing under the laws of the State of Nevada and a wholly owned subsidiary of defendant Universal Entertainment Corporation ("Universal"). Until February 18, 2012, Aruze USA was a 19.66% shareholder in Wynn Resorts. Mr. Okada serves as Director, President, Secretary, and Treasurer of Aruze USA.

7. Defendant Universal (formerly Aruze Corporation) is a public corporation organized under the laws of Japan. Universal manufactures and sells pachislot and pachinko machines and other similar gaming equipment. Universal does business in the State of Nevada, has been issued a manufacturer's license by the Nevada Gaming Commission, and was deemed suitable by the Nevada Gaming Commission as a 100% shareholder of Aruze USA. Mr. Okada serves as Director and Chairman of the Board of Universal, and, together with his family members, is a 67.9% shareholder of Universal.

8. In February 2012, the Wynn Resorts Board of Directors consisted of twelve members: Chairman Stephen A. Wynn, Linda Chen, Russell Goldsmith, Dr. Ray R. Irani, former Nevada Governor Robert J. Miller, John A. Moran, Marc D. Schorr, Alvin V. Shoemaker, D. Boone Wayson, Elaine P. Wynn, Allan Zeman, and Mr. Okada.

9. Wynn Resorts' Gaming Compliance Committee (the "Compliance Committee") is an internal committee chaired by Governor Miller and consisting of two additional members: Mr. Schorr (director and Chief Operating Officer of Wynn Resorts) and John Strzemp (Executive Vice President and Chief Administrative Officer of Wynn Resorts). The Compliance Committee

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is charged with assuring Wynn Resorts' compliance with all laws and regulations, including, in particular, applicable gaming laws, regulations, and policies.

10. The Honorable Louis J. Freeh, Esq. is a former director of the Federal Bureau of Investigation, having led that agency with distinction from 1993 to 2001. Prior to serving as FBI Director, Mr. Freeh was a United States District Court Judge. In February 2012, Mr. Freeh was a partner in Freeh Sporkin & Sullivan, LLP — a law firm he founded with two other former federal judges — which specialized in domestic and foreign corporate investigations and compliance. Today, Mr. Freeh is a partner and the chairman of the Executive Committee of Pepper Hamilton LLP.

JURISDICTION

11. Defendants Mr. Okada, Universal, and Aruze USA have each individually and in concert with one another caused the acts and events herein within the State of Nevada, and all are subject to the jurisdiction of this Court. Venue is also proper in this Court.

12. This matter is properly designated as a business court matter and assigned to the Business Docket under EDCR 1.61(a), as the claims alleged herein arise from business torts.

GENERAL ALLEGATIONS

13. A Nevada gaming license is a privilege. Nevada law imposes comprehensive regulatory requirements upon gaming licensees, including the requirement that persons and entities associated with the licensee possess the necessary character, qualifications, and integrity to be suitable to hold that privilege so as not to threaten the public interest or the integrity of the regulation and control of gaming.

14. Under the applicable gaming laws and regulations, Wynn Resorts has an obligation to police itself and to take independent and proactive measures with respect to compliance issues before it becomes necessary for gaming regulators to take action. Consistent with this regulatory framework, Wynn Resorts has adopted a compliance program that requires the Compliance Committee to, among other things, investigate senior officers, directors, and key employees to protect Wynn Resorts from becoming associated from any unsuitable persons. The compliance

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program further requires Wynn Resorts to self-report to Nevada gaming regulators with respect to any significant compliance-related issues that may arise.

15. As a director of Wynn Resorts (and formerly, through Aruze USA, one of its largest shareholders), Mr. Okada's conduct and reputation for probity had a direct impact on the ability of Wynn Resorts to maintain its Nevada gaming license and to seek additional licenses in the future. Accordingly, pursuant to Nevada law and its own compliance program, Wynn Resorts was obliged to monitor Mr. Okada's business activities to ensure that his association with Wynn Resorts did not create any regulatory concern.

Okada Announces Plan to Enter Philippine Market

16. In or about 2008, Wynn Resorts learned that Mr. Okada, through one or more companies he controlled, had publicly stated his intention to develop a casino resort in the Philippines. Wynn Resorts was not and has never been an investor or participant in Mr. Okada's development project in the Philippines.

17. For a number of reasons, it was highly uncertain whether Mr. Okada's planned casino resort in the Philippines would ever come to fruition. The scale of the proposed development was larger than any comparable project in existence in the Philippines at the time, and Mr. Okada and the companies he controlled had never developed anything on such a scale previously. Numerous approvals and licenses from the Philippine government would also be needed before any project could get off the ground, let alone become operational.

18. In 2008, the Philippines Amusement and Gaming Corporation ("PAGCOR") awarded four provisional gaming licenses, without public bidding, in connection with a development project in the Manila Bay area referred to as Entertainment City. PAGCOR is a 100% government-owned and -controlled corporation that operates under the direct supervision of the Office of the President of the Philippines and is charged with licensing and regulating casino gaming in the Philippines. One of the provisional licenses that PAGCOR awarded went to a newly-formed entity that is 99% owned by Aruze USA, known as Tiger Resort, Leisure and Entertainment Inc.

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19. Apart from obtaining a provisional license, however, between 2008 and early 2010, Mr. Okada and his companies made very little apparent progress with respect to the proposed development in the Philippines. Indeed, on various occasions during that period, Mr. Okada made statements to Mr. Wynn and others at Wynn Resorts expressing doubt that he would ever actually develop a casino resort in the Philippines, stating that he had reconsidered.

20. In this period of time, Wynn Resorts did not know what activities Mr. Okada was engaged in to promote his Philippine project. As of early 2010, Wynn Resorts had no reason to suspect that Mr. Okada and his associates would engage in unethical or unlawful conduct, or that Mr. Okada's project in the Philippines would damage Wynn Resorts or pose a threat to Wynn Resorts' gaming licenses. Indeed, Mr. Okada had every reason to conceal his activities, both because he could be harmed by its exposure, and because Mr. Okada made periodic attempts in that time period to persuade Wynn Resorts and/or Mr. Wynn to have some degree of involvement with his Philippine project.

Wynn Resorts Begins to Have Concerns

21. Beginning in 2010, a number of events occurred to change Wynn Resorts' perception of Mr. Okada and his Philippine project. In June 2010, as Mr. Wynn was planning to return from a visit to Macau, Mr. Okada prevailed on Mr. Wynn to make an unscheduled stopover in Manila in the course of his trip back to the United States. Mr. Wynn had no interest in involving Wynn Resorts in Mr. Okada's project in the Philippines and agreed to the visit as a courtesy to Mr. Okada. Mr. Okada abused Mr. Wynn's courtesy, however, and went to great lengths to try to associate Wynn Resorts and Mr. Wynn with his Philippine project.

22. Unbeknownst to Mr. Wynn, Mr. Okada had arranged for a public event at his Manila Bay development site that was to be attended by various Philippine government officials. Mr. Okada conspicuously publicized Mr. Wynn's attendance at the event by erecting a large sign that read, "Welcome to the Philippines Chairman Steve Wynn," and bore the trademarked corporate logo of Wynn Resorts. Mr. Wynn immediately recognized that Mr. Okada had brought him to the Philippines under misleading pretenses, and that he had orchestrated the event to send

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the false message to the Philippine government that Wynn Resorts' good reputation and standing in the casino resort industry backed Mr. Okada's development project.

23. Following Mr. Wynn's stopover in Manila, and in light of concerns that Mr. Okada was trading on Wynn Resorts' reputation and creating the false impression that Wynn Resorts had a role in his Philippine project, management determined to conduct an investigation regarding the general business environment in the Philippines as part of the Company's general compliance program. Management produced a written report and presented it to the Board (including Mr. Okada) in July 2010.

24. Based on reports from sources in the U.S. government and local authorities in the Philippines, as well as international organizations and media, the report concluded that corruption posed a major problem in the Philippines and that Philippine anti-corruption efforts were ineffective. Management's report cited a "Global Corruption Barometer" study that listed the Philippines in the top quintile of "Countries most affected by bribery."

25. At this same July 2010 meeting of the Wynn Resorts Board, the other directors asked Mr. Okada to state his intentions with respect to his casino resort development in the Philippines. Mr. Okada was evasive, however, and failed to alleviate the Board's concerns. By refusing to make full disclosure to the Board about his business activities in the Philippines and the factual circumstances surrounding those activities, Mr. Okada was able to conceal his wrongful conduct from the Company and his fellow directors.

26. Although Wynn Resorts did not appreciate the situation at the time — due to Mr. Okada's lack of candor — 2010 was a critical period for Mr. Okada's project in the Philippines. Effective June 30, 2010, Benigno S. Aquino III assumed office as President of the Republic of the Philippines, succeeding Gloria M. Arroyo. Soon thereafter, President Aquino appointed Cristino L. Naguiat, Jr. to replace Efraim C. Genuino as the Chairman of PAGCOR.

27. In July 2010, reports surfaced in the Philippine press that at the behest of the new President, Mr. Naguiat was investigating certain "midnight deals" that had been approved by his predecessor. Specifically, in his final weeks as Chairman, Mr. Genuino, with the support of then-President Arroyo, had caused PAGCOR to award several gaming licenses and related

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concessions on an abnormally expedited basis. Among the beneficiaries of these deals was Mr. Okada, who received a special exemption allowing an Okada-controlled company to take title to the land on which his casino resort was to be built. Without the exemption, Mr. Okada's company would have been subject to Philippine law prohibiting foreign investors from owning land. A decision by Mr. Naguiat to revoke the exemption, therefore, would have significantly impaired Mr. Okada's project in the Philippines.

28. Despite direct inquiry by Wynn Resorts management, the Company was not made aware of these events until 2011, when it began to receive certain third-party investigative reports discussed below. Mr. Okada still has never made a full or fair disclosure to the Company despite the material effects his activities in the Philippines have had on Wynn Resorts' rights and interests.

Wynn Resorts Receives Further Evidence of Mr. Okada's Misconduct

29. By mid-2010, Wynn Resorts had no definitive proof of wrongdoing by Mr. Okada or his associates. Mr. Okada's continued evasiveness, however, coupled with substantial concerns about widespread corruption in the Philippines, caused Wynn Resorts to determine that further inquiry was warranted.

30. Accordingly, in early 2011, Wynn Resorts retained a well-known investigative organization, The Arkin Group LLC ("Arkin Group"), to further examine the risks associated with doing business in the Philippines and to investigate Mr. Okada's activities in that country. Arkin Group summarized its findings in a series of written reports that were provided to Wynn Resorts in February 2011.

31. Based on its investigation, which included interviews of Philippine officials and other industry and government contacts, Arkin Group concluded that official corruption in the Philippines — particularly in the gaming industry — was "deeply ingrained" and that "official corruption at some level accompanies most if not all major business deals and transactions in the Philippines." In support of these conclusions, Arkin Group cited, among other sources, the 2010 Transparency International Corruption Percentage Index, which rated the Philippines at the lower end of the index, 134th out of 178 countries surveyed. The Arkin Group observed that this rating

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placed the Philippines "on par with Nigeria, Honduras, Azerbaijan and Bangladesh" in terms of the pervasiveness of government corruption.

32. As for Mr. Okada's activities, Arkin Group found that Mr. Okada was "perceived as touting his relationship with Wynn Resorts as a means to generate a positive reputation and high profile" and "proving his and Aruze's credibility." The Arkin Group's reports also discussed the land title exemption that Mr. Okada had obtained in the final days of the administrations of PAGCOR Chairman Genuino and Philippine President Arroyo, and explained that such "midnight deals" were at that time "receiving significant media attention and scrutiny" in the Philippines.

33. The Wynn Resorts Board discussed the results of the Arkin Group's investigation at a Board meeting held on February 24, 2011. Mr. Wynn advised the Board that Mr. Okada (who was present for the meeting) had arranged for him to meet with Philippine President Aquino. Based on the information the Board had received about endemic corruption in the Philippines, the independent directors unanimously advised Wynn Resorts management that any involvement in the Philippines was inadvisable and strongly recommended that the meeting with President Aquino be cancelled. Management agreed with the Board's recommendation. Mr. Okada, however, was embarrassed and angry about having to cancel the arrangements he had made with President Aquino.

34. At the same Board meeting, in the course of an update from Wynn Resorts' general counsel on the Foreign Corrupt Practices Act ("FCPA"), Mr. Okada stated that he personally rejected Wynn Resorts' anti-bribery rules and regulations, as well as legal prohibitions against making such payments to government officials. Mr. Okada also stated that paying bribes to government officials was a common business practice in certain Asian countries, and that the important thing was to channel such illegal payments through third parties. Given that such conduct is prohibited by law in virtually every Asian country, as well as the United States, this was a shocking statement for Mr. Okada to make.

35. Mr. Okada responded to the rift he had opened with the other Board members through such comments by counter-attacking. At a Board meeting held on April 18, 2011, Mr. Okada was the lone director to vote against a proposed charitable gift to the University of

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Macau Development Foundation. At the time, Mr. Okada's stated concern related solely to the length of the commitment, not its propriety. Mr. Okada has subsequently asserted, however, that the charitable gift violated the FCPA, and he has sued Wynn Resorts in this Court seeking documents and records related to the Board's decision to authorize the charitable gift. These claims are baseless, and they are designed to divert attention from Mr. Okada's own misconduct and breaches of fiduciary duty.

36. Mr. Okada's business activities in the Philippines were again discussed at a Wynn Resorts Board meeting held on July 28, 2011. At that time, Mr. Okada confirmed to the Board that notwithstanding his fellow directors' stated concerns, he was proceeding with his Philippine project. Wynn Resorts' independent directors expressed great concern regarding probity issues attendant to Mr. Okada's decision to do business in the Philippines and the possible adverse effect that Mr. Okada's involvement in the Philippines would have on Wynn Resorts. The Board was advised that the Compliance Committee had engaged a second independent firm — Archfield Limited ("Archfield") — to further investigate these issues.

37. The Compliance Committee reviewed the results of Archfield's investigation at a meeting held on September 27, 2011. The reports from Archfield deepened the Compliance Committee's concerns about Mr. Okada's involvement in the Philippines.

38. As described therein, Archfield's investigation identified additional anomalies and apparent improprieties related to Mr. Okada's business activities in the Philippines. Among other things, Archfield reported that a gaming license had been granted to Mr. Okada's company notwithstanding that Mr. Okada did not appear to have a Philippine business partner, as required by Philippine law. In addition, Archfield cited reports that former Chairman Genuino, with the support of former President Arroyo, had paved the way for Mr. Okada to obtain title to the land on which his casino resort was to be located in a clear reversal of Philippine policy on foreign investment.

39. Archfield also reported that former PAGCOR Chairman Genuino, the government official who had authorized Mr. Okada's gaming license and who had direct regulatory authority over Mr. Okada's project in the Philippines, had been removed from office and was under

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investigation for potential misconduct. This was particularly troubling for the Compliance Committee given the report from Archfield that former Chairman Genuino and former President Arroyo were "strongly rumored to have profited from their relationship with Okada."

40. A few days later, at the direction of the Compliance Committee, Wynn Resorts management met with Mr. Okada's attorneys, including Robert Faiss of the Lionel Sawyer firm, to discuss Wynn Resorts' concerns relative to Mr. Okada's business activities in the Philippines and the potential adverse effect of those activities on Wynn Resorts' privileged status as a gaming licensee. At this meeting, the Wynn Resorts representatives made clear that Mr. Okada's alleged activities in the Philippines posed substantial risks for Wynn Resorts and needed to be explained post haste. Wynn Resorts' concerns were ill-received, and the meeting was not productive. Mr. Okada's representatives refused to disclose the full factual circumstances surrounding his business activities in the Philippines, much less provide an explanation for those activities that might somehow address the Company's concerns.

41. Around this same time, Wynn Resorts was preparing to hold a training session for its directors regarding the FCPA. The training session was scheduled for October 31, 2011, the day before a scheduled in-person Board meeting, and Mr. Okada (through his assistant) had previously sent an RSVP indicating that he would attend. Six days before the session, however, Mr. Okada requested that the training materials be translated into Japanese (despite his previous, long-term practice of translating all materials on his own) and that the date of the session be moved (despite that it had been planned around his previous confirmation). Wynn Resorts accommodated Mr. Okada's first request by obtaining a Japanese translation of the training materials and arranging for professional translators to be available to assist Mr. Okada at the session. Ultimately, however, although he was present at the Board meeting held the very next day, Mr. Okada was the sole Board member who failed to attend the FCPA training session in October 2011, with all other directors appearing in person or telephonically. Mr. Okada likewise was the sole Board member to not attend a similar FCPA training session held in 2012. Mr. Okada's refusal to attend these training sessions further demonstrates his disregard for his obligations as a director of a company in a highly regulated gaming industry.

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42. At this point, even if there was insufficient evidence in hand at that time to prove misconduct by Mr. Okada in the Philippines, it was clear that Mr. Okada had set himself on a course against the rest of the Board and was acting without regard for the best interests of Wynn Resorts. Accordingly, in October 2011, management was authorized by the Board to request Mr. Okada's resignation as a director. Mr. Okada refused.

43. On November 1, 2011, in light of Mr. Okada's failure to attend mandatory FCPA compliance training, acknowledge the Company's internal compliance policies, or to address the Company's serious concerns and inquiries about potentially dangerous and illegal activities in the Philippines, the Board (apart from Mr. Okada) voted unanimously to remove Mr. Okada from his Vice Chairmanship and to leave the office vacant.

44. The Board and management have reiterated their request that Mr. Okada resign his directorship on various occasions between October 2011 and the present date. Mr. Okada has consistently refused to do so. At a special meeting of the Wynn Resorts stockholders held on February 22, 2013, 99.6% of the shares voted at the meeting were cast in favor of a proposal to remove Mr. Okada from the Wynn Resorts Board.

Former FBI Director Freeh Investigates

45. By late 2011, the Compliance Committee was sufficiently concerned to seek further assistance in determining the propriety of Mr. Okada's activities in the Philippines. Accordingly, on October 29, 2011, the Compliance Committee determined to retain Mr. Freeh and his colleagues at Freeh Sporkin & Sullivan LLP to conduct a rigorous investigation.

46. Over a three-month period, Mr. Freeh and/or his colleagues made several trips to the Philippines and Macau, reviewed thousands of pages of documents, emails, and public records, and conducted dozens of interviews, including of every independent director on the Wynn Resorts Board. By early 2012, Mr. Freeh and his team had uncovered detailed prima facie evidence of serious wrongdoing by Mr. Okada and his associates.

47. On February 15, 2012, Mr. Freeh conducted a full-day, in-person interview of Mr. Okada in Tokyo. Mr. Okada was accompanied by counsel, the former United States Attorney for the Central District of California. Following the interview, Mr. Freeh advised Mr. Okada and

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his counsel that he would be reporting his findings to the Wynn Resorts Board on February 18, 2012, and invited Mr. Okada to present Mr. Freeh with any exculpatory evidence that might be available.

48. At the Board meeting, Mr. Freeh made a detailed presentation and provided the directors with copies of his 47-page written report, outlining the following improprieties, among others:

a. Since 2008, Okada and his associates have made multiple payments to and on behalf of the Philippines' chief gaming regulators at PAGCOR, the government officials who directly oversee and regulate Mr. Okada's licensing agreement to operate in the Philippines.

b. For example, records reviewed by Mr. Freeh revealed 36 separate instances, from May 2008 to through June 2011, where Mr. Okada or his associates/affiliates made payments exceeding $110,000 that directly benefitted senior PAGCOR officials. This included payments to former PAGCOR Chairman Genuino, current PAGCOR Naguiat, and their family, friends, and associates.

c. On one particular occasion in September 2010, Mr. Okada arranged for newly appointed PAGCOR Chairman Naguiat, his wife, his three children, their nanny, and other senior PAGCOR officials (one of whom also brought his family) to stay at Wynn Macau. Mr. Okada and his associates refused to provide Wynn Macau management with the name of Chairman Naguiat and tried to conceal his identity. At Mr. Okada's associates' request and Mr. Okada's direction, Chairman Naguiat and his entourage were provided with the most expensive accommodation, food, and star treatment. In addition, Mr. Okada's associates asked that each guest be provided a $5,000 advance, in cash, during their stay. Following the stay, Mr. Okada's associates requested that Wynn Macau reduce the excessive charges because they feared an investigation and did not want Mr. Okada or his companies to get in trouble. Wynn Macau refused.

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d. There is substantial evidence that Mr. Okada, his associates, and companies may have arranged and manipulated ownership and management of legal entities in the Philippines under his control, in a manner that may have enabled the evasion of Philippine constitutional and statutory requirements.

e. Moreover, close associates and consultants of the former PAGCOR administration attained positions as corporate officers, directors, and/or nominal shareholders of entities controlled by Mr. Okada and, in some cases, served as links between Mr. Okada and the former PAGCOR Chairman.

f. Mr. Okada has stated his personal rejection of Wynn Resorts' anti-bribery policies and applicable anti-bribery laws to his fellow Wynn Resorts directors. Despite being advised by members of the Wynn Resorts Board and the Company's counsel that making payments and providing gifts to foreign government officials is strictly prohibited, Mr. Okada has expressed a willingness to engage in such conduct when doing business in Asia.

g. The nature of Mr. Okada's gaming license in the Philippines requires continued oversight by PAGCOR officials. Mr. Okada thus has a strong and continuing motive to maintain favorable relations with the Chairman and other senior officials of PAGCOR.

49. Despite being invited to present exonerating evidence regarding these matters, Mr. Okada provided no such evidence at his interview with Mr. Freeh in Tokyo or subsequently. Moreover, Mr. Freeh concluded and advised the Board that Mr. Okada lacked credibility in the statements he did make concerning his conduct.

The Wynn Resorts Board Redeems Aruze USA's Shares

50. The conduct detailed in Mr. Freeh's report is conduct of a type that, when engaged in by a person affiliated with a licensed entity, puts the entity's existing and prospective gaming licenses at risk. The Board was so advised by two independent experts on Nevada gaming law.

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LAS VEGAS, NEVADA 89169

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS LIMITED, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, DEPT. XI, Respondent, and KAZUO OKADA, UNIVERSAL ENTERTAINMENT CORP. AND ARUZE USA, INC., Real Parties in Interest.	Case No. _____ **APPENDIX IN SUPPORT OF WYNN RESORTS, LIMITED'S PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** **VOLUME II OF VI**

DATED this 29th day of March, 2016.

PISANELLI BICE PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 29th day of March, 2016, I electronically filed and served by electronic mail and United States Mail a true and correct copy of the above and foregoing **APPENDIX IN SUPPORT OF PETITIONER WYNN RESORTS LIMITED'S PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** properly addressed to the following:

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Section 42. Purchase of memberships.

If authorized in its articles or bylaws, a corporation may buy the membership of a member who resigns or whose membership is terminated for the amount and pursuant to the conditions in the articles or bylaws.

Note: Adapted from Minn. Nonprofit Corp. Act. §317A.413.

This statute allows a corporation in general terms to buy the membership of a member pursuant to the articles and bylaws.

Section 43. Delegates.

A corporation may provide in its articles or bylaws for delegates having some or all the authority of members. The articles or bylaws may set forth provisions relating to:

1. the characteristics, qualifications, rights, limitations, the geographical areas or districts delegates may represent and the obligations of the delegates, including their selection and removal;

2. calling, noticing, holding, and conducting meetings of delegates; and

3. carrying on corporate activities during and between meetings of delegates.

Note: Adapted from Minn. Nonprofit Corp. Act §317A.415; part of subsection (1) suggested by Wisconsin Nonstock Corporation Act §181.175.

Many nonprofit corporations have a structure by which members elect delegates to a convention who, in turn, elect the board of directors. This statute permits that kind of structure at the corporation's desire. The statute also permits the election of delegates by geographic area or district.

MEETINGS, ELECTIONS, VOTING AND NOTICE

Section 44. Place of members' and directors' meetings.

Meetings of members (if any), delegates (if any) and

directors of any corporation may be held within or without this state, in the manner provided by the articles or bylaws of the corporation. The articles or bylaws may designate any place or places where the members' or directors' meetings may be held.

Note: Adapted from NRS 78.310.

Sections 44 through 58 are adapted from the correlative portion of NRS Chapter 78 on meetings, elections, voting and notice, beginning with NRS 78.310. A close examination of the various nonprofit corporation laws recently enacted as well as the MN-PCA shows that the provisions in Chapter 78 are as modern and provide as much flexibility as any of them.

Section 45. Directors and delegates' meetings: Quorum; consent for actions taken without meeting; participation by telephone or similar method.

1. Unless the articles or the bylaws provide for a lesser proportion, a majority of the board of directors or delegates of the corporation, at a meeting duly assembled, is necessary to constitute a quorum for the transaction of business at their respective meetings, and the act of a majority of the directors or delegates present at a meeting at which a quorum is present is the act of the board of directors or delegates.

2. Unless otherwise restricted by the articles or bylaws, any action required or permitted to be taken at any meeting of the board of directors or the delegates or of any committee thereof may be taken without a meeting if, before or after the action, a written consent thereto is signed by a majority of the board of directors or the delegates or of such committee. If the vote of a greater proportion of the directors or delegates is required for an action, then the greater proportion of written consents is required. Such written consent must be

filed with the minutes of proceedings of the board, the delegates or the committee.

3. Unless otherwise restricted by the articles or bylaws, members of the board of directors, the delegates or of any committee designated by the board or the delegates, may participate in a meeting by means of a conference telephone network or a similar communications method by which all persons participating in the meeting can hear each other. Participating in a meeting pursuant to this subsection constitutes presence in person at such meeting.

Note: Adapted from NRS 78.315 with changes suggested by this report.

This statute is drawn from one of the statutes in Chapter 78 concerning directors' meetings. Note that the provision has been expanded to make the same provisions for delegates' meetings. Most of the other nonprofit corporation statutory schemes provide little specificity on the conduct of delegate meetings. Counsel to a nonprofit would be unable to determine whether a delegates' meetings should be governed pursuant to statutes applicable to directors' meetings or governed by statutes applicable to members' meetings.

Section 46. Consent of members in lieu of meeting.

1. Unless otherwise provided in the articles or bylaws, any action which may be taken by the vote of members at a meeting may be taken without a meeting if authorized by the written consent of members holding at least a majority of the voting power, except that:

(a) If any greater proportion of voting power is required for such an action at a meeting, then the greater proportion of written consents is required; and

(b) This general provision for action by written consent does not supersede any specific provision for action by written

consent contained in this chapter.

2. In no instance where action is authorized by written consent need a meeting of members be called or noticed.

3. A written consent is not valid unless it is:

(a) Signed by the member;

(b) Dated, as to the date of the members' signature; and

(c) Delivered to the corporation, within 60 days after the earliest date that a member signed the written consent. The written consent must be filed with the minutes of proceedings of the members.

Note: Adapted from NRS 78.320 as changed by the recommendations of this report.

This statute treats members' meetings like stockholders' meetings under Chapter 78. This statute permits the members to act by written consent if the majority signed the consent. As in NRS 78.320, once written consent has been executed, it must be delivered to the corporation for placement in the corporate records.

Section 47. Actions at meetings not regularly called: Ratification and approval.

1. Whenever all persons entitled to vote at any meeting, whether of directors, trustees, delegates or members, consent, either by:

(a) A writing on the records of the meeting or filed with the secretary; or

(b) Presence at such meeting and oral consent entered on the minutes; or

(c) Taking part in the deliberations at such meeting without objection;

the doings of such meeting shall be as valid as if had at a meeting regularly called and noticed.

2. At such meeting any business may be transacted which is not excepted from the written consent or to the consideration of which no objection for want of notice is made at the time.

3. If any meeting is irregular for want of notice or of such consent, provided a quorum was present at such meeting, the proceedings of the meeting may be ratified and approved and rendered likewise valid and the irregularity or defect waived by a writing signed by all parties having the right to vote at the meeting.

4. Unless otherwise provided in the articles or bylaws, such consent or approval of delegates or members may be by proxy or attorney, but all such proxies and powers of attorney must be in writing.

Note: Adapted from NRS 78.325.

This provision is virtually identical with NRS 78.325 and governs directors', delegates' or members' meetings.

Section 48. Directors: Election; classification.

1. If a corporation has members entitled to vote for the election of directors, or for the election of delegates who vote for the election of directors, unless elected pursuant to Section 45, and subject to subsection 2, the directors or delegates of every corporation must be chosen at the annual meeting of the members or delegates, to be held on a date and at a time and in the manner provided for in the bylaws, by a plurality of the votes cast at the election. If for any reason the directors are not elected pursuant to NRS 81.240 or at the annual meeting of the members or delegates, they may be elected at any special meeting of the members which is called and held

for that purpose.

2. The articles or bylaws may provide for the classification of directors as to their respective terms of office, their election by one or more authorized classes or series of members or delegates, their election by members or delegates in geographic areas, districts or precincts and their election annually by ballot instead of at an annual meeting.

Note: Adapted from NRS 78.330.

This statute is almost identical with NRS 78.330 except it provides for the election of directors by delegates instead of directly by the members, allows the articles or bylaws to permit the election of directors or delegates by geographic areas, districts or precincts and allows the directors to be selected by written ballot instead of at an annual meeting. By omitting new 78.335(2), it implies directors may be removed by written consent of members.

Section 49. Quorum for meetings of members; delegates.

Unless otherwise provided in the articles or bylaws, a quorum for a meeting of members is a majority of the voting power of the members entitled to vote at the meeting. If the number of members of a corporation is 1000 or more but less than 5000, no quorum for a meeting of members may be less than 2⅓% of the voting power entitled to vote at the meeting. If the number of members of a corporation is 5000 or more, no quorum for a meeting of members may be less than 1% of the voting power entitled to vote at the meeting. Otherwise, a quorum for a meeting of members may be no less than 10% for the voting power of the members entitled to vote at the meeting. A quorum for a meeting of delegates is a majority of the voting power of the delegates.

Note: Adapted from Minn. Nonprofit Corp. Act §317.451 and Cal. Corp. Code §5036.

As you will note, this statute permits a quorum of members' meetings to be less than a majority but no less than 2½% or 1% depending on the number of members a corporation has. Many nonprofits, and co-ops as well, are unable to obtain a membership meeting attendance even approaching 10%. Other nonprofit corporation statutes permit small quorums for members' meetings. Minnesota provides that a quorum is 10% unless otherwise provided by the articles and bylaws. Minn. Nonprofit Corp. Act §317A.451. California provides that a quorum for a members' meeting is a majority of the voting power but the bylaws and articles may set a different quorum (with no lower limit). Cal. Corp. Code §5512. However, California governs the voting on certain matters by the definition of "authorized number" at Cal. Corp. Code §5036 from which the 2½% and 1% figures above are taken. Illinois provides for a quorum of a members' meeting of 10%. The articles and bylaws can provide for a greater or lesser quorum. Illinois Not For Profit Corp. Act §107.60. The Model Nonprofit Corporation Act provides for a quorum as set in the articles or bylaws but never less than 1/3, at §20.

The existing Chapter 81 provides no guidance on the quorums for members' meetings.

Section 50. Directors: Removal; filling of vacancies.

1. Any director may be removed from office by the vote of members (if any) representing not less than a majority of the voting power of the members entitled to vote for the election of the director being removed or a majority of the voting power of the members entitled to vote for delegates who vote for the election of the director being removed, provided:

(a) That in case of corporations which have provided in their articles or bylaws for the election of directors by cumulative voting, no director may be removed from office under the provisions of this section except upon the vote of members holding sufficient voting power to have prevented his election to office in the first instance; and

(b) That the articles or bylaws may require the concurrence of a larger percentage of the members entitled to voting power in order to remove a director.

2. If there are no members entitled to vote for the election of directors or entitled to vote for delegates who vote for the election of directors, any director may be removed from office by a majority vote of those directors entitled to vote for the director being removed.

3. Except as otherwise provided in the articles or bylaws, a director appointed by persons or public officials specified in the articles or bylaws may be removed with or without cause by a written notice from the person or public official who appointed the director being removed, delivered to the chairman of the board or president of the corporation. The vacancy created may be filled by such person or public official.

4. Except as provided in subsection 3, all vacancies, including those caused by an increase in the number of directors, may be filled by a majority of the remaining directors, though less than a quorum, unless it is otherwise provided in the articles or bylaws.

5. Unless otherwise provided in the articles or bylaws, when one or more directors give notice of his or their resignation to the board, effective at a future date, the board may fill the vacancy or vacancies to take effect when the resignation or resignations become effective, each director so appointed to hold office during the remainder of the term of office of the resigning director or directors.

Note: Adapted from NRS 78.335; subsection (2) adapted from Minn. Nonprofit Corp. Act §§317A.223(3).

This statute concerning the removal of directors is adapted from Chapter 78. However, it had to be extensively modified to fit nonprofit corporations. Many nonprofits do not have members. Thus, subsection (2) is required, allowing the

director of a nonprofit which does not have members to be removed by those directors who could elect him.

NRS 78.330 requires a 2/3 vote of shareholders to remove a director. This is unnecessarily high since many nonprofits have great difficulty obtaining even a majority of members to vote on any matter or attend any meeting.

Subsection (1) provides that only members (not delegates) can remove directors. Only those members who elect a director, or those members who vote for the delegates that can elect that director, can remove the director. Similar provisions are found in Cal. Corp. Code §5222 and the Minn. Nonprofit Corp. Act noted above. Similar provisions exist in the Illinois Not For Profit Corp. Act §108.35.

Only subsections (3), (4) and (5) can be changed by the articles or bylaws.

Subsection 3 is adapted from the Revised Model Nonprofit Corporation Act (1987), §8.09 and provides for the removal of directors by the "persons" (defined at NRS 0.039 for the entire Nevada Revised Statutes as a natural person, any form of business or social organization and other nongovernmental entity) or "public official" who appointed him. See Section 29.

Section 51. Failure to hold election of directors on regular day does not dissolve corporation.

If the directors are not elected on the day designated for the purpose, the corporation is not for that reason dissolved; but every director shall continue to hold his office and discharge his duties until his successor has been elected.

Note: Adapted from NRS 78.340

Section 52. District court to appoint directors upon failure of election.

1. If any corporation fails to elect directors within 6 months after the time designated for its annual meeting of members or delegates (if any), the district court has jurisdiction in equity, upon application of any one or more of its members representing 10% of the voting power of the members entitled to vote for the election of directors or for the

election of delegates who are entitled to elect directors, or 50 members, whichever is less, to appoint a board of directors for the corporation not exceeding the number authorized by the corporation's bylaws. Such appointments may be made from among the members.

2. The application must be made by petition filed in the county where the principal office of the corporation is located and must be brought on behalf of all members desiring to be joined therein. Such notice must be given to the corporation and the members as the court may direct.

3. The appointees of the court have the same rights, powers and duties and the same tenure of office possessed by those directors duly elected by the members at the next annual meeting after the date of the court's appointment.

Note: Adapted from NRS 78.345; Subsection 1 adopted in part from Minn. Nonprofit Corp. Act. §317.434.

The threshold for the number of members entitled to file an action in the district court to call a meeting to elect directors exists in every modern nonprofit corporation act. Cal. Corp. Code §5515 provides for a court-ordered meeting at any time when it is impractical or unduly difficult for a corporation to call or conduct a meeting of its members, delegates or directors. We believe this is too sweeping a power. Requiring a certain threshold of members' participation in such an action before the district court helps ensure that a corporation will not be subject to lawsuits seeking meetings without good reason.

Section 53. Appointment of provisional director on deadlock.

1. Any director or 33-1/3% of the members may apply to the district court to appoint one person to be a provisional director when the business of the corporation is suffering or is threatened with irreparable injury because the directors are so

divided respecting the management of the affairs of the corporation that the required vote for action by the board of directors cannot be obtained and the members (if any) are unable to terminate this division.

2. A provisional director must be an impartial person, who is neither a member nor a creditor of the corporation, nor related by consanguinity or affinity within the third degree according to the common law to any of the other directors of the corporation. A provisional director has all the rights and powers of a director until the provisional director is removed by order of the court or by approval of 33-1/3% of the members (if any) or majority of the directors, not counting the provisional director. The provisional director is entitled to compensation as fixed by the court unless otherwise agreed with the corporation.

Note: Adapted from this report's recommendation for a new statute labeled NRS 78.346; and Cal. Corp. Code §5225.

Members and directors should be given the power to file an action breaking a deadlock in the operation of this corporation. This statutory wording is taken from 7 Del. Code §226 and appears as a recommended new statute in this report for Chapter 78. However, we have modified the wording to provide for a provisional director as provided in Cal. Corp. Code §5225. We believe a nonprofit corporation should not be driven to the drastic remedy of dissolution before something is done to break a deadlock.

Section 54. Determination of members entitled to notice of and to vote at meeting; fixing date when members entitled to give consent in lieu of meeting.

1. Unless contrary provisions are contained in the articles or bylaws, the directors may prescribe a period not exceeding 60 days before any meeting of the members during which

no transfer of memberships on the books of the corporation may be made, or may fix a day not more than 60 days before the holding of any meeting of members as the day as of which members entitled to notice of and to vote at the meeting must be determined. Only members of record on that day are entitled to notice or to vote at the meeting.

2. The directors may adopt a resolution prescribing a date upon which the members of record are entitled to give written consent pursuant to Section 46. The date prescribed by the directors may not precede nor be more than 10 days after the date the resolution is adopted by the directors. If the directors do not adopt a resolution prescribing a date upon which the members of record are entitled to give written consent pursuant to Section 46 and:

(a) No prior action by the directors is required by this chapter, the date is the first date on which a valid written consent is delivered in accordance with the provisions of Section 46.

(b) Prior action by the directors is required by this chapter, the date is at the close of business on the day on which the directors adopt the resolution taking the required action.

Note: Adapted from NRS 78.350.

Section 55. Proxies.

1. Unless the articles or bylaws provide otherwise, at any meeting of the members of any corporation any member may be represented and vote by a proxy or proxies appointed by an instrument in writing. In the event that any written proxy

shall designate two or more persons to act as proxies, a majority of those persons present at the meeting, or, if only one shall be present, then that one shall have and may exercise all of the powers conferred by the written proxy upon all of the persons so designated unless the instrument provides otherwise.

2. No proxy shall be valid after the expiration of 6 months from the date of execution, or unless the person executing it specifies therein the length of time for which it is to continue in force, which in no case shall exceed three (3) years from the date of its execution. Subject to the above, any proxy duly executed is not revoked and continues in full force and effect until an instrument revoking it or a duly executed proxy bearing a later date is filed with the secretary of the corporation.

Note: Adapted from NRS 78.355; three year life of a proxy suggested by Cal. Corp. Code §5613(b).

Section 56. Action by written ballot.

1. Except as provided in subsection 5 and unless prohibited or limited by the articles or bylaws, an action that may be taken at a regular or special meeting of members, including the election of directors, may be taken without a meeting if the corporation mails or delivers a written ballot to every member entitled to vote on the matter.

2. A written ballot must:

(a) set forth each proposed action or candidate; and

(b) provide an opportunity to vote for or against each proposed action.

3. Approval by written ballot under this section is valid

only when the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

4. Solicitations for votes by written ballot must:

(a) indicate the number of responses needed to meet the quorum requirements;

(b) state the percentage of approvals necessary to approve each matter other than election of directors; and

(c) specify the time by which a ballot must be received by the corporation in order to be counted.

5. Except as otherwise provided in the articles or bylaws, a written ballot may not be revoked.

Note: Adapted from Minn. Nonprofit Corp. Act §317A.447. Some of the more recent nonprofit corporation statutory schemes allow members to vote on matters by ballot. See the Minnesota Act section noted above; Cal. Corp. Code §5513, §7513. This procedure allows nonprofits additional flexibility in voting on director candidates and specific matters and permits the corporation to act if it is difficult or inconvenient to obtain the necessary quorum of members assembled in one place for a meeting.

Section 57. Cumulative voting.

1. The articles or bylaws of any corporation may provide that at all elections of directors of the corporation each member having a right to elect directors at the meeting is entitled to as many votes as equal the number of his memberships multiplied by the number of directors to be elected, and that he may cast all of his membership votes for a single director or may distribute them among the number to be voted for or any two

or more of them, as he may see fit. In order to exercise the right of cumulative voting, one or more of the stockholders calling or requesting a vote by cumulative voting must give notice before the vote to the president or secretary of the corporation that the stockholder desires that the voting for the election of directors be cumulative.

Note: Adapted from NRS 78.360.

This statute and Section 55 are taken almost verbatim from the correlative sections of Chapter 78 as changed by this report. Other nonprofit corporation laws provide for cumulative voting and for proxies but shorten the maximum life of a proxy from the longer limits set forth in the business corporation statutes. In light of the need for flexibility in the voting provisions of nonprofit corporations, we have used the same provisions giving similar flexibility to business corporations.

Section 58. Demand for special meetings; notice of meetings of delegates and members; Signature; contents; service; publication; waiver.

1. A corporation with members entitled to vote on the matter involved must hold a special meeting of delegates or members if:

(a) the board of directors or persons authorized to do so by the articles or bylaws demand such a meeting; or

(b) at least 5% of such members demand such a meeting. The demand must state the purpose for the meeting. Those making the demand on the corporation must sign, date and deliver their demand to the president, chairman of the board or the treasurer of the corporation. The corporation must then immediately notice a special meeting of delegates or members as set forth in subsections 2 through 7 below.

2. Whenever under the provisions of this chapter

delegates or members are required or authorized to take any action at a meeting, the notice of the meeting must be in writing and signed by the president or the chairman of the board or a vice president, or the secretary, or an assistant secretary, or by such other person or persons as the bylaws may prescribe or permit or the directors designate.

3. The notice must state the purpose or purposes for which the meeting is called and the time when, and the place, which may be within or without this state, where it is to be held.

4. A copy of the notice must be either delivered personally to, or must be mailed postage prepaid, to each delegate or member, as the case may be, entitled to vote at such meeting not less than 10 nor more than 60 days before such meeting. If mailed, it must be directed to the person at his address as it appears upon the record of the corporation. Upon the mailing of any notice the service thereof is complete, and the time of the notice begins to run from the date upon which the notice is deposited in the mail for transmission to the person. Personal delivery of the notice to any officer of a corporation or association, or to any member of a partnership, shall constitute delivery of the notice to the corporation, association or partnership.

5. The articles or bylaws may require that the notice be also published in one or more newspapers.

6. Notice duly delivered or mailed to a delegate or member in accordance with the provision of this section and the provisions, if any, of the articles or bylaws is sufficient, and

in the event of the transfer of a membership after the delivery or mailing and prior to the holding of the meeting it is not necessary to deliver or mail notice of the meeting upon the transferee.

7. Any delegate or member may waive notice of any meeting by a writing signed by him, or his duly authorized attorney, either before or after the meeting.

8. Unless otherwise provided in the articles or bylaws, whenever notice is required to be given, under any provision of this chapter, the articles or bylaws of any corporation, to any member to whom notice of 2 consecutive annual meetings, and all notices of meetings or of the taking of action by written consent without a meeting to such person during the period between such 2 consecutive annual meetings, have been mailed addressed to such person at his address as shown on the records of the corporation and have been returned undeliverable, the giving of further notices to such person is not required. Any action or meeting taken or held without notice to such person has the same force and effect as if the notice had been duly given. If any such person delivers to the corporation a written notice setting forth his current address, the requirement that notice be given to such person is reinstated. In the event that the action taken by the corporation is such as to require the filing of a certificate under any of the other sections of this title, the certificate need not state that notice was not given to persons to whom notice was not required to be given pursuant to this subsection.

Note: Adapted from NRS 78.370 including the changes to NRS

78.370 as recommended.

Subsection 1 allows 5% of the members to call a special meeting of the members. See Minn. Nonprofit Corp. Act. §317A.433; Cal. Corp. Code §5510(e); Revised MNPCA §7.02.

We have provided for the changes this report recommends to NRS 78.370. The changes allow a corporation to drop a member from the mailing list if mailings are returned undeliverable on two different occasions.

This statute covers both notices of delegates' meetings and members' meetings.

Section 59. Waiver of notice.

Whenever any notice whatever is required to be given under the provisions of this chapter, a waiver thereof in writing, signed by the person or persons entitled to the notice, whether before or after the time stated therein, is equivalent thereto.

Note: Adapted from NRS 78.375.

AMENDMENTS OF ARTICLES

Section 60. Amendment of articles of incorporation before organizational meeting of directors.

1. If the first or organizational meeting of the directors has not taken place and if there are no members, a majority of the incorporators of any corporation may amend the original articles in the following manner:

(a) A majority of the incorporators must execute and acknowledge or prove in the manner required for original articles, and file with the secretary of state a certificate amending, modifying, changing or altering the original articles, in whole or in part. The certificate must:

(1) Declare that the signers thereof are a majority of the original incorporators of the corporation.

(2) State the date upon which the original articles

were filed with the secretary of state.

(b) The amendment is effective upon the filing of the certificate with the secretary of state.

2. Nothing in this section permits the insertion of any matter not in conformity with this chapter.

3. The secretary of state must charge such fee as shall be allowed by law for filing the amended certificate of incorporation.

Note: Adapted from NRS 78.380 and Minn. Nonprofit Corp. Act §317A.133(1).

Both the Minn. Nonprofit Corp. Act §317A.133(1) and Cal. Corp. Code §5811 provide for amendments before the corporation begins operation. This allows a corporation to amend its articles easily to add last minute items.

Section 61. Amendment of articles of incorporation: Scope of amendments.

1. Any corporation may amend its articles in any or all of the following respects:

(a) By addition to its corporate powers and purposes, or diminution thereof, or both.

(b) By substitution of other powers and purposes, in whole or in part, for those prescribed by its articles of incorporation.

(c) By changing the name of the corporation.

(d) By making any other change or alteration in its articles of incorporation that may be desired.

2. Any and all such changes or alterations may be effected by one certificate of amendment. Any articles so amended, changed or altered may contain only such provisions as it would be lawful and proper to insert in an original articles,

pursuant to Sections 8 and 9 or the other statutes governing the contents of the corporation's articles, executed, acknowledged and filed at the time of making the amendment.

Note: Adapted from NRS 78.385.

Section 62. Amendment of articles of incorporation: Procedure.

1. Every amendment adopted pursuant to the provisions of Section 61 must be made in the following manner:

(a) The board of directors must adopt a resolution setting forth the amendment proposed, approve it and, if the corporation has members, call a meeting, either annual or special, of the members entitled to vote on an amendment to the articles. The amendment must also be approved by every person or public official whose approval of an amendment of articles is required by the articles.

(b) At the meeting of members, of which notice shall be given to each member entitled to vote pursuant to the provisions of this section, a vote of the members entitled to vote in person or by proxy must be taken for and against the proposed amendment. A majority of a quorum of the voting power of the members or such greater proportion of the voting power of members as may be required in the case of a vote by classes or series, as provided in subsections 2 and 4, or as may be required by the articles, must vote in favor of the amendment.

(c) Upon approval of the amendment by the directors, or if the corporation has members, by both the directors and members, and such other persons or public officials (if any) required to do so by the articles, the chairman of the board, the president

or vice president, and the secretary or assistant secretary, must execute a certificate setting forth the amendment, or setting forth the articles as amended, that the persons or public officials (if any) required by the articles have approved the amendment, and the vote of the members and directors by which the amendment was adopted. The chairman of the board, president or vice president, and the secretary or assistant secretary, must acknowledge the certificate before a person authorized by the laws of the place where the acknowledgement is taken to take acknowledgements of deeds.

(d) The certificate so executed and acknowledged, must be filed in the office of the secretary of state. Upon filing the certificate, the articles of incorporation are amended accordingly.

2. If any proposed amendment would alter or change any preference or any relative or other right given to any class or series of members, then such amendment must be approved by the vote, in addition to the affirmative vote otherwise required, of the holders of a majority of a quorum of the voting power of each class or series of members affected by the amendment regardless of limitations or restrictions on their voting power.

3. In the case of any specified amendments, the articles may require a larger vote of members than that required by this section.

4. Different series of the same class of members do not constitute different classes for the purpose of voting by classes except when the series is adversely affected by an amendment in a different manner than other series of the same

class.

Note: Adapted from NRS 78.390.

Other states have substantially the same requirements for an amendment to the articles. See Cal. Corp. Code §5812; Minn. Nonprofit Corp. Act §317.133. Illinois and the Model Act require a two-thirds vote of the members to approve an amendment, an unnecessarily high threshold. See Illinois Not For Profit Corporation Act §110.20; MN-PCA §34.

Some nonprofits will be subservient to parent organizations, like lodges or religious orders, or designate other persons or public officials to approve amendments. Subsection 1(a) requires the approval of this person if such approval is required by the articles. See Cal. Corp. Code §5812.

Section 63. Amendment of articles of incorporation: Public benefit corporation.

In addition to the requirements of Sections 61 and 62, a public benefit corporation must send a copy of the proposed amendment as approved by its board of directors to the attorney general no less than 30 days before the amendment is filed with the secretary of state. The failure to send a copy of the amendment to the attorney general as required by this section does not, by itself, render the amendment, once filed with the secretary of state, ineffective.

Note: Any amendment to the articles of a public benefit corporation (defined at Section 1(f) as a 501(c)(3) organization or is organized only for a public or charitable purpose) may change its nature and, contrary to its public charitable purpose, divert its assets to private use. The requirement that all amendments to the articles of such organizations be sent to the attorney general allows that office to monitor public charities. However, such a requirement should not force a corporation or its counsel to make difficult factual determinations about the public charitable nature of its operations when a few operations may be on the borderline. A wrong guess could void a desparately-needed amendment or void transactions with third parties based on an amendment, in each case, if the management of the corporation mistakenly forgets the requirements or makes an incorrect guess on the nature of its organization. The balance, we feel, should be weighted on the side of the validity of the amendment.

Section 64. Adoption of amended articles of incorporation: Procedure.

1. If the provisions of Sections 20 and 21 have been complied with, the board of directors and members (if any) of any corporation, when amending any portion of its articles pursuant to the provisions of Sections 61 and 62, may, at the same time, pursuant to the procedure prescribed in Section 62 to effect an amendment of articles, adopt amended articles of incorporation, which must:

(a) Be titled "amended articles of incorporation."

(b) Set forth in full every provision of the original articles of incorporation as of record in the office of the secretary of state, including the execution and acknowledgment thereof, as amended to date.

(c) State, after each provision of the amended articles, whether or not it has been amended; and if any provision of the articles has been amended it must be made to read as it was last amended, and the date of the certificate last amending it must be stated.

(d) Include the provisions of the articles which were never amended.

2. Upon the filing with the secretary of state of the certificate of amendment, the articles of incorporation are amended accordingly.

3. Notice of any meeting of members at which the adoption of the subject amended articles of incorporation is to be considered must specifically state the purpose to consider the adoption thereof at the meeting.

Note: Adapted from NRS 78.395.

All the states with modern nonprofit codes allow amended articles to be filed. Consistent with our desire to adopt Chapter 78 language where possible, we used NRS 78.395 as our model.

Section 65. Restated articles of incorporation: Filing requirements; execution of certificates; use.

1. A corporation may restate, or amend and restate, in a single certificate the entire text of its articles as amended by filing with the secretary of state a certificate entitled "Restated Articles of Incorporation of _____," which must set forth the articles as amended to the date of the certificate. If the certificate alters or amends the articles in any manner, it must comply with the provisions of this chapter governing such amendments and must be accompanied by:

(a) A resolution; or

(b) A form prescribed by the secretary of state, setting forth which provisions of the articles of incorporation on file with the secretary of state are being altered or amended.

2. If the certificate does not alter or amend the articles, it must be signed by the president or vice president and the secretary of assistant secretary of the corporation and must be verified by their signed affidavits that they have been authorized to execute the certificate by resolution of the board of directors adopted on the date stated, and that the certificate correctly sets forth the text of the articles as amended to the date of the certificate.

3. The signatures and acknowledgments of the incorporators may be omitted from the restated articles.

4. Whenever a corporation is required to file a certified copy of its articles, in lieu thereof it may file a certified copy of the most recent certificate restating its articles as amended, subject to the provisions of subsection 2, together with certified copies of all certificates of amendment filed after the restated articles and certified copies of all certificates supplementary to the original articles.

Note: Adapted from NRS 78.403.

Most nonprofit corporation codes require restated articles to be adopted by the directors, not the officers as provided in Chapter 78 of the NRS. There appears to be no reason why the officers should not restate the articles at their desire since no amendments to the articles will be made as a result.

MERGER

Section 66. Merger of domestic corporations authorized.

In the manner provided in Sections 67 to 77, inclusive, any two or more corporations governed by this chapter and any other corporation, governed by Nevada law, the law of any other state, the United States or any foreign country, may be merged into one of such constituent corporations, which is designated as "the surviving corporation" in Sections 67 to 77, inclusive.

Note: Adapted from existing NRS 78.450.

All of the recent nonprofit corporation codes permit mergers of their corporations with other corporations. Existing NRS 81.130 allows a consolidation of two or more "nonprofit cooperative associations" by two-thirds of a vote of the members. The 1985 legislature repealed NRS 81.140 governing nonprofit cooperatives which referred to NRS 78.350 for their merger statutes. The effect of this repeal is unknown but could raise the possibility mergers are no longer permitted for the co-ops. None of the other nonprofit corporation code chapters mention merger at all.

In all instances, the following merger statutes are based upon the wording and approach of Chapter 78 on mergers. As in our recommended changes to the merger statutes of Chapter 78, consolidations are being eliminated as outmoded.

Section 67. Domestic corporations: Agreement of directors to merge; approval by other person.

1. A majority of the directors of each corporation governed by this chapter desiring to merge, may authorize and approve an agreement prescribing the terms and conditions of merger, the mode of carrying the merger into effect, and the manner of converting the memberships or shares of each of the constituent corporations into memberships or shares of the corporation surviving the merger. The agreement must also set forth the other consideration which the holders of memberships or shares in the constituent corporations may receive in exchange for, or upon conversion of, those memberships or shares or the certificates evidencing them which may be in addition to or in lieu of memberships, shares or other securities of the surviving corporation.

2. The agreement must also be approved by each other persons or public officials whose approval of a merger is required by the articles.

Note: Adapted from NRS 78.455.

The wording in this statute has modified existing NRS 78.455 extensively. First, the provision must allow a merger with a corporation with shares or with memberships. If one of the corporations being merged has shares, the statute requires provisions be placed in the merger agreement setting forth how the shares are to be converted into memberships. The language concerning the conversion of shares into memberships is borrowed, in part, from NRS 78.480. A large portion of NRS 78.455 requiring the agreements set forth the cash, property, rights or securities into which shares are to be converted if not solely into the shares of the surviving corporation has been deleted since the new nonprofit corporation law does not permit the issuance of shares.

Finally, this new statute requires the agreement to be approved by other persons or public officials whose approval of a merger or consolidation is required by the articles. The word "person" includes natural persons, business organizations and

social organizations. NRS 0.039. Thus, if set forth in the initial articles, a parent or superior organization may be required to approve mergers.

Section 68. Domestic corporations: Mandatory provisions of agreement.

The agreement of merger must state any matters with respect to which the articles of the surviving corporation governed by this chapter are to be amended, and the articles are amended accordingly upon the effective date of the merger.

Note: Adapted from NRS 78.460.

The wording of existing NRS 78.460 has been changed to reflect the fact that the surviving domestic corporation may be one governed by Chapter 78 or one governed by this new nonprofit corporation chapter. Thus, the articles of either corporation must comply with those sections of the chapter setting forth the mandatory contents of the articles of incorporation.

Section 69. Notice to attorney general; waiting period.

A public benefit corporation must notify the attorney general of its intent to merge with any other corporation. The notice must include the agreement of merger and must be mailed to the attorney general by registered mail, return receipt requested. No such merger may be effective until 30 days after the corporation has placed the notice to the attorney general in the mail. The articles of merger filed with the secretary of state must set forth the date of such mailing and the date the 30 day notice period expires.

Note: Not found in the NRS previously.

This new section requires "public benefit corporations" (defined at Section 1(1)(e) to notify the attorney general of its intent to merge with another corporation and include the text of the agreement of merger. It requires the agreement of merger as filed to set forth the date of mailing and the date the 30 day notice period expires. The allows the attorney general the necessary oversight over "public benefit corporations" to make sure the money entrusted to them is not being diverted for private purposes or for purposes other than

those for which the money was contributed to the "public benefit corporation".

Similar provisions are found in Minnesota at Minn. Nonprofit Corp. Act §317A.811. Minnesota requires notice to be given the attorney general of a corporation's intent to dissolve, merge, consolidate or transfer all or substantially all its assets. It requires that notice only for a corporation that holds assets for a public or charitable purpose or exempt pursuant to the Internal Revenue Code §501(c)(3).

California is far more restrictive. It requires that the attorney general approve any merger of a public benefit corporation with any other kind of corporation entity except another public benefit corporation, a religious corporation or a foreign public benefit corporation. Cal. Corp. Code §6010.

Illinois allows a merger of a not for profit corporation only with another domestic or foreign not for profit corporation. See Ill. Not For Profit Corp. Act §111.35 and §111.37.

Similarly, the Model Non-Profit Corporation Act, §38 and §39, allows merger and consolidation only of a nonprofit with another nonprofit.

The Revised Model Non-Profit Corporations Act, §11.02, forbids mergers of public benefit or religious corporations, except with others of the same kind, unless its assets are first transferred to another 501(c)(3) organization or to an organization permitted by its articles or bylaws and a majority of disinterested directors approve. A judge has the power to approve a merger otherwise forbidden in a proceeding in which the attorney general is a party.

We believe a less restrictive approach is better. Nonprofit corporations should be able to merge with any other kind of corporation but, if it is a "public benefit corporation", it must notify the attorney general 30 days before the merger occurs. We do not believe the merger should be valid unless such notification takes place. Only "public benefit corporations" incorporated under the new Chapter 81 are required to notify the attorney general, giving other nonprofits the full freedom of action they should have.

Section 70. Domestic corporations: Approval of agreement by members required; exceptions; voting rights by class; certified copy of agreement prima facie evidence of existence of corporation; filing.

1. If a constituent corporation governed by this chapter

has members with rights to vote on mergers, the agreement must be submitted to the members of each constituent corporation with members at a meeting called for that purpose. Notice of the time, place and object of each meeting must be given in the manner required by Section 58 to each member of each of the constituent corporations.

2. At each meeting the agreement must be considered and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the agreement. The agreement must be approved by a majority of a quorum of the votes of members entitled to vote thereon unless a class of members of a constituent corporation are entitled to vote thereon as a class. If a class of members is so entitled, the agreement must be approved by a majority of a quorum of the votes of each class entitled to vote thereon as a class. Members of a class of any constituent corporation are entitled to vote as a class if the agreement contains a provision that, if contained in a proposed amendment to its articles, would entitle those members to vote as a class. The agreement must also be approved by the persons or public officials whose approval is required by the corporation's articles. The secretary or assistant secretary of each constituent corporation must certify the approval of the agreement by the members and by the persons or public officials and attach the certification to the agreement.

3. Any constituent corporation governed by this chapter which has no members may merge by the adoption by its board of directors of a resolution approving the agreement and by the approval of the persons or public officials whose approval is

required by its articles.

4. The agreement so adopted and certified must be signed by the chairman of the board, president or vice president, and the secretary or assistant secretary, of each constituent corporation governed by this chapter, and acknowledged in the manner prescribed by NRS 111.270 by the chairman of the board, president or vice president of each constituent corporation, before a person authorized by the laws of this state to take acknowledgments of deeds.

5. The agreement so certified and acknowledged must be filed in the office of the secretary of state, and shall be deemed to be the agreement and act of merger of the constituent corporations. Unless a later effective date is specified in the agreement, the merger is effective when the agreement is filed. The effective date must not be more than 90 days after the agreement is filed.

6. A certified copy of the agreement is prima facie evidence of the performance of all conditions precedent to the merger and of the continued existence of the surviving corporation.

7. The articles of any corporation governed by this chapter may require a larger vote of directors or members for the approval of a merger agreement than the vote required by this section.

Note: Adapted from NRS 78.470.

Omitted from this statute are the provisions of existing NRS 78.470(3) regarding the approval of a merger without stockholder votes if the plan of merger does not issue shares of the surviving corporation which is 20% more than the shares of the constituent corporations.

Subsection 3 allows a corporation with no members to merge only by vote of the board of directors or any persons whose approval is required by the articles.

As in the statutes dealing with amendments, provision is made for the signature of the certificate of merger by the chairman of the board as well as a president. Most nonprofits have a chairman of the board and many do not have a president.

Section 71. Merger of domestic and foreign corporations authorized.

Any one or more corporations governed by this chapter may be merged with one or more other corporations organized under the laws of any other state or states of the United States of America or under the laws of any foreign country, if the laws under which the other corporation or corporations are formed permit such merger. The constituent corporations may be merged into a single corporation, which may be any one of the constituent corporations, and which is designated as "the surviving corporation" in Sections 72 and 74.

Note: Adapted from NRS 78.475.

Section 72. Domestic and foreign corporations: Agreement for merger.

1. All constituent corporations must enter into an agreement in writing which must prescribe:

(a) The terms and conditions of the merger.

(b) The mode or carrying the merger into effect.

(c) The manner of converting the memberships or shares of each of the constituent corporations into memberships or shares or other securities of the surviving corporation and the other consideration which the holders of memberships or shares in the constituent corporations may receive in exchange for, or upon

the conversion of, those memberships or shares, or the certificates evidencing them which may be in addition to or in lieu of memberships or shares or other securities of the surviving corporation.

(d) Such other details and provisions as are deemed necessary or proper, including, without limitation, any of the provisions permitted by Sections 67 and 68.

2. The agreement must also set forth such other facts as are required in articles of incorporation by the laws of the state or foreign country, which are stated in the agreement to be the laws that govern the surviving corporation.

3. If the surviving corporation is a corporation organized under the laws of this state, the agreement must state any matters with respect to which the articles of the surviving corporation are to be amended, and articles are amended accordingly upon the effective date of the merger.

Note: Adapted from NRS 78.480.

As above, a nonprofit corporation is permitted to merge with a corporation with shares. Thus, provisions for the conversion of memberships and/or shares must be contained in the statute.

Section 73. Domestic and foreign corporations: Approval of agreement.

1. The agreement must be authorized, adopted, approved, signed and acknowledged by each of the constituent corporations in accordance with the laws under which it is formed and, in the case of a corporation organized under the laws of this chapter, in the manner provided in Sections 67, 68, 69 and 70.

2. The agreement so authorized, adopted, approved, signed

and acknowledged must be filed in the office of the secretary of state and is the articles of merger of the constituent corporations for all purposes of the laws of this state. Unless a later effective date is specified in the agreement, the merger is effective when the agreement is filed. The effective date must not be more than 90 days after the agreement is filed.

3. A certified copy of the articles of merger is prima facie evidence of the performance of all conditions precedent to the merger, and of the continued existence of the surviving corporation.

Note: Adapted from NRS 78.485.

This statute requires the approval pursuant to Nevada procedures for Nevada corporations and pursuant to the law of the foreign jurisdiction for foreign corporations when the two corporations merge. The statutes described in subsection 1 include the statute requiring the notification of the attorney general pursuant to Section 69 if a "public benefit corporation" is involved.

Section 74. Domestic and foreign corporations: Service of process in Nevada in certain proceedings.

1. If the surviving corporation will be governed by the laws of a state other than this state or by the laws of a foreign country, it must agree that it may be served with process in this state in any proceeding for enforcement of any obligation of any constituent corporation organized and existing, before the merger, under the laws of this state, and must irrevocably appoint the secretary of state as its agent to accept service of process.

2. Service of such process must be made by personally delivering to and leaving with the secretary of state duplicate copies of such process and the payment of a fee of $10 for

accepting and transmitting the process. The secretary of state must forthwith send by registered or certified mail one of the copies to the surviving corporation at its specified address, unless the surviving corporation has designated in writing to the secretary of state a different address for that purpose, in which case it must be mailed to the last address so designated.

Note: Adapted from NRS 78.490.

In order to clean up the language presented by existing NRS 78.490, we deleted the language from subsection 1 providing that obligations enforced against the surviving corporation include "any amount fixed by appraisers or the district court pursuant to the provisions of NRS 78.510 . . ." However, there was no intent to change the substance of the statute. The language remaining after deleting the above-described phrase does, in fact, include any amount fixed by appraisers or others to members who may dissent pursuant to Section 77.

Section 75. Effect of merger.

1. When a merger takes effect:

(a) every other corporation which is a party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;

(b) the title to all real estate and other property owned by each corporation which is a party to the merger is vested in the surviving corporation without reservation or impairment subject to any and all conditions to which the property was subject before the merger;

(c) the surviving corporation has all liabilities and obligations of each corporation which is a party to the merger;

(d) a proceeding pending against any corporation which is a party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased;

(e) the articles of incorporation and bylaws of the surviving corporation are amended to the extent provided in the plan of merger;

(f) the surviving corporation inures to a devise, bequest, gift or grant contained in a will or other instrument, in trust or otherwise, made before the merger becomes effective, to any of the constituent corporations, unless the will or other instrument provides otherwise.

2. (a) For purposes of this subsection, "fiduciary capacity" means the capacities of trustee, executor, administrator, personal representative, guardian, conservator, receiver, escrow agent, agent for the investment of money, attorney-in-fact, or a similar capacity.

(b) Except where the will, declaration of trust, or other instrument provides otherwise, the surviving corporation is, without further act or deed, the successor of the constituent corporations in fiduciary capacities in which a constituent corporation was acting at the time of the merger or consolidation and is liable to the beneficiaries as fully as if the constituent corporation had continued its separate corporate existence.

(c) If a constituent corporation is nominated and appointed, or has been nominated and appointed, in a fiduciary capacity in a will, declaration of trust, or other instrument, order, or judgment before or after the merger, then even if the will or other instrument, order, or judgment does not becomes operative or effective until after the merger becomes effective, every fiduciary capacity and the rights, powers, privileges,

duties, discretions, and responsibilities provided for in the nomination or appointment fully vest in and are to be exercised by the surviving corporation, whether there are one or more successive mergers or consolidations.

Note: Adapted from Rev. MN-PCA (1987) §11.05 and NRS 78.495; subsections 1(f) and 2 adapted from Minn. Nonprofit Corp. Act §317A.651(3).

This statute sets forth the effect of mergers. Subsection 1 of this statute is an adaptation of the wording of Rev. MN-PCA (1987) §11.05.

Subsection 1(f) is a provision which, in substance, is found in a number of other nonprofit corporations statutory schemes. While the language contained in other portions of NRS 78.495 might, in effect, provide for the succession of a surviving or consolidating corporation to devises or bequests, since devises and bequests are so important to nonprofits, this specific provision has been inserted. See Cal. Corp. Code §6022; Minn. Nonprofit Corp. Act §317A.641.

Subsection 2 is adapted directly from Minn. Nonprofit Corp. Act §317.651(3). This provision ensures a nonprofit corporation will become the trustee, executor, etc. under a will or trust instrument if the constituent corporations have been so appointed. The will or other instrument can, of course, provide otherwise. See also Revised Model Nonprofit Corporation Act (1987) §11.07 (bequests etc. only, not "fiduciary capacities").

Section 76. Power of directors and officers of constituent corporations to execute necessary instruments of title after merger.

If at any time the surviving corporation decides that any further grants, assignments, confirmations or assurances are necessary or desirable to vest or to perfect or confirm of record or otherwise in such surviving corporation the title to any property of any constituent corporation, the officers or any of them and directors of the surviving or constituent corporations may execute and deliver any and all such deeds, assignments, confirmations and assurances and do all things

necessary or proper so as to best prove, confirm and ratify title to such property in the surviving corporation or to otherwise carry out the purposes of the merger and the terms of the agreement of merger. The surviving corporation has the same power and authority to act in respect to any debts, liabilities and duties of the constituent corporations as the constituent corporations would have had, had they continued in existence.

Note: Adapted from NRS 78.500.

This statute is virtually the same as NRS 78.500 and permits the directors and officers to execute those deeds necessary to make the public real estate records show the new surviving corporation in ownership.

Section 77. Dissent and resignation of member.

1. Except as provided in subsection 2 and unless otherwise provided in the articles or bylaws, any member of any constituent corporation governed by this chapter who voted against the merger may, without prior notice, but within 30 days following the effective date of the merger, resign from membership and is thereby excused from all contractual obligations to the constituent or surviving corporations which have not accrued before the member's resignation and is thereby entitled to those rights, if any, as would have existed if there had been no merger and the membership had been terminated or the member had been expelled.

2. No member of a rural electric cooperative or any person who is a member of a corporation as a condition of or by reason of the ownership of an interest in real property may resign and dissent pursuant to subsection 1.

Note: Adapted from Cal. Corp. Code §12533.

The new nonprofit corporation code will, except as specifically provided therein, govern two of the three co-op associations now found in Chapter 81. Those co-ops often have members with a financial stake in the co-op. Existing NRS 81.230(4)(f) permits the bylaws of a co-op to provide for the manner of succession of membership and the mode and manner of expulsion. It also provides that if expulsion and succession is discussed in the bylaws, the expelled or refused member has the right to a board of arbitration to appraise the member's interest in the association and pay that amount to the expelled member within 40 days.

Existing NRS 81.480(3) also permits the bylaws to provide for the expulsion of members but gives the expelled member the right to have the board of directors "equitably appraise his property interests in the corporation" and pay that money within 60 days.

All modern business corporation statutes provide for appraisal rights to dissenting stockholders upon merger or consolidation of the corporation with another corporation. If a shareholder does not like the merger or consolidation, he can dissent to it and have his stock appraised in a court proceeding. See NRS 78.505-78.521. Co-ops (and other nonprofits for that matter) may also have members with a pecuniary interest of some kind in the corporation. If the bylaws provide for expulsion, refusal or termination of the membership, the provisions of existing NRS 81.230 and 81.480 apply. Instead of appraisal rights, members who dissent to the merger or consolidation should have the right to receive, in some fashion, the value of their membership analogous to a dissenting stockholder.

The wording of this statute was adapted from a portion of the California Corporations Code governing consumer cooperative corporations.

Subsection 2 provides that no member who is a member because he owns real property (for instance, a member of a homeowner's association), and no member of a rural electric cooperative, may resign and dissent. Permitting such resignations on a merger would destroy such an association, since some homeowners could use a merger as an excuse to resign. While the articles and bylaws may provide no payment for resigning or expelled members (and probably do not provide for expulsion at all) such resignations would mean the association would lose the homeowner's dues and assessments, narrowing the base of homeowners who support the association while probably not narrowing, as a practical matter, the number of people using the association's amenities. See also 81.210.

A resignation from a rural electric cooperative could mistakenly impose greater Public Service Commission regulation on it. See NRS 704.673 and 704.675.

SALE OF ASSETS; DISSOLUTION AND WINDING UP

Section 78. Sale, lease or exchange of assets: Conditions; procedure.

1. Every corporation may, by action taken at any meeting of its board of directors, sell, lease or exchange all of its property and assets, including its good will and its corporate franchises, upon such terms and conditions as its board of directors may deem expedient and for the best interests of the corporation.

2. The sale, lease or exchange must be approved by every person or public official whose approval of the sale, lease or exchange is required by the articles.

3. If the corporation has members entitled to vote on the matter, the directors must call a meeting, either annual or special, of the members entitled to vote on the sale, lease or exchange. At the meeting, of which notice must be given to each member, a vote of the members entitled to vote in person or by proxy must be taken for and against the proposed sale, lease or exchange. A majority of a quorum of the voting power of the members must vote in favor of the sale, lease or exchange.

4. The articles may require the vote of a larger proportion of the members and the separate vote or consent of any class of members.

5. Unless the articles provide otherwise, no vote of members is necessary for a transfer of assets by way of mortgage, or in trust or in pledge to secure indebtedness of the corporation.

Note: Adapted generally from NRS 78.565; subsections 2 and

3 adapted generally from Section 61 (1)(a) and 1(b) of the new nonprofit corporation act.

Some recent nonprofit statutory schemes require a majority vote of members, if any, to approve sales of all assets. See Minn. Nonprofit Corp. Act §317A.661; Cal. Corp. Code §5911 and §5512. Some require a two-thirds vote of members. See Ill. Not For Profit Corp. Act §111.60; Revised MN-PCA (1987) §12.02 [two-thirds of votes counted or majority of members, whichever is less].

We believe a two-thirds vote is too high a threshold for nonprofits. Most have a difficult time obtaining a quorum, much less an absolute two-thirds or majority vote of the members at a meeting.

Section 79. Sale, lease or exchange: notice to attorney general.

A public benefit corporation must notify the attorney general of its intent to sell, lease or exchange all its property or assets. The notice must be mailed to the attorney general by registered mail, return receipt requested. No such corporation may sell, lease or exchange all its property or assets until 30 days after the corporation has placed the notice to the attorney general in the mail.

Note: Not found in the NRS previously.

This new section requires "public benefit corporations" (defined at subsection 1(1)(e)) to notify the attorney general of its intent to sell, lease or exchange all its assets. The sale, lease or exchange is not effective until the 30 day notice period expires. This allows the attorney general the necessary oversight over "public benefit corporations" to make sure the money entrusted to them is not being diverted for private purposes or for purposes other than those for with the money was contributed to the "public benefit corporation".

Similar provisions are found in Minnesota at Minn. Nonprofit Corp. Act §317A.811. Minnesota requires a 45 day notice to be given the attorney general of a corporation's intent to transfer all or substantially all its assets. The corporation may not do so until after the 45 days have passed. The Revised MN-PCA (1987) requires a 20 days' notice to the attorney general. See §12.02(g). California has a similar provision. See Cal. Corp. Code §5913.

Section 80. Voluntary dissolution by member action.

1. Any corporation may be dissolved and its affairs wound up voluntarily by the written request of a majority of the members and any person or head organization whose approval is required by a provision of the articles authorized by section 9(2). The request must:

(a) Be addressed to the directors.

(b) Specify reasons why the winding up of affairs of the corporation is deemed advisable.

(c) Name three persons who are members to act as trustees in liquidation and in winding up the affairs of the corporation. The act of a majority of the directors as trustees remaining in office is the act of the directors as trustees.

2. Upon filing of the request with the directors and in the offices of the secretary of state, and, if the corporation is a public benefit corporation, upon mailing a copy of the request to the attorney general by registered mail, return receipt requested, all powers of the directors cease. The secretary of state must issue a certificate that the corporation is dissolved.

Note: Adapted from NRS 81.0075.

Existing NRS 81.0075 provides for dissolution of a nonprofit corporation upon written request of two-thirds of its members. While we believe a procedure whereby the members can take charge and by their own action, without the directors, dissolve the corporation is permissible, we believe the two-thirds threshold is too high. Therefore, we have changed it to a majority.

Few other nonprofit statutory schemes contain a provision like existing NRS 81.0075 allowing the members, on their own action, to dissolve a nonprofit corporation.

Section 81. Voluntary dissolution by directors and members; by directors alone; directors to be trustees of dissolved or expired corporation.

1. Any corporation may be dissolved and its affairs wound up voluntarily by the board of directors adopting a resolution to that effect and calling a meeting of the members having voting power to take action upon the resolution. The resolution must also be approved by any person or head organization whose approval is required by a provision of the articles authorized by section 9(2). The meeting of the members must be held with due notice. If at the meeting the members entitled to exercise a majority of all the voting power consent by resolution to the dissolution, a copy of the resolution, together with a list of the names and residences of the directors and officers, certified by the chairman of the board, president, or vice president, and the secretary, or an assistant secretary, must be filed in the office of the secretary of state.

2. If a corporation has no members having voting power to act upon a resolution calling for the dissolution of the corporation, the corporation may be dissolved and its affairs wound up voluntarily by the board of directors adopting a resolution to that effect. The resolution must also be approved by any person or head organization whose approval is required by a provision of the articles authorized by section 9(2). A copy of the resolution and a list of the officers and directors, certified as provided in subsection 1, must be filed in the office of the secretary of state.

3. If the corporation is a public benefit corporation, a

copy of the resolution and list as filed with the secretary of state must be mailed to the attorney general by registered mail, return receipt requested.

4. Upon filing of the resolution or request with the office of the secretary of state, the secretary of state must issue a certificate that the corporation is dissolved.

5. Upon the dissolution of any corporation under the provisions of this section or upon the expiration of its period of corporate existence, the directors are the trustees of the corporation in liquidation and in winding up the affairs of the corporation. The act of a majority of the directors as trustees remaining in office is the act of the directors as trustees.

Note: Adapted from NRS 85.0075.

NRS 78.580 provides that the board of directors may pass a resolution for the dissolution of the corporation and the stockholders must approve it by a majority vote. A similar provision is provided here. The directors may pass such a resolution and the majority of members with voting power on the matter must approve it. If there are no members with voting powers on the matter, the directors may dissolve the corporation solely on their resolution.

In both cases, a certificate must be filed with the secretary of state and, if the corporation is a public benefit corporation, a copy sent to the attorney general.

The dissolution statutes of other jurisdictions contain similar provisions with similar thresholds. See Cal. Corp. Code §6610; Revised MN-PCA (1987) §14.02 (two-thirds vote of members required); Minn. Nonprofit Corp. Act §317A.721.

Subsection 5 is adapted from NRS 78.590(1).

Section 82. Dissolution: powers of directors; powers and jurisdiction of the court; limitation on actions.

1. Actions available to or against a corporation or its directors, officers of members are limited as provided in NRS 78.585.

2. A corporation dissolved under this chapter and its directors, trustees, receivers, members, creditors and the district court have all the rights, duties and liabilities they have with respect to dissolved corporations governed by NRS Chapter 78 provided by NRS 78.585, 78.595 and 78.615.

3. The district court and the court clerk have the same powers and duties with respect to dissolved corporations governed by this chapter as they have with respect to dissolved corporations governed by NRS Chapter 78 as provided in NRS 78.600, 78.605, 78.615 and 78.620.

Note: Since the policies behind the power given the courts and the corporation, stockholders, receivers, trustees, etc. do not differ between nonprofit corporations and business corporations, for the most part, we have merely included by reference the correlative statutes from NRS Chapter 78.

Section 83. Distribution of assets.

1. No assets shall be transferred or conveyed by a public benefit corporation as a part of the dissolution process until 30 days after it has given notice to the attorney general pursuant to sections 80(2) and 81(3).

2. The directors, trustees, receivers, or those persons appointed or authorized to act in liquidation of a corporation dissolved under Sections 80 or 81 must:

(a) Wind up the corporation;

(b) Realize upon its assets;

(c) Pay its debts; and

(d) Distribute the residue of its money and property as follows:

(1) Assets held by the corporation on the condition that upon dissolution they be returned, transferred or conveyed

must be returned, transferred or conveyed as required;

(2) Assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational or similar purposes, but not held upon a condition requiring return, transfer or conveyance upon dissolution, must be transferred or conveyed to one or more domestic or foreign corporations, societies or organizations engaged in activities substantially similar to those of the dissolving corporation, pursuant to a plan of distribution;

(3) Other assets, if any, must be distributed in accordance with the provisions of the articles or the bylaws to the extent the articles or bylaws determine the distribution of assets; and

(4) Any remaining assets may be distributed to the members and such persons, societies, organizations or domestic or foreign corporations, whether for profit or nonprofit, as may be specified in the plan of distribution.

Note: Adapted from existing NRS 81.0075(2).

NRS 81.0075 was added to the NRS in 1985 and amended in 1989. The scheme for the distribution of the assets of the corporation, with small modifications, provides a good model for such procedures. We added subsection 1, based upon revised MN-PCA (1987) §14.03(b). This subsection provides that no public benefit corporation (defined at section 1(1)(e)) can distribute its assets until a 30 day period expires after notice to the attorney general. This permits the attorney general to file an action to intervene in the dissolution if necessary.

INSOLVENCY; RECEIVERS AND TRUSTEES

Section 84. Reorganization under federal law.

A federal court may take the same actions with respect to corporations governed by this chapter as a federal court may

take with respect to corporations governed by NRS Chapter 78 under NRS 78.622(1).

Section 85. Filings with secretary of state.

Corporations governed by this chapter must file with the secretary of state the plans of reorganization and the notices of bankruptcy described in NRS 78.622(2), (4) and (5) and 78.626.

Section 86. Application of creditors or members of insolvent corporation for injunction and appointment of receiver or trustee; hearing.

1. Whenever any corporation becomes insolvent or suspends its ordinary business for want of funds to carry on the same, or if its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or members, any creditors holding 10% of the outstanding indebtedness, or members (if any) having 10% of the voting power to elect directors, may, by petition of bill of complaint setting forth the facts and circumstances of the case, apply to the district court of the county in which the principal office of the corporation is located for a writ of injunction and the appointment of a receiver or receivers or trustee or trustees.

2. The court, being satisfied by affidavit or otherwise of the sufficiency of the application and of the truth of the allegations contained in the petition or bill, and upon hearing after such notice as the court by order may direct, must proceed in a summary way to hear the affidavits, proofs and allegations which may be offered in behalf of the parties.

3. If upon such inquiry it appears to the court that the

corporation has become insolvent and is not about to resume its business in a short time thereafter, or that its business has been and is being conducted at a great loss and greatly prejudicial to the interests of its creditors or members, so that its business cannot be conducted with safety to the public, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the court, until the court otherwise orders.

4. Within 30 days after filing for the relief described in this section, the person filing for such relief must file with the secretary of state a notice of the application, specifying:

(a) The date of the application;

(b) The name and address of the court where the application is filed; and

(c) The number assigned to the case by the court.

The person filing for such relief with respect to a public benefit corporation must immediately send a copy of the notice to the attorney general by registered mail, return receipt requested.

Note: This statute has been adapted from NRS 78.630 in order to delete references to stockholders and insert references to members. Subsection 4 is adapted from NRS 78.627.

Section 87. Appointment of receiver or trustee of insolvent corporation: Powers.

1. The district court, at the time of ordering the

injunction upon petition of the creditors or members pursuant to Section 86, or at any time afterwards, may appoint a receiver or receivers or a trustee or trustees for the creditors and members of the corporation.

2. The receiver or receivers or trustees have the following powers and duties:

(a) To demand, sue for, collect, receive and take into his or their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property, of every description of the corporation; and

(b) To institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation; and

(c) In his or their discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they deem just and beneficial to the corporation;

(d) In case of mutual dealings between the corporation and any person to allow just setoffs in favor of such person in all cases in which the same ought to be allowed according to law and equity;

(e) To take possession of the property of the corporation as provided in NRS 78.665;

(f) To take inventory, account for debts and report to the

courts every 3 months as provided in NRS 78.670;

(g) To pass upon the claims of creditors as provided in NRS 78.685;

(h) To be substituted in as a party to suits as provided in NRS 78.695;

(i) To be vested in the property of the corporation as provided in NRS 78.640.

3. An act approved or done by a majority of the receivers or trustees is the act of the receivers or trustees.

4. A debtor who in good faith has paid his debt to the corporation without notice of its insolvency or suspension of business, is not liable therefor, and the receiver or receivers or trustee or trustees have power to sell, convey and assign all the estate, rights and interests, and must hold and dispose of the proceeds thereof under the directions of the district court.

Note: Adapted from NRS 78.635; subsection 3 is adapted from NRS 78.715(1). The reference at subsection 2(g) is to NRS 78.685 as this report recommends it be changed.

Section 88. Circumstances under which corporations may resume control.

The district court may reconvey the property of the corporation back to it or dissolve the corporation and declare it null and void as provided in NRS 78.645.

Section 89. Involuntary dissolution.

1. The persons or public officials described in Subsection 1, 2 or 3 may apply to the district court in the district where the corporation has its principal place of business:

(a) For an order dissolving the corporation and appointing

a receiver to wind up its affairs, and by injunction restrain the corporation from exercising any of its powers or doing business whatsoever, except by or through a receiver appointed by the court; or

(b) For such other equitable relief that is just and proper in the circumstances.

2. A member or members, if any, holding at least 33-1/3% of the voting power for the election of directors or a majority of the directors in office, may apply for the relief described in Subsection 1 whenever it is established that:

(a) The corporation has willfully violated its charter;

(b) Its trustees or directors have been guilty of fraud or collusion or gross mismanagement in the conduct or control of its affairs;

(c) Its trustees or directors have been guilty misfeasance, malfeasance or nonfeasance;

(d) The corporation is unable to conduct its activities or conserve its assets by reason of the act, neglect or refusal to function of any of the directors or trustees;

(e) The assets of the corporation are in danger of waste, misapplication, sacrifice or loss;

(f) The corporation has abandoned its business;

(g) The corporation has not proceeded diligently to wind up its affairs or to distribute its assets in a reasonable time;

(h) The corporation has become insolvent;

(i) The corporation, although not insolvent, is for any cause not able to pay its debts or other obligations as they mature;

(j) The corporation is not about to resume its business with safety to the public;

(k) The period of corporate existence has expired and has not been lawfully extended;

(l) The corporation has solicited property and has failed to use it for the purpose solicited;

(m) The corporation has fraudulently used or solicited property; or

(n) The corporation has exceeded its powers.

3. The Attorney General may apply for the relief described in Subsection 1 whenever the corporation is a public benefit corporation and whenever it is established that:

(a) The corporation has willfully violated its charter;

(b) Its trustees or directors have been guilty of fraud or collusion or gross mismanagement in the conduct or control of its affairs;

(c) The corporation has abandoned its business;

(d) The corporation has become insolvent;

(e) The corporation, although not insolvent, is for any cause not able to pay its debts or other obligations as they mature;

(f) The corporation has solicited property and has failed to use it for the purpose solicited;

(g) The corporation has fraudulently used or solicited property; or

(h) The period of corporate existence has expired and has not been lawfully extended.

4. Any person or head organization under which the

corporation was formed, if expressly authorized to act by the articles, may apply for the relief described in Subsection 1 pursuant to the grounds, if any, set forth in the articles.

5. The court may appoint a temporary receiver upon the same grounds and pursuant to the same procedure as provided in the Nevada Rules of Civil Procedure for granting a temporary restraining order. A hearing must be held on the appointment of a temporary receiver within 15 days after the receiver's appointment, unless the appointment is extended by order of the court or upon stipulation of the parties.

6. The court may, if good cause exists, appoint one or more receivers for such purpose. Directors or trustees who have not been guilty of negligence or active breach of duty must be preferred in making the appointment.

7. Receivers so appointed have, among the usual powers, all the functions, powers, tenure and duties to be exercised under the direction of the court as are conferred on receivers and as provided in Sections 87 and 88 whether the corporation is insolvent or not.

8. The court may, at any time, grant lesser equitable relief, order a partial liquidation, terminate the receivership, or dissolve or terminate the corporation as would be just and proper in the circumstances.

9. Within 30 days after filing for the relief described in subsection 1, the person filing for such relief must file with the secretary of state a notice of that application, a copy specifying:

(a) The date of the application;

(b) The name and address of the court in which the application was filed; and

(c) The number assigned to the case by the court.

The person filing for such relief with respect to a public benefit corporation must immediately send a copy of the notice to the attorney general by registered mail, return receipt requested.

Note: Adapted from NRS 78.650; subsections 2(k), 2(l), 2(m) and 2(n) are adapted from Minn. Nonprofit Corp. Act §317A.757; subsection 8 is adapted from Minn. Nonprofit Corp. Act §317A751(7).

Subsection 9 is adapted from NRS 78.628.

NRS 78.650 allows a 10% stockholder to apply to the district court for the dissolution of a corporation on the grounds we have reproduced in this statute at subsection 2(a) through 2(j). The grounds at subsections 2(k) through 2(n) are adapted from the Minnesota Act. They are specifically directed toward problems which can occur for nonprofit corporations.

This statute allows 33% of the members, or a majority of the directors to apply for dissolution of the corporation. The model act permits 50 members or those holding 5% of the voting power to file a proceeding for dissolution and permits any creditor to file a proceeding for dissolution if the claim has been reduced to judgment and execution is return unsatisfied. The grounds for a proceeding for dissolution filed by the Attorney General are extremely limited. See Revised MN-PCA (1987) §14.30.

California allows an involuntary dissolution proceeding to be initiated by one-half or more of the directors or 33% of the members, as well as the Attorney General.

We believe the grounds set forth at NRS 78.650 are comprehensive and have added only four additional grounds specifically applicable to nonprofit corporations. The Revised Model Act allows an Attorney General to file for dissolution only if the corporation obtained its articles through fraud, a public benefit corporation wastes its assets, a public benefit corporation is no longer able to carry out its purposes, or the corporation exceeds its authority conferred by law. See §14.30(a)(1). We believe these grounds are insufficient. We found in our research that under the law prevailing in the early part of the 20th Century, a corporation could obtain its articles through fraud only if it failed to pay the minimum capitalization it was required to pay under the business corporation laws. Since no business corporation has been

required in this state to pay a minimum capitalization for some years now, and since such a standard is irrelevant to nonprofit corporations in any event, we deleted that requirement. We anticipate the most common grounds for an Attorney General's petition will be those found at subsections 3(f) and 3(g).

We also believe that the attorney general should have the power to challenge, under this statute, a public benefit corporation. Such corporations, and their assets, are charged with a public, charitable purpose. The attorney general may still challenge any corporation pursuant to NRS Chapter 35 and Section 18 of this new nonprofit corporation law.

Subsection 4 was necessary to provide for dissolutions upon demand by a head organization or any person set forth in the articles. Such a provision may be placed in the articles pursuant to subsection 9(2). Subsection 8 is adapted from Minnesota Nonprofit Corporation Act §317A.751(7) and permits the court to fashion whatever relief it may deem necessary, short of appointing a receiver and dissolving the corporation, to cure the problem presented by the facts before it.

Section 90. Powers of district court.

In a dissolution action, the district court has the following powers:

1. To send for and examine persons as provided in NRS 78.660;

2. To sell encumbered property as provided in NRS 78.700;

3. To remove and replace receivers as provided in NRS 78.715(2);

4. To pass upon creditors' appeals from the decision of the trustees or receivers as provided in NRS 78.685.

Note: Adapted from the statutes noted herein.

Section 91. Creditors' proofs of claims; when participation barred; notice.

All creditors must present and make proof to the receiver of their respective claims against the corporation within 6 months from the date of appointment of the receiver or trustee for the corporation, or sooner if the court shall order and

direct. All creditors and claimants failing to do so within the time limited by this section, or the time prescribed by the order of the court, are barred from participating in the distribution of the assets of the corporation. The court must prescribe what notice, by publication or otherwise, must be given to creditors of such limitation time.

Note: Adapted from NRS 78.675.

Section 92. Creditors' claims to be in writing under oath; examination of claimants.

Every claim against any corporation for which a receiver has been appointed must be presented to the receiver in writing and upon oath. The claimant, if required, must submit himself to such examination in relation to the claim as the court directs, and must produce such books and papers relating to the claim as the court requires. The court has power to authorize the receiver to examine, under oath or affirmation, all witnesses produced before him touching the claim or any part thereof.

Note: Adapted from NRS 78.680.

Section 93. Abatement of actions.

No action against a receiver of a corporation shall abate by reason of his death, but, upon suggestion of the facts on the record, shall be continued against his successor, or against the corporation in case no new receiver be appointed.

Note: Adapted from NRS 78.695(2).

Section 94. Distribution of money to creditors and others.

After payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds

of the corporation to the extent of their lawful priority, the creditors shall be paid proportionately to the amount of their respective debts, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors. The creditors shall be entitled to distribution on debts not due, making in such case a rebate of interest, when interest is not accruing on the same. The surplus funds, if any, after payment of the creditors and the costs, expenses and allowances, shall be distributed as provided in Section 83(2)(d).

Note: Adapted from NRS 78.710.

Section 95. Employees' liens for wages when corporation insolvent.

1. Whenever any corporation becomes insolvent or is dissolved in any way or for any cause, the employees doing labor or service, of whatever character, in the regular employ of the corporation, have a lien upon the assets thereof for the amount of wages due to them, not exceeding $1,000, which have been earned within 3 months before the date of the insolvency or dissolution, which must be paid before any other debt of the corporation.

2. The word "employees" does not include any of the officers or directors of the corporation.

Note: Adapted from NRS 78.720.

INDEMNIFICATION

Section 96. Indemnification; insurance and other financial arrangements against liability.

1. A corporation governed by this chapter may indemnify

any person against expenses as provided in NRS 78.751. For the purposes of this section, the word "stockholders" in NRS 78.751(4)(a) and 78.751(6)(a) is deemed to be the word "members".

2. A corporation governed by this chapter may purchase and maintain insurance or make other financial arrangements on behalf of any person for any liability asserted against him as provided in NRS 78.752.

FEES PAYABLE TO SECRETARY OF STATE

Section 97. Fees.

1. The fee for filing articles of incorporation and amendments to articles of incorporation is $25.00 for each document.

2. Except as provided in Sections 13, 20, 21, 23, 25, and subsection 1 of this section, the fees for filing other documents are those fees set forth in NRS 78.765 through 78.775, inclusive.

Note: Adapted from NRS 78.755.

We have raised the filing fee for articles and amendments for nonprofits to $25.00 from $15.00.

FINANCIAL REPORTS OF CHARITABLE ORGANIZATIONS

[86.190] Section 98. Annual financial reports to be filed with secretary of state.

Each national charitable organization and each public benefit corporation and statewide charitable organization which is operating in the State of Nevada and receives its major support from donations from the public shall upon July 1 of each year file with the secretary of state a report on the financial

condition, showing all receipts and expenditures realized through operation in the State of Nevada for the preceding year.

Note: This statute has been moved here from NRS Chapter 86, now repealed.

Chap. 81-86

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CHAPTERS 81 through 86

Introduction

As stated in our introduction to the new nonprofit corporation law, much of Chapter 81 will be repealed. The introductory sections of Chapter 81, NRS 81.002 through 81.0095 are either being moved to the new nonprofit corporation law or repealed.

The Nonprofit Cooperative Corporation statutes at NRS 81.010 through 81.160 are being retained with a few modifications. Similarly, the statutes governing Cooperative Associations, NRS 81.170 through 81.280 are being retained with minor modifications.

The statutes governing nonprofit corporations for Educational, Religious, Scientific, Charitable and Eleemosynary Activities, NRS 81.290 through 81,340, are being repealed. Also, the statutes relating to Nonprofit Corporations for Advancement of State and Local Interests, NRS 81.350 through 81.400 are being repealed.

The final co-op statute, governing Nonprofit Cooperative Corporations Without Stock, NRS 81.410 to 81.540, are being retained with minor modifications. So is the Charitable Corporation Act, NRS 81.550 through 81.660.

NRS Chapter 82 should be repealed. Similarly, NRS Chapter 83 should be repealed, with the exception of NRS 81.110 regarding a tax exemption, NRS 83.120 regarding the inalienability of cemetery lots and the civil and criminal penalties for injury to cemetery property at NRS 83.130. These statutes should be retained, with a few modifications.

We recommend that Chapter 84 be retained with only one minor change, that Chapter 85 be repealed except for the property tax exemption at NRS 85.070 and that Chapter 86 be completely repealed.

Finally, we provide guidance to the Legislative Counsel's Bureau regarding references to Chapter 81 other statutes of the NRS.

NRS 81.002 [Now section 21 of new nonprofit corporation chapter.]

NRS 81.004 [Now section 22 of new nonprofit corporation chapter.]

NRS 81.005 Repeal

NRS 81.007 Repeal

NRS 81.0075 [Now section 83 of new nonprofit corporation chapter.]

NRS 81.008 [Now section 23 of new nonprofit corporation chapter.]

NRS 81.0085 [Now section 24 of new nonprofit corporation chapter.]

NRS 81.009 [Now section 25 of new nonprofit corporation chapter.]

NRS 81.0095 [Now section 26 of new nonprofit corporation chapter.]

NONPROFIT COOPERATIVE CORPORATIONS

NRS 81.010 Formation of nonprofit cooperative corporations.

Nonprofit cooperative corporations may be formed by the voluntary association of any three or more persons in the manner prescribed in NRS 81.010 to 81.160, inclusive. A majority of such persons must be residents of this state, and such corporation shall have and may exercise the powers necessarily incident thereto. [and also all other powers granted to private corporations by the laws of this state, excepting such powers as are inconsistent with those granted by NRS 81.010 to 81.160, inclusive.] The provisions of Chapter 78, and all future amendments to it, govern each nonprofit cooperative corporation organized pursuant to NRS 81.010 to 81.160, inclusive. If such a nonprofit cooperative corporation is organized without shares of stock, the members shall be deemed to be "shareholders" or "stockholders" as these terms are used in NRS Chapter 78.

Note: Additional language suggested by Cal. Food and Agricultural Code §54040.

While Nevada statutes have never been precise about the source of law for specifics about Chapter 81 corporations which are not mentioned in Chapter 81 itself, most attorneys, and the Attorney General in a 1955 opinion, have always believed they were governed by NRS Chapter 78, where applicable. See AGO 28 (3/29/55). The new language now makes this principle explicit.

Nonprofit cooperatives organized pursuant to NRS 81.010 to 81.160 are the only one of the three types of nonprofit cooperatives to continue to be governed by NRS Chapter 78. These co-ops may issue stock and can issue dividends, two basic provisions contrary to the new nonprofit corporation statutory scheme.

NRS 81.020; 81.030 No changes.

NRS 81.040 Articles of incorporation: Mandatory contents.

Each corporation formed under NRS 81.010 to 81.160, inclusive, must prepare and file articles of incorporation in writing, setting forth:

1. The name of the corporation.

2. The purpose for which it is formed.

3. The address or location, including the county and city or town, where its principal business will be transacted; but other meetings of the association or meetings of the board of directors may be held within or without the state.

4. The term for which it is to exist, [not exceeding 50 years.] which may be perpetual.

5. If formed with capital stock, the amount of its capital stock and the number and par value and the shares into which it is divided, and the amount of common and of preferred stock that may be issued with the preferences, privileges, voting rights, restrictions and qualifications pertaining thereto.

6. The names and addresses of those selected to act as directors, not less than three, for the first year or until their successors have been elected and have accepted office.

7. Whether the property rights and interest of each member are equal or unequal, and if unequal the articles must set forth a general rule applicable to all members by which the property rights and interests of each member may be determined, but the corporation may admit new members who may vote and share in the property of the corporation with the old members, in accordance with the general rule.

Note: There is no reason to limit the existence of these corporations to 50 years. Consistent with modern corporate practice, it is now permissible to make their existence perpetual.

NRS 81.050 No change.

NRS 81.060 Articles of incorporation: Acknowledgment; filing, microfilming and fees; certified copy prima facie evidence.

1. The articles of incorporation shall be:

(a) Subscribed by three or more of the original members, a majority of whom must be residents of this state.

(b) Acknowledged by each before a person authorized to take and certify acknowledgements of conveyances of real property.

(c) Filed in the office of the secretary of state in all respects in the same manner as other articles of incorporation are filed.

2. If a corporation formed under NRS 81.010 to 81.160, inclusive, shall be authorized to issue capital stock there

shall be paid to the secretary of state for filing the articles the fee applicable to the amount of authorized capital stock of the corporation as the secretary of state may be required by law to collect upon the filing of articles of incorporation which authorize the issue of capital stock.

3. The secretary of state shall issue to the corporation over the great seal of the state a certificate that a copy of the articles containing the required statements of facts has been filed in his office.

[4. A certified copy of the articles shall be filed or microfilmed in the office of the clerk of the county where the principal business of the association is to be transacted.]

[5.] 4. Upon the issuance of the certificate by the secretary of state, [and upon the filing or microfilming of a certified copy of the articles in the office of the county clerk] the persons signing the articles and their associates and successors shall be a body politic and corporate. When so filed, [or microfilmed,] the articles of incorporation or certified copies thereof shall be received in all the courts of this state, and other places, as prima facie evidence of the facts contained therein.

Note: Consistent with our practice elsewhere, filings with the County Clerks are being eliminated.

NRS 81.070 No change.

NRS 81.080 No change.

NRS 81.090 No change.

NRS 81.100 No change.

NRS 81.110 General powers of nonprofit cooperative corporations.

[1. Each corporation incorporated under NRS 81.010 to 81.160, inclusive, shall have the powers granted by the provisions of other laws of Nevada relating to private corporations which are not inconsistent with those granted by NRS 81.010 to 81.160, inclusive.]

[2. In addition to the powers granted in subsection 1,] Each corporation incorporated under NRS 81.010 to 81.160, inclusive, shall have the following powers:

[(a)] 1. To appoint such agents and officers as its business may require, and such appointed agents may be either persons or corporations.

[(b)] 2. To admit persons and corporations to membership in the corporation.

[(c)] 3. To expel any member pursuant to the provisions of its bylaws.

[(d)] 4. To forfeit the membership of any member for violation of any agreement between him and the corporation or for his violation of its bylaws.

[(e)] 5. To purchase, lease or otherwise acquire, hold, own, enjoy, sell, lease, mortgage and otherwise encumber and dispose of any and all and every kind of real and personal property

[(f)] 6. To carry on any and all operations necessary or convenient in connection with the transactions of any of its business.

Note: Removed subsection 1 has been replaced by changes to NRS 81.010. The remainder of this statute has been renumbered to conform to standard drafting practice.

NRS 81.120 No change.

NRS 81.130 Consolidation of cooperative corporations: Procedure; powers.

1. Upon written assent of two-thirds of all the members or by a vote of members representing two-thirds of the total votes of all members of each of two or more such nonprofit cooperative corporations to cooperate with each other for the more economical carrying on of their respective businesses by consolidation, such consolidation shall be effected by two or more associations entering into an agreement in writing and adopting a name, which agreement must:

(a) Be signed by two-thirds of the members of each such association.

(b) State all the matters necessary to articles of association.

(c) Be acknowledged by the signers before a person competent to take an acknowledgment of deeds in this state.

[(d) Be filed in the office of the county clerk of the county wherein the principal business of the association is to be transacted.]

2. A certified copy of the agreement shall be filed in the office of the secretary of state and the same fees for filing and recording, as required for filing and recording of original articles of incorporation, shall be paid. From and after the filing of the certified copy, the former associations comprising the component parts cease to exist, and the consolidated association:

(a) Succeeds to all the rights, duties and powers of the

component associations.

(b) Is possessed of all the rights, duties and powers prescribed in the agreement of consolidated associations not inconsistent with NRS 81.010 to 81.160, inclusive.

(c) Is subject to all the liabilities and obligations of the former component associations.

(d) Succeeds to all the property and interests thereof.

(e) May make bylaws and do all things permitted by NRS 81.010 to 81.160, inclusive.

3. Any such corporation, upon resolution adopted by its board of directors, shall have the power:

(a) To enter into contracts and agreements.

(b) To make stipulations and arrangements with any other corporation or corporations for the cooperative and more economical carrying on to its business, or any part or parts thereof.

4. Any two or more cooperative corporations organized under NRS 81.010 to 81.160, inclusive, upon resolutions adopted by their respective boards of directors, may, for the purpose of more economically carrying out their respective businesses, by agreement, unite in adopting, employing and using, or several such corporations may separately adopt, employ and use, the same methods, policy, means, agents, agencies and terms of marketing for carrying on and conducting their respective businesses.

Note: Consistent with our practice elsewhere, filings with the county clerk have been eliminated.

NRS 81.150 No change.

NRS 81.160 No change.

COOPERATIVE ASSOCIATIONS

NRS 81.___ Applicability of Chapter ___.

1. Except as provided in subsection 2, the provisions of NRS Chapter ___ and all future amendments to it, govern each cooperative association organized pursuant to NRS 81.170 to 81.280, inclusive, except where the provisions of Chapter ___ are inconsistent with NRS 81.170 to 81.280, inclusive.

2. Sections 7 and 36 of Chapter ___ are not applicable to cooperative associations organized pursuant to NRS 81.170 to 81.280, inclusive.

Note: This is one of the two types of co-ops that will generally be governed by the new nonprofit corporation law. Stock cannot be issued by this co-op. However, a co-op may make payments to its members or accept goods or services at reduced prices or market goods through a co-op in ways which might be interpreted as "distributions", forbidden by the new non-profit corporation law. Thus, section 36 (containing the prohibition of distributions) does not apply to these co-ops.

NRS 81.200 sets forth the contents of the articles of incorporation of this co-op. Section 7 of the new nonprofit corporation law, setting forth the contents of articles, is not necessary. It requires that a corporation be a nonprofit corporation described in the preamble of section 7(1) as "a corporation no part of the income or profit of which is distributed to its members." These restrictions on a corporation should not apply to co-ops and should be avoided.

NRS 81.170 No change.

NRS 81.180 No change.

NRS 81.190 No change.

NRS 81.200 Articles of association: Contents; subscription, acknowledgement, filing and microfilming.

1. Every association formed under NRS 81.170 to 81.280, inclusive, shall prepare articles of association in writing, setting forth:

(a) The name of the association.

(b) The purpose for which it is formed.

(c) The address or location, including the county and city or town, where its principal business is to be transacted.

(d) The term for which it is to exist, [not exceeding 50 years.] which may be perpetual.

(e) The amount which each member is to pay upon admission as a fee for membership, and that each member signing the articles has actually paid the fee.

(f) That the interest and right of each member therein is to be equal.

2. The articles of association must be subscribed by the original associates or members, and acknowledged by each before some person competent to take an acknowledgement of a deed in this state.

3. The articles so subscribed and acknowledged must be filed in the office of the secretary of state, who shall furnish a certified copy thereof. [The certified copy must be filed or microfilmed in the office of the county clerk of the county where the principal business or association is to be transacted.] From the time of the filing [or microfilming] in the office of the [county clerk] secretary of state, the association may exercise all powers for which it was formed.

Note: There is no reason to limit the term of these co-ops to 50 years. Consistent with modern practice, the amendment to subsection (1)(d) will permit perpetual existence.

Since we recommend eliminating filings with the county clerk, subsection (3) has been amended to delete it.

NRS 81.210 No change.

NRS 81.220 No change.

NRS 81.230 No change.

NRS 81.240 No change.

NRS 81.250 Bylaws and amendments to be recorded and filed.

The bylaws and all amendments must be recorded in a book and kept in the office of the association.[and a copy certified by the directors must be filed in the office of the county clerk where the principal business is transacted.]

Note: Consistent with our policy with other statutes, no filing is required at the county clerk's office.

NRS 81.260 No change.

NRS 81.270 No change.

NRS 81.280 Repeal.

Note: The new nonprofit corporation law contains a complete statutory scheme for mergers, consolidations and dissolutions, including one permitting the members, acting alone, to dissolve the corporation. There is no need for another nearly identical procedure here.

NONPROFIT CORPORATIONS FOR EDUCATIONAL, RELIGIOUS, SCIENTIFIC, CHARITABLE AND ELEEMOSYNARY ACTIVITIES

NRS 81.290 through 81.340 Repeal.

Note: The new nonprofit corporation chapter provides a complete structure for all traditional nonprofit corporations, like educational institutions and hospitals (specifically mentioned in NRS 81.312.) Existing NRS 81.330 permits the articles to provide for selection of some of the trustees by associations, corporations or public officials. This provision is continued in the new nonprofit corporation law at §29.

Existing NRS 81.280(2) allows the complete delegation of investment powers to a trust or banking business. Nothing is said about whether or not a director's fiduciary responsibilities are thereby also removed for improper investment decisions. The new nonprofit corporation law contains no such delegation power. It is probably bad policy to permit the complete delegation of such a duty, although a board can hire a professional investment advisor and probably rely on it, if the advice is reasonable. In addition, the articles can contain a provision eliminating a trustee's fiduciary responsibility in such a situation. See the new nonprofit

corporation law, §9(1).

NONPROFIT CORPORATIONS FOR ADVANCEMENT OF STATE AND LOCAL INTERESTS

NRS 81.350 through 81.400 Repeal.

Note: Existing NRS 81.380 contains provisions like those in existing NRS 81.320 regarding delegation of investment decisions. Existing NRS 81.390 contains provisions like those in existing NRS 81.330 regarding other associations or public officials choosing directors. See our note on those subjects immediately above.

NONPROFIT COOPERATIVE CORPORATIONS WITHOUT STOCK

NRS 81.410 Formation; applicability of Chapter .

1. Nonprofit cooperative corporations may be formed by the voluntary association of any three or more persons in the manner prescribed in NRS 81.410 to 81.540, inclusive. [Such corporation shall have and may exercise the powers necessarily incident thereto, and also all other powers granted to private corporations by the laws of this state, excepting such powers as are inconsistent with those granted by NRS 81.410 to 81.540, inclusive.]

2. Except as provided in subsection 3, the provisions of NRS Chapter , and all future amendments to it, govern each nonprofit cooperative corporation organized pursuant to NRS 81.410 to 81.540, inclusive, except when the provisions of Chapter are inconsistent with NRS 81.410 to 81.540, inclusive.

3. Sections 7 and 36 of Chapter are not applicable to nonprofit cooperative corporations organized pursuant to NRS 81.410 to 81.540, inclusive.

Note: Additional language suggested by Cal. Food and Agricultural Code §54040.

This co-op has members, not stockholders. Thus, the provisions of the new nonprofit corporation law are easily

adaptable to it. These co-ops obtain revenues and distribute them to its members in cash or in the form of services or reduced costs for goods and services. If they do so, they may not be "nonprofit" in the sense of the new nonprofit corporation law and may be making "distributions" under that law under some interpretations. Thus, sections 7 and 36 should not apply to these co-ops. See out discussion of similar provisions in a new statute placed before NRS 81.180 above.

NRS 81.420 No change.

NRS 81.430 No change.

NRS 81.440 Articles of incorporation: Contents.

Each corporation formed under NRS 81.410 to 81.540, inclusive, shall prepare and file articles of incorporation in writing, setting forth:

1. The name of the corporation.

2. The purpose for which it is formed.

3. The address or location, including the county and city or town, where its principal business will be transacted.

4. The term for which it is to exist, [not exceeding 50 years] <u>which may be perpetual</u>.

5. The number of directors thereof, which must be not less than three and which may be any number in excess thereof, and the names and residences of those selected for the first year and until their successors have been elected and have accepted office.

6. Whether the voting power and the property rights and interest of each member are equal or unequal, and if unequal the articles must set forth a general rule applicable to all members by which the voting power and the property rights and interests of each member may be determined, but the corporation may admit new members who may vote and share in the property of the

corporation with the old members, in accordance with the general rule.

Note: There is no reason why these co-ops should not have perpetual duration. We recommend that this statute be changed to permit it, as we recommended for the two other co-ops at NRS 81.040(4) and NRS 81.200(1)(d).

NRS 81.450 Articles of incorporation: Acknowledgment; filing or microfilming; certified copy prima facie evidence.

1. The articles of incorporation shall be:

(a) Subscribed by three or more of the original members, a majority of whom must be residents of this state.

(b) Acknowledged by each before a person authorized to take and certify acknowledgments of conveyances of real property.

(c) Filed in the office of the secretary of state in all respects in the same manner as other articles of incorporation are filed.

2. The secretary of state shall issue to the corporation over the great seal of the state a certificate that a copy of the articles containing the required statements of facts has been filed in his office.

[3. A certified copy of the articles shall be filed or microfilmed in the office of the clerk of the county where the principal business of the association is to be transacted.]

[4.] 3. Upon the issuance of the certificate by the secretary of state [and upon the filing or microfilming of a certified copy of the articles by the county clerk] the persons signing the articles and their associates and successors shall be a body politic and corporate. When so filed, [or

microfilmed,] the articles of incorporation or certified copies thereof shall be received in all the courts of this state, and other places, as prima facie evidence of the facts contained therein.

Note: In keeping with our general policy, no filings with the county clerk are required.

NRS 81.460 Repeal.

Note: This statute provides for amending the articles using the procedures of NRS Chapter 78. Since these co-ops will be governed by the new nonprofit corporation law, we recommend repeal of 81.460.

NRS 81.470 No change.

NRS 81.480 No change.

NRS 81.490 No change.

NRS 81.500 No change.

Note: This statute gives these co-ops the powers "granted by the provisions of other laws of Nevada relating to private corporations" which should mean the powers granted business corporations by Chapter 78. Since this gives co-ops the power to distribute profits (except as provided in NRS 81.410 to 81.540) and since we believe such co-ops should have those powers, we recommend no change. We have also recommended changes to NRS 81.410 which would make inapplicable to these co-ops those sections of the new nonprofit corporations law which forbid distributions to members.

NRS 81.505 Restriction on power of rural electric cooperatives to sell, lease or dispose of assets.

1. A rural electric cooperative formed or consolidated pursuant to NRS 81.410 to 81.540, inclusive, may sell, lease or otherwise dispose of all or a substantial portion of its assets only if the sale, lease or disposition is:

(a) Authorized by the affirmative vote of not less than three-fourths of the directors of the cooperative; and

(b) Assented to by two-thirds of the members of the

cooperative:

(1) In writing; or

(2) By a vote of the members at a meeting, notice of which has been given in the manner provided in [NRS 78.370] section 58 of Chapter ___ . [For the purpose of this subparagraph, any reference to NRS 78.370 to "stockholder" must be replaced by a reference to "member."]

2. As used in this section, "substantial portion of its assets" means any portion of the assets of a cooperative representing 25 percent or more of the total book value of all of its assets.

Note: We recommend changing the reference to the provision of Chapter 78 governing notices of stockholders' meetings to the equivalent provision of the new nonprofit corporation chapter.

NRS 81.510 [Consolidation of] Agreement of two or more cooperative corporations.[: Procedure; powers.]

[1. Upon written assent of two-thirds of all the members or by a vote of members representing two-thirds of the total votes of all members of each of two or more such nonprofit cooperative corporations to cooperate with each other for the more economical carrying on of their respective businesses by consolidation, such consolidation must be effected by two or more associations entering into an agreement in writing and adopting a name, which agreement must:

(a) Be signed by two-thirds of the members of each such association.

(b) State all the matters necessary to articles of association.

(c) Be acknowledged by the signers before a person

competent to take an acknowledgment of deeds in this state.

(d) By filed or microfilmed in the office of the county clerk of the county wherein the principal business of the association is to be transacted.

2. A certified copy of the agreement must be filed in the office of the secretary of state and the same fees for filing and recording, as required for filing and recording of original articles of incorporation, must be paid. From and after the filing of the certified copy, the former associations comprising the component parts cease to exist, and the consolidated association:

(a) Succeeds to all the rights, duties and powers of the component associations.

(b) Is possessed of all the rights, duties and powers:

(1) Prescribed in the agreement of consolidated associations not inconsistent with NRS 81.410 to 81.540, inclusive; and

(2) Of a corporation formed pursuant to NRS 81.410 to 81.540, inclusive.

(c) Is subject to all the liabilities and obligations of the former component associations.

(d) Succeeds to all the property and interests thereof.

(e) May make bylaws and do all things permitted by NRS 81.410 to 81.540, inclusive.

3. Any such corporation, upon resolution adopted by its board of directors, has the power:

(a) To enter into contracts and agreements.

(b) To make stipulations and arrangements with any other

corporation or corporations for the cooperative and more economical carrying on of its business, or any part or parts thereof.]

[4.] Any two or more cooperative corporations organized under NRS 81.410 to 81.540, inclusive, upon resolutions adopted by their respective boards of directors, may, for the purpose of more economically carrying out their respective businesses, by agreement, unite in adopting, employing and using, or several such corporations may separately adopt, employ and use, the same methods, policy, means, agents, agencies and terms of marketing for carrying on and conducting their respective businesses.

Note: The new nonprofit corporation law contains detailed statutes on consolidation and amendment. The procedure in existing NRS 81.510 is unnecessarily cumbersome and requires an unnecessarily high two-thirds vote. We recommend its repeal.

The only portion of the statute remaining is the subsection permitting agreements between two or more co-ops on marketing, policies etc.

NRS 81.530 Repeal.

Note: Quo warranto proceedings are already permitted by the provisions of NRS Chapter 35. The new nonprofit corporation law, at section 18, permits the Attorney General to inquire into nonprofits, including these co-ops. There will be no need for 81.530.

NRS 81.540 No change.

INTRODUCTION

Below is a discussion relating to Nevada's "CHARITABLE CORPORATIONS ACT", NRS 81.550 to 81.660. We discuss the requirements necessary to comply with Internal Revenue Code (IRC)[1] relating to tax exempt organizations. We then set forth the recommended changes to NRS 81.550 to 81.660.

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1 All section references are to the Internal Revenue Code.

DISCUSSION

IRC--Charitable Organizations

For an organization to be classified as a charitable organization under §501(c)(3)[2] of the Internal Revenue Code (IRC) it must meet certain enumerated requirements. Within the body of the statute exists two tests, both of which must be met to be characterized as 501(c)(3) organization: (1) the organization test; and (2) the operational test.

The organization test requires that the Articles of Organization must: (1) limit the purpose of operation to one prescribed; (2) contain no express powers to engage in conduct outside such enumerated purposes, except on an unsubstantial level; and (3) no part of the net earnings are to inure or be distributed for the benefit of any private shareholder or individual directly or upon liquidation.

The operational test requires: (1) that such organization be operated exclusively in furtherance of its exempt purpose with only unsubstantial deviations; (2) net earnings must not inure to a private shareholder or individual; and (3) it must not operate as an "action" organization (i.e. active promotion, lobbying or challenging of legislation).

Satisfying one test alone is insufficient. The organization must be both formally organized and operated in compliance in order to be classed as a 501(c)(3) organization. If so, the tax exemption provided by Section 501(a) may apply.[3]

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2 "Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competitions (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholders or individual, no substantial part of the activities of which is carrying on propaganda or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

3 Section 501(a) EXEMPTION FROM TAXATION - "An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such

Section 508 entitled, "Special Rules with Respect to Section 501(c)(3) Organizations," requires organizations wishing to be recognized as a 501(c)(3) organization to notify the Secretary of its intention to apply for such status. IRC §508(a). However, the statute provides certain exceptions to this notice requirement, both mandatory and discretionary.

Churches and public charities with gross receipts of less than $5,000 need not notify the secretary. IRC §508(c)(1). The Secretary may also recognize educational organizations in §170B(1)(a)(ii) or any other class of organizations the secretary determines that full compliance is not necessary. IRC §508(c)(2).

IRC: PRIVATE FOUNDATIONS

Section 501(c)(3) is applicable to "foundations." The term "foundation" was given no restrictive language, therefore, a "foundation" may be either public or private, a corporation or some other entity. Private foundations, however, are given special considerations under the IRC. These special considerations are the focus of Nevada's "Charitable Corporation Act".

The principal difference between a private foundation and public charity is its contributor base. A public charity relies on the general public and/or governmental support. A private foundation relies on a much smaller group of contributors. Since private foundations may have what the IRC calls, "substantial contributors", special rules were deemed necessary to prevent the use of private foundations as vehicles for unjustifiable charitable deductions and private gains. These rules are found in IRC Section 507, 508 and 509.

Private foundations are defined in Section 509(a). A private foundation is any 501(c)(3) organization other than:

> (1) organizations described in §170B(1)(a)(i)-(vi) to which the fifty-percent deduction applies, (except §170B(1)(a)(vii), which deals directly with private foundations, and (viii), which pertains to the deduction for organizations meeting the 509(a)(2) and (3) requirements);
>
> (2) an organization which (a) receives more than one-third of its annual support from the public, its

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exemption is denied under section 502 or 503."

members and the gross receipts from its activities and (b) less than one-third of its support from gross investment income and excess unrelated business income;

(3) an organization which: (a) is organized and operated exclusively for a type (1) or (2) organization, (b) is operated or controlled by or in connection with a type (1) and (2) organization and (c) is not directly controlled by a disqualified person; or

(4) an organization which is organized and operated exclusively for public safety. IRC §509(a).

If an organization meets any one of these tests it is not considered a private foundation.

A special provision applicable to private foundations, §508(e), describes provisions required to be contained in the "governing instrument" (the articles of incorporation for a corporation, the trust instrument for a trust, etc.). This section requires that the governing instrument contain restrictions against self-dealing, retaining excess business holdings, making investments that may jeopardize the private foundation's tax exempt status, and making taxable expenditures. §508(e)(1)(b). Also, the governing instrument must contain a provision requiring distributions each taxable year, at such times and in such manner so that no tax accrues against the organization. §508(e)(1)(a).

So as not to create an undue burden to such private charitable foundations, Treasury Regulation 1.508-3(d) provides an option for state legislatures. This Treasury Regulation gives states the option of codifying the prohibited and required conduct or deeming it as contained in the articles of organization. Treas. Reg. 1.508-3(d)(i)(ii). By providing for this, a trap for the unwary organizer of a Private Foundation is avoided.

Nevada has exercised this option, as have the majority of jurisdictions. NRS 81.630 prohibits the conduct stated in §508(e)(1)(b) and NRS 81.640 requires the distributions mandated by §508(e)(1)(a).

However, drafting problems within Nevada's Charitable Corporation Act hamper the efficiency and understandability of the act. The act as it now exists defines the term "charitable organization" as a §503(c)(3) organization but never uses the term in the Act. NRS 81.620, 81.630 and 81.650 use the term "nonprofit charitable corporation" which the drafters fail to define. Finally, NRS 81.640 uses the term "private foundation corporation", defined by NRS 81.610 as a Nevada "corporation or association" which is also a "private foundation" under the IRC. Thus, some of the operative sections apply only to corporations (NRS 81.630, 81.650 and 81.660) and some to corporations and

"associations" which may not be corporations.

To reflect the legislative policy demonstrated at NRS 81.560, this statute should cover those organizations which obtain a benefit from the restrictions pursuant to the IRC. Such coverage would include <u>both</u> corporations and unincorporated entities. The following draft reflects the desired application. The provisions of NRS 81.650 and 81.660 relate only to the amendment of the articles of incorporation and are limited in their application to corporations.

CHARITABLE [CORPORATION] <u>ORGANIZATIONS</u> ACT

NRS 81.550 Short title.

NRS 81.550 to 81.660, inclusive, shall be known as the Charitable [Corporation] <u>Organizations</u> Act of 1971.

Note: Since the act is not limited to only corporations, it should be retitled to reflect its true scope and so as not to mislead the reader upon first glance. The Act applies to all private foundations wishing to gain tax exempt status in any organizational form, not just those "private foundations" choosing the corporate form.

NRS 81.560 No change.

NRS 81.570 References to Internal Revenue Code.

As used in NRS 81.550, inclusive, unless otherwise indicated, section references are to the Internal Revenue Code of 1954, [as in effect on January 1, 1971,] and include future amendments to such sections and corresponding provisions of future Internal Revenue Laws.

Note: This deletion simplifies the wording of the statute and makes it more readable. The statutory language as it reads picks up all future amendments.

NRS 81.580 No change.

NRS 81.590 Repeal.

Note: This definition was never used by the other statutes in the Act and is not used in this new draft.

NRS 81.600 No change.

NRS 81.6__ <u>"Governing instrument" defined.</u>

"Governing instrument" means the articles or certificate of incorporation or association or other written instrument by which a private foundation is created, but not including its bylaws.

Note: This term was added to cover those organizations which are governed by documents other than articles of incorporation. This term is necessary to clarify that forms of organizations other than corporations are governed by the Act.

NRS 81.610 "Private foundation" [corporation] defined.

"Private foundation" [corporation] is any nonprofit corporation, [or] association, foundation, or any other charitable entity formed pursuant to the laws of the State of Nevada which is a "private foundation" as defined in Section 509(a).

Note: To be a private foundation under the IRC, the foundation must first be within the definition of §501(c)(3) (i.e. charitable). To reflect the expansion of coverage to private foundations whether or not they are corporations, the words "other charitable entity" are used instead of simply "corporation".

NRS 81.620 Application of NRS 81.550 to NRS 81.660, inclusive.

The provisions of NRS 81.550 to 81.660, inclusive, are applicable to any [nonprofit charitable corporations,] private foundation whether [they were] it was created before or [are] is created after the effective date of this act, if [they are] it is subject to the Internal Revenue Code sections set out herein.

NRS 81.630 Prohibited acts.

In the administration of any [nonprofit charitable corporation] private foundation that is subject to the

provisions of the Internal Revenue Code of 1954, [as in effect on January 1, 1971,] unless otherwise provided in the governing instrument, the following acts are prohibited:

1. Engaging in any act of "self-dealing" (as defined in Section 4941(d)) which would give rise to any liability for the tax imposed by Section 4941(a).

2. Retaining any "excess business holdings" (as defined in Section 4943(c)) which would give rise to any liability for the tax imposed by Section 4943(a).

3. Making any investments which would jeopardize the carrying out of any of the exempt purposes of the organization within the meaning of Section 4944, so as to give rise to any liability for the tax imposed by Section 4944(a).

4. Making any "taxable expenditures" (as defined in Section 4945(d)) which would give rise to any liability for the tax imposed by Section 4945(a).

Note: We recommend deleting the words "nonprofit charitable corporation" and adding the new defined term "private foundation".

NRS 81.640 Minimum distributions required.

Unless otherwise provided in the governing instrument, in the administration of any [organization which is a "private foundation corporation,"] <u>private foundation</u>, there shall be distributed for the purposes specified in the [articles of incorporation or] governing instrument, for each taxable year, amounts at least sufficient to avoid liability for the tax imposed by Section 4942(a).

NRS 81.650 Amendment of <u>governing instrument</u>: [articles of incorporation:] Procedure.

1. The board of directors or trustees of any [nonprofit charitable corporation] private foundation which is a corporation organized under and governed by Nevada law may, by a majority vote of its directors or trustees, amend its [articles of incorporation or] governing instrument at any regular or special meeting of the board of directors or trustees, without a vote of the stockholders or members of [the corporation,] such private foundation, if any, in order to avoid the penalties and liabilities described in Section 4941(a), 4942(a), 4943(a), 4944(a), and 4945(a) or to comply with the provisions of Section 508(e).

2. Such an amendment must not be made until the board of directors or trustees has notified the members or stockholders, if any, at least 30 days before the meeting at which the [articles of incorporation or] governing instrument is to be amended. Notice of the intention to amend the [articles or] governing instrument must be served upon the attorney general at least 30 days before the meeting, together with a copy of the proposed amended [articles or] governing instrument.

3. [After] If the private foundation is a corporation organized under and governed by Nevada law, after any such amendment has been approved by the directors or trustees, a copy of the amended [articles or] governing instrument must be filed with the secretary of state.

Note: This statute allows the directors or trustees of a Nevada nonprofit corporation, acting alone, to pass necessary amendments to its articles to comply with the Charitable Organizations Act.

We also added a reference to IRC §4944(a). There is no reason why it was excluded. It is included in similar

provisions in other jurisdictions.

NRS 81.660 Amendment of [articles of incorporation:] governing instrument: Provision for termination of status of private foundation.

In addition to amending the [articles of incorporation or] governing instrument of such [corporation] private foundation in accordance with NRS 81.650, the amendment may include a provision for the [organization] private foundation to conform with the requirements for termination of private foundation status as provided in Section 507, in order to avoid the tax provided in Section 507(c).

CHAPTER 82

82.010 through 82.550 Repeal entire chapter.

CHAPTER 83

83.010 through 83.100 Repeal.

83.110 Lands and property exempt from taxation; no streets to be laid through cemetery.

The cemetery lands and property of any [association formed pursuant to this chapter] nonprofit corporation governed by the provisions of NRS Chapter formed for the purposes of procuring and holding lands to be used exclusively for a cemetery or place of burial of the deed shall be exempt from all public taxes, rates and assessments, and shall not be liable to be sold on execution or be applied in payment of debts due from any individual proprietors[;]. [but] [t] The proprietors of lots or plats in such cemeteries, their heirs or devisees, may hold the same exempt therefrom, so long as the same shall remain dedicated to the purpose of a cemetery[;]. [and] [d] During that

time no street, road, avenue or thoroughfare shall be laid through such cemetery, or any part of the lands held by such [association] corporation for the purposes aforesaid, without the consent of the trustees of such [association] corporation and of four-fifths of the lot owners.

Note: Except for NRS 83.110, 83.120 and 83.130, all of Chapter 83 should be repealed. Cemetery associations can be formed under the new nonprofit corporations law. Existing cemetery associations continue in existence and are governed by the new nonprofit corporation law. See § 2(1)(b). These statutes should be retained to preserve the tax exemption for cemetery lands, to protect the lands from execution sales and the construction of streets, to protect the inalienability of lots and continue criminal penalties for destruction of gravestones and other cemetery property.

83.120 Lots inalienable.

1. Whenever the [lands] cemetery lands and property of any nonprofit corporation governed by the provisions of NRS Chapter formed for the purpose of procuring and holding lands to be used exclusively for a cemetery or place of burial of the dead shall be laid off into lots or plats, and such lots or plats, or any of them, shall be transferred to individual holders, and after there shall have been an interment in a lot or plat so transferred, such lot or plat, from the time of such interment, shall be forever thereafter inalienable, and shall, upon the death of the holder or proprietor thereof, descend to the heirs at law of such holder or proprietor, and to their heirs at law forever; but any one or more of such heirs at law may release to any other of the heirs at law his, her, or their interest in the same, on such conditions as shall be agreed on and specified in such release, which release shall be recorded with the county recorder of the county within which the

cemetery shall be situated.

2. The body of any deceased person shall not be interred in such lot or plat, unless it be the body of a person having, at the time of such decease, an interest in such lot or plat, or the relative of some person having such interest, or the wife of such person, or her relative, except by the consent of all persons having an interest in such lot or plat.

Note: This statute, like NRS 83.110, has been rewritten to clarify that only lands owned by cemetery associations originally formed pursuant to NRS Chapter 83 and cemetery associations formed under the new nonprofit corporation law are covered by this statute.

83.130 Criminal and civil penalties for willful injury to or removal of property.

1. Unless a greater penalty is provided by NRS 206.125, a person who:

(a) Willfully destroys, mutilates, defaces, injures or removes any tomb, monument, gravestone, building or other structure placed in any cemetery of any [association incorporated under this chapter;] nonprofit corporation governed by the provisions of NRS Chapter formed for the purpose of procuring and holding lands to be used exclusively for a cemetery or place of burial of the deed;

(b) Willfully destroys, mutilates, defaces, injures or removes any fence, railing or other work for the protection or ornament of any cemetery of any [association incorporated under this chapter,] such nonprofit corporation, or any tomb, monument, gravestone, or any structure, plat or lot within the cemetery; or

(c) Willfully destroys, cuts, breaks or injures any tree,

shrub or plant within the limits of any cemetery of any [association incorporated under this chapter,] such nonprofit corporation, is guilty of a misdemeanor.

2. An offender is also liable in an action of trespass to be brought in all cases in the name of [the association,] such nonprofit corporation to pay all damages which are occasioned by this unlawful act or acts. Any money recovered must be applied by the trustees to the reparation or restoration of the property which was destroyed or injured.

Note: See notes to NRS 83.110 and 83.120.

CHAPTER 84

84.010 through 84.020 No change.

84.030 Specifications of articles of incorporation.

The articles of incorporation shall specify:

1. The name of the corporation by which it shall be known, which name shall be the name of the person making and subscribing the articles and the title of his office in such church or religious society, naming it if desired, and followed by the words "and his successors, a corporation sole," or the title of his office in such church or religious society, naming it if desired, and followed by the words "and his successors, a corporation sole."

2. The object of the corporation.

[3. The estimated value of the property at the time of making the articles of incorporation.]

[4.] 3. The title of the person making the articles, and the manner in which any such vacancy occurring in the incumbency of such archbishop, bishop, president, trustee in trust,

president of stake, president of congregation, overseer, presiding elder, district superintendent, or other presiding officer, or clergyman is required by the rules, regulations or discipline of such church, society or denomination to be filled.

Note: There is no reason for the articles to state the estimated value of the church's property in the articles. The requirement should be deleted.

84.040 through 84.080 No change.

CHAPTER 85

85.010 through 85.060 Repeal.

85.070 Property exempt from taxation.

The property on which [the asylum or institution building] stands a hospital or other charitable asylum for the care or relief of orphan children, or of sick, infirm or indigent persons owned by a nonprofit corporation organized or existing pursuant to NRS Chapter , together with the buildings, shall, while occupied for the objects and purposes thereof, be exempt from taxation.

Note: Chapter 85, except for the hospital tax exemption, should be repealed. Hospitals etc. organized pursuant to Chapter 85 continue to exist and will be governed by the new nonprofit corporation law.

CHAPTER 86

86.010 through 86.190 Repeal entire chapter.

CHAPTERS 81, 82 & 83 -
REFERENCES CONTAINED IN EXISTING STATUTES

This study recommends the repeal of large portions of existing Chapters 81, 82 and 83 of the Nevada Revised Statutes. To the extent that portions of these chapters are moved, repealed, or altered, the references to them in other areas of the Nevada Revised Statutes should be correspondingly revised. This portion of the study is designed to assist in the process of revision.

The easiest chapter is Chapter 83. Chapter 83 is not referred to elsewhere in the statutes. It is, however, referred to in a few scattered cross-references in the published codes.

Chapter 82 is, likewise, relatively simple. In addition to the scattered nonstatutory cross-references in the published statutes, NRS 82.010 to 82.060 was referred to in NRS 86.180. Assuming the changes recommended by this study are made, this does not pose a cross-referencing problem, because existing NRS 86.180 will have been repealed.

Chapter 81 will require more work in order to revise the existing cross-references in the official statutes. In general, references to the following must be deleted or revised: 81.002 through 81.0095, 81.280 through 81.400, 81.460, 81.530 and 81.590. All general references to Chapter 81 should be reviewed for revisions. This would include statutes, as well as notes and cross-references.

NRS 278.320 makes a general reference to Chapter 81, in allowing a board of county commissioners to exempt land owned by such nonprofit corporations as an immediate successor in title to a railroad company from subdivision regulations. In order to make this provision consistent, a reference to the new nonprofit corporation law should be added to NRS 278.320(2)(a) to provide an exemption for those nonprofit corporations which would fall within this exemption but would be required to be incorporated under the new act.

NRS 332.221 provides that local governments may provide maintenance services for vehicles which belong to, and may purchase motor vehicle fuel to sell to Chapter 81 corporations. This reference should be changed to the new nonprofit corporation law.

Specific provisions of Chapter 81 are referred to in several statutes scattered throughout the Nevada Revised Statutes, in addition to the general references. Several of these references are to statutes which this study recommends deleting. These references should be changed to incorporate the corresponding provisions in the new nonprofit corporation law, or be deleted entirely. Some of the references are to provisions which have been materially changed. For these references, a policy decision should be made concerning whether or not the reference should be altered, remain the same, or be deleted. NRS 426.715 should probably contain a reference to the new nonprofit corporation act.

NRS 127.220 defines a "child-placing agency" as an agency meeting the other requirements and organized under NRS 81.290 to 81.340, inclusive. This reference should be changed to the new nonprofit corporation law.

Under NRS 232.250, the director of the Department of Commerce has the power to participate in the operation of, create, or cause to be created, any nonprofit corporation,

pursuant to NRS 81.350 to 81.400, inclusive, which he deems necessary or convenient for the exercise of the powers and duties of the department. NRS 232.250(3) should be changed to allow the director to use corporations incorporated under the new nonprofit corporation law.

Under NRS 319.165, the housing division of the Department of Commerce may also use nonprofit corporations to exercise its powers and duties. NRS 319.165(1)(a) refers to nonprofit corporations created pursuant to NRS 81.350 to 81.400.

Under NRS 349.750, the director of the Department of Commerce may also create or cause to be created nonprofit corporations pursuant to NRS 81.350 to 81.400, inclusive, which he determines to be necessary or convenient for the purposes of NRS 349.700 to 349.870, inclusive. Again, this reference should be changed.

Under NRS 385.091, the State Board of Education may utilize nonprofit corporations formed pursuant to NRS 81.290 to 81.340, inclusive, for the acquisition of money and personal property for awards and recognition of exceptional teachers, pupils and public schools and for special projects regarding educational enhancement, but such corporations may not receive or hold real property. References to the appropriate sections of the new nonprofit corporation law should be included in NRS 385.091(1).

The Board of Regents of the University of Nevada system may, pursuant to NRS 396.7992 and 396.801, use nonprofit corporations formed pursuant to NRS 81.270 to 81.340, inclusive, for the acquisition of real property for future development and expansion of Nevada's two state universities. Subsections 1 and 3(b) of each statute should be amended to include a reference to the new nonprofit corporation law.

NRS 678.300 which applies to local credit unions subjects those credit unions to the provisions of NRS 81.410 to 81.540, inclusive. Most of these statutes would remain in the code, if the recommendations of this study are adopted. No change to NRS Chapter 578 is necessary.

The additions, deletions, and changes to the statutes, outside the area of corporations are beyond the scope of this study. However, the above noted inconsistencies should be cleared up when enacting the recommendations of this study.

Chap. 89

PROFESSIONAL CORPORATIONS

Introduction

Chapter 89 sets forth restrictions on professional corporations and associations. Corporations are governed by Sections NRS 89.010 to 89.110, while associations are regulated by Sections NRS 89.200 to 89.270. Although most of the provisions of Chapter 89 were adopted in 1963 and 1969, they remain among the most modern and flexible. Most of the changes in the realm of professional corporations have come as a result of changes in the Internal Revenue Code.

We have reviewed the professional corporation statutes of California, see Cal. Corp. Code §§ 13400 to 13410, inclusive; Delaware, see Del. Code Ann. tit. 8, §§ 601-619, inclusive; Virginia, Va. Code Ann. §§ 13.1-542 to 13.1-556, inclusive, as well as the provisions of the Model Professional Corporation Supplement of 1984. There are no significant innovations in this area. Computer research has also revealed no significant innovations.

NRS 89.010 to 89.060 No change.

NRS 89.070 Restrictions on ownership and transfer of shares.

1. Except as provided in subsection 3, no corporation organized under the provisions of this chapter may issue any of its capital stock to anyone other than a natural person who is licensed or authorized to render the same specific professional services as those for which the corporation was incorporated. Except as provided in subsection 3, no stockholder of a corporation organized under this chapter may enter into a voting trust agreement or any other type of agreement vesting another person with the authority to exercise the voting power of any or all of his stock, unless the other person is licensed or authorized to render the same specific professional services as those for which the corporation was incorporated.

2. Except as provided in subsection 3, no shares of a corporation organized under this chapter may be sold or

transferred except to an individual who is eligible to be a stockholder of the corporation or to the personal representative or estate of a deceased or legally incompetent stockholder. The personal representative or estate of the stockholder may continue to own shares for a reasonable period, but may not participate in any decisions concerning the rendering of professional services. The articles of incorporation or bylaws may provide specifically for additional restrictions on the transfer of shares and may provide for the redemption or purchase of the shares by the corporation, its stockholders or an eligible individual account plan complying with the requirements of subsection 3 at prices and in a manner specifically set forth. The provisions dealing with the purchase or redemption by the corporation of its shares may not be invoked at a time or in a manner which would impair the capital of the corporation. A stockholder may transfer his shares in the corporation or any other interest in the assets of the corporation to a revocable trust so long as the stockholder acts as trustee of the revocable trust and any person who acts as co-trustee and is not licensed to perform the services for which the corporation was incorporated does not participate in any decisions concerning the rendering of such services.

3. A person not licensed to render the professional services for which the corporation was incorporated may own a beneficial interest in any of the assets, including corporate shares, held for his account by an eligible individual account plan sponsored by the professional corporation for the benefit of its employees, which is intended to qualify under section 401

of the Internal Revenue Code, 29 U.S.C. § 401, if the terms of the trust are such that the total number of shares which may be distributed for the benefit of persons not licensed to render the professional services for which the corporation was incorporated is less than a controlling interest and:

(a) The trustee of the trust is licensed to render the same specific professional services as those for which the corporation was incorporated; or

(b) The trustee is not permitted to participate in any corporate decisions concerning the rendering of professional services in his capacity as trustee. A trustee who is individually a stockholder of the corporation may participate in his individual capacity as a stockholder, director or officer in any corporate decision.

Note: The transfer of assets to a revocable trust is a device used by estate planners to avoid probate and reduce taxes. Under current NRS Chapter 89, this practice is not permitted. The additional language added to NRS 89.070(2) permits such estate planning provisions, giving to professionals who incorporate the same advantages available to other businesses.

NRS 89.080 Termination of employment and financial interest on legal disqualification; officers and directors to be licensed to render professional services.

1. If any officer, stockholder, director or employee of a corporation organized under this chapter who has been rendering professional services to the public becomes legally disqualified to render such professional services within this state, he shall sever within a reasonable period all employment with and financial interest in such corporation; but nothing contained in this chapter shall prevent a corporation formed under this

chapter from entering into an employment contract with an employee that provides for severance pay or for compensation for past services upon termination of employment, whether by death or otherwise.

2. No person shall be an officer or director of a corporation organized under this chapter other than an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the corporation was incorporated.

3. Upon the death of an employee of a corporation who has transferred his interest in the corporation to a revocable trust as permitted by NRS 89.070(2), the trustee of the revocable trust may continue to retain any interest so transferred, including corporate shares, for a reasonable period, but may not exercise any authority concerning the rendering of professional services and may not distribute the corporate interest to any person not licensed to render the services for which the corporation was incorporated.

[3.] 4. A corporation's failure to require compliance with the provisions of this section shall be a ground for the forfeiture of its charger.

Note: The changes here permit the revocable trust to retain stock for a reasonable period after the death of the professional.

NRS 89.090 through 89.230, inclusive No change.

NRS 89.240 Termination of employment and financial interest on legal disqualification; redemption of member's interest.

1. If any member or employee of a professional association

who has been rendering professional service to the public becomes legally disqualified to render such professional service within this state, he shall sever within a reasonable period all employment with and financial interest in such association; but nothing contained in this chapter shall prevent a professional association from entering into an employment contract with a member or employee that provides for severance pay or for compensation for past services upon termination of employment, whether by death or otherwise. Upon the death of a member of the association who has transferred his interest in the association to a revocable trust as permitted by subsection 2, the trustee of the revocable trust may continue to retain any interest so transferred for a reasonable period, but may not exercise any authority concerning the rendering of professional services and may not distribute the interest in the association or its assets to any person not licensed in the association or its assets to any person not licensed to render the services for which the association was organized.

2. No membership interest in a professional association shall be sold or transferred except to an individual who is eligible to be a member of such association or to the personal representative or estate of a deceased or legally incompetent member, except as provided in this subsection. The personal representative of such a member may continue to own such interest for a reasonable period, but shall not be authorized to participate in any decisions concerning the rendering of professional service. A member may transfer his interest in the association or any other interest in the assets of the

association to a revocable trust so long as the interestholder acts as trustee of the revocable trust and any person who acts as co-trustee and is not licensed to perform the services for which the association is organized does not participate in any decisions concerning the rendering of such professional services.

3. The articles of association may provide specifically for additional restrictions on the transfer of members' interests and may provide for the redemption or purchase of such interest by the association or its other members at prices and in a manner specifically set forth. The provisions dealing with the purchase or redemption by the association of a member's interest may not be invoked at a time or in a manner that would create a capital deficit for the association.

Note: Transfer of assets to a revocable trust is a device used by estate planners to avoid probate. However, under current NRS Chapter 89, this practice is not permitted. We should do so to allow professionals the same advantages available to other businesses.

NRS 89.250 to 89.270 No changes.

Ltd. Liab.

THE NEVADA LIMITED LIABILITY COMPANY ACT

The Nevada Limited Liability Company Act is advanced to keep pace with the recent development of the limited liability company. Four states, Wyoming, Florida, Colorado and Kansas, have already recognized such business organizations. See Wyoming Statutes §17-15; Florida Statutes Chapter 608; Coloroado Statutes, Article 80 and Kansas H.B. No. 3064 (1990). The tax advantages created by a recent Revenue Ruling on the tax status of limited liability companies, where all participants have limited liability but are taxed as partners, will certainly persuade many other states to adopt similar acts.

Although Wyoming adopted its Act in 1977, the tax status of a limited liability company was uncertain, until Revenue Ruling 88-76, 1988-2 CB 392 (1988). Despite the issuance of an earlier private letter ruling, certain proposed regulations ("Kintner Regulations") left in doubt the status of limited liability companies.

In Revenue Ruling 88-76, the service considered the following issue: "Whether a Wyoming limited liability company, none of whose members or designated managers, are personally liable for any debts of the company, is classified for federal tax purposes as an association or as a partnership." The Service held: "[the limited liability company] has associates and an objective to carry on business and divide the gains therefrom, but lacks a preponderance of the four remaining corporate characteristics. Accordingly, [the limited liability company] is classified as a partnership for federal tax purposes." After the ruling, the Service issued a favorable Announcement (88-188, 1988-38 IRB 25, September 2, 1988) announing that it had completed its review of entity classification rules under Treasury Regulations §§301.7701-2 and 301.7701-3. The Announcement held that minimum capitalization (net worth) requirements should not be extended to all organizations seeking a partnership classification. A private letter ruling was also issued on the status of a limited liability company under the Florida Act. See Letter Rule 8937010. However, that letter requested capitalization levels under Revenue Procedure 89-12, 1989-7 IRB 22, January 30, 1989.

Characteristics.

A limited liability company integrates many of the best characteristics of both corporations and partnerships. Participants, called "members," as well as managers, are immune from judgment, decrees, or court orders, for any liabilities, debts or obligations of the limited liability company. Members enjoy the single level of taxation of a partnership including the pass-through of taxable income, losses and credits.

Members may participate in the management of the company or may designate managers as defined by the articles of organization. The company may not exist beyond thirty years and

dissolves upon death, termination or bankruptcy of any member unless all members agree to continue business. Interest in the company is transferable only upon consent of all members.

Advantages.

Limited liability companies enjoy advantages over S corporations, limited and general partnerships.

1. Subchapter S Corporations.

Subchapter S corporations generally are unable to increase the basis in stock incurred as a result of liabilities of the corporation. Shareholders also recognize income upon distributions of appreciated property from subchapter S corporations. IRS Section 1362(d)(3) also limits a subchapter S corporation's percentage of passive income. Members of limited liability companies avoid these tax consequences.

Additional benefits include no limitation on the number of shareholders, ease of qualification, and no prohibition on belonging to an affiliated group.

2. Limited partnerships.

While limited partners also receive pass-through tax benefits and limited liability, the general partner is subject to personal liability. Both managers and members of a limited liability company are entitled to the limited liability protection. Although the same result may be achieved by using a corporate general partner for the limited partnership, the corporate general remains limited by the capitalization and ownership requirements of the Internal Revenue Code.

In Ruling 88-76, the Service announced it would use the "two-out-of-four" test of Larson v. Commissioner, 66 T.C. 159 (1976), acq., 1979-1 CB. 1. Equal weight is accorded to each of the four corporate characteristics of (1) continuity of life, (2) centralization of management, (3) limited liability, and (4) free transferability of interests. If a limited liability company has three or more of these characteristics, then it will be taxed as a corporation. Otherwise it will be taxed as a partnership. The Service's contained acquiescence to the Larson rule was reaffirmed in Announcement 88-118.

The Wyoming limited liability company possessed only two corporate characteristics, limited liability and centralized management. Under the Wyoming Act, a practitioner can easily eliminate the characteristic of centralized management.

The Nevada Act is modeled after the Wyoming Act as it is the only act having received a favorable public ruling. Companies formed under the other acts have received private rulings, which only govern the person seeking the ruling. However, the Nevada Act has been fashioned in light of

improvements included in the Colorado, Florida and Kansas Acts.

LIMITED LIABILITY COMPANIES

NRS __.010 Short title.

This act shall be known and may be cited as the "Nevada Limited Liability Company Act."

NRS __.020 Definitions.

1. As used in this act:

(a) "Articles of organization" means the articles of organization filed with the secretary of state for the purpose of forming a limited liability company as specified in NRS __.060 to __.090, inclusive.

(b) "Bankrupt" means bankrupt under the federal Bankruptcy Act.

(c) "Contribution" means anything of value which a person contributes to the limited liability company as a prerequisite for or in connection with membership, including cash, property, or services rendered or a promissory note or other binding obligation to contribute cash or property or to perform services.

(d) "Court" includes every court and judge having jurisdiction in the case;

(e) "Foreign limited liability company" means a limited liability company formed under the laws of any jurisdiction other than this jurisdiction.

(f) "Limited Liability company" or "company" means a limited liability company organized and existing under this act;

(g) "Manager" means a person elected by the members of a limited liability company to manage the company pursuant to NRS

__.170.

(h) "Member" means a person with an ownership interest in a limited liability company with the rights and obligations specified under this article.

(i) "Membership interest" means a member's share of the profits and losses of a limited liability company and the right to receive distributions of such company's assets.

(j) "Operating agreement" means any valid written agreement of the members as to the affairs of a limited liability company and the conduct of its business. The operating agreement may contain any provisions for the affairs of a limited liability company and the conduct of its business to the extent that such provisions are not inconsistent with law or the articles of organization, including manner of electing managers, if any.

(k) "Person" includes individuals, general partnerships, limited partnerships, limited liability companies, corporations, trusts, business trusts, real estate investment trusts, estates and other associations;

(l) "Real property" includes land, any interest, leasehold or estate in land and any improvements on it;

(m) "Records office" means that office required to be maintained by NRS __.110.

(n) "This act" means NRS __.010 - __.390.

NRS __.030 Purpose.

Limited liability companies may be organized under this act for any lawful purpose, except for the purpose of banking or insurance.

NRS __.040 Powers.

1. Each limited liability company organized and existing under this act may:

(a) Sue and be sued, complain and defend, in its name;

(b) Purchase, take, receive, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or an interest in it, wherever situated;

(c) Sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets;

(d) Lend money to and otherwise assist its members;

(e) Purchase, take, receive, subscribe for or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge or otherwise dispose of, and otherwise use and deal in and with shares or other interests in or obligations of domestic or foreign limited liability companies, domestic or foreign corporations, associations, general or limited partnerships or individuals, or direct or indirect obligations of the United States or of any government, state, territory, governmental district or municipality or of any instrumentalility of it;

(f) Make contracts and guarantees and incur liabilities, borrow money at such rates of interest as the limited liability company may determine, issue its notes, bonds and other obligations and secure any of its obligations by mortgage or pledge of all or any part of its property, franchises and income;

(g) Lend money for its proper purposes, invest and reinvest its funds and take and hold real property and personal

property for the payment of funds so loaned or invested;

(h) Conduct its business, carry on its operations and have and exercise the powers granted by this act in any state, territory, district or possession of the United States, or in any foreign country;

(i) Elect or appoint managers and agents of the limited liability company, and define their duties and fix their compensation;

(j) Make and alter operating agreements, not inconsistent with its articles of organization or with the laws of this state, for the administration and regulation of the affairs of the limited liability company;

(k) Indemnify and insure a member or manager or former manager or former member of the limited liability company as provided in NRS __.043 and __.047.

(l) Cease its activities and surrender its articles of organization;

(m) Have and exercise all powers necessary or convenient to effect any or all of the purposes for which the limited liability company is organized;

(n) Become a member of a general partnership, limited partnership, joint venture or similar association, or any other limited liability company.

NRS __.043 Indemnification of members, managers, employees and agents; advancement of expenses.

1. A limited liability company may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding,