

**MINUTES OF THE MEETING  
OF THE  
LEGISLATIVE COMMISSION=S SUBCOMMITTEE  
TO ENCOURAGE CORPORATIONS AND OTHER BUSINESS ENTITIES  
TO ORGANIZE AND CONDUCT BUSINESS IN THIS STATE: SUB-SUBCOMMITTEE  
FOR THE EXAMINATION OF THE  
BUSINESS COURT AND BUSINESS LAWS  
(Senate Concurrent Resolution No. 19, File No. 144, *Statutes of Nevada 1999*)  
January 7, 2000  
Las Vegas, Nevada**

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The first meeting of the Legislative Commission=s Subcommittee to Encourage Corporations and Other Business Entities to Organize and Conduct Business in this State (S.C.R. 19): Sub-Subcommittee for the Examination of the Business Court and Business Laws was held on Friday, January 7, 2000, at 10 a.m., at the Grant Sawyer State Office Building, 555 East Washington Avenue, Room 4401, Las Vegas, Nevada. The meeting was videoconferenced to the Legislative Building, 401 South Carson Street, Room 3138, Carson City, Nevada. Pages 3 and 4 contain the AMeeting Notice and Agenda.@

**SUB-SUBCOMMITTEE MEMBERS PRESENT IN LAS VEGAS:**

Senator Mark A. James, Chairman  
Senator Michael A. Schneider  
Assemblyman Greg Brower  
Scott Anderson, Secretary of State=s Office  
John Fowler, State Bar of Nevada

**SUB-SUBCOMMITTEE MEMBERS PRESENT IN CARSON CITY:**

Bob Shriver, Commission on Economic Development

**SUB-SUBCOMMITTEE MEMBER EXCUSED:**

Senator Dina Titus

**LEGISLATIVE COUNSEL BUREAU STAFF PRESENT:**

Allison Combs, Principal Research Analyst  
Bradley A. Wilkinson, Principal Deputy Legislative Counsel  
Jill E. Lusher, Deputy Legislative Counsel  
Roxanne Duer, Senior Research Secretary

## **MEETING NOTICE AND AGENDA**

Name of Organization: Legislative Commission's Subcommittee to Study Methods to Encourage Corporations and Other Business Entities to Organize and Conduct Business in this State (S.C.R. 19):  
**Sub-Subcommittee for the Examination of the Business Court and Business Laws**

Date and Time of Meeting: Friday, January 7, 2000  
10 a.m.

Place of Meeting: Grant Sawyer State Office Building  
Room 4401  
555 East Washington Avenue  
Las Vegas, Nevada

Note: Some members of the Sub-Subcommittee may be attending the meeting and other persons may observe the meeting and provide testimony, through a simultaneous videoconference conducted at the following location:

Legislative Building  
Room 3138  
401 South Carson Street  
Carson City, Nevada

### **AGENDA**

- I. Opening Remarks and Introductions  
Senator Mark A. James, Chairman
- II. Overview of Business Courts in Other States and Issues to Consider When Creating Specialized Courts  
Dean Richard Morgan, William S. Boyd School of Law  
Professor Jeffrey W. Stempel, William S. Boyd School of Law
- III. Impact on the Judicial Branch of the Addition of a Business Court, Efforts in Other States to Establish a Court for Business Disputes, and Methods of Establishing a Business Court in Nevada  
Robert E. Rose, Chief Justice, Nevada Supreme Court
- IV. Additional Considerations Regarding the Creation of a Business Court in Nevada, Including Methods of Creating the Court and the Possible Impact in Nevada  
John Fowler, Advisory Member of S.C.R. 19 Subcommittee and Chairman of the Executive Committee, Business Law Section, State Bar of Nevada  
Scott Anderson, Advisory Member of S.C.R. 19 Subcommittee and Deputy Secretary of State for Commercial Recordings
- V. Recommendations for Changes in Nevada's Business Laws to Encourage Corporations and Other Business Entities to Organize and Conduct Business in this State
  - A. Business Laws Generally  
John Fowler, Advisory Member of S.C.R. 19 Subcommittee and Chairman of the Executive Committee, Business Law Section, State Bar of Nevada
- 2 Intellectual Property Laws  
Ian Burns, President, Nevada Technology Council

3 Suggestions Regarding the Office of the Secretary of State  
Scott Anderson, Advisory Member of S.C.R. 19 Subcommittee and Deputy  
Secretary of State for Commercial Recordings

VI. Public Testimony

\*VII. Discussion of Recommendations

VIII. Adjournment

\*Denotes item on which the Sub-Subcommittee may take action.

Note: We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If special arrangements for the meeting are necessary, please notify the Research Division of the Legislative Counsel Bureau, in writing, at the Legislative Building, 401 South Carson Street, Carson City, Nevada 89701-4747, or call Roxanne Duer, at 775/684-6825, as soon as possible.

Notice of this meeting was posted in the following Carson City, Nevada, locations: Blasdel Building, 209 East Musser Street; Capitol Press Corps, Basement, Capitol Building; City Hall, 201 North Carson Street; Legislative Building, 401 South Carson Street; and Nevada State Library, 100 Stewart Street. Notice of this meeting was faxed for posting to the following Las Vegas, Nevada, locations: Grant Sawyer State Office Building, 555 East Washington Avenue; and Clark County Office, 500 South Grand Central Parkway.

**OPENING REMARKS AND INTRODUCTIONS**

Senator Mark A. James, Chairman, called the meeting to order and directed the secretary to call roll. He explained that this Sub-Subcommittee is one of three subdivisions of the Legislative Commission's Subcommittee to Study Methods to Encourage Corporations and Other Business Entities to Organize and Conduct Business in this State (S.C.R. 19) necessitated by the large number of responsibilities it has been assigned. Senator James listed the issues for this Sub-Subcommittee to study as directed by S.C.R. 19:

- \$ Examination of whether Nevada should establish a business court, possibly modeled after the Court of Chancery in Delaware; and, how this should be accomplished; and
- \$ Examination of business laws in Nevada.

**OVERVIEW OF BUSINESS COURTS IN OTHER STATES AND ISSUES TO  
CONSIDER WHEN CREATING SPECIALIZED COURTS**

**Dean Richard Morgan**

Dean Morgan introduced himself and his colleague, Professor Jeffrey W. Stempel, William S. Boyd School of Law. He began his testimony with discussion on the Delaware Court of Chancery. Mr. Morgan stated:

- \$ The Delaware Court of Chancery currently is the dominant business court in this country.
- \$ Delaware is the only state that did not distinguish between law and equity.
- \$ The Delaware Court of Chancery was created as a court of equity by the 1792 *Delaware Constitution*. It is the only court in the State of Delaware that has the authority to grant equitable relief.
- \$ These courts hear only equitable actions and do not use jury trials.

- \$ Parties seeking injunctions, constructive trusts, accounting, or other forms of equitable relief, come before the Delaware Court of Chancery.
- \$ Claims in the corporate arena most often involve requests for injunctive relief.
- \$ Most of the work of the Court of Chancery is work involving internal corporate relations of Delaware corporations.
- \$ The Delaware Court of Chancery consists of a chancellor and four vice-chancellors who sit separately on a county-by-county basis. The chancellor and vice-chancellors are appointed by the Governor with the advice and consent of the Delaware Senate. He commented the key to the success and excellence of the Delaware Court of Chancery is the quality of its judges who have been very highly regarded for their quality and experience, particularly in the realm of Delaware corporation law.

### **Professor Jeffrey W. Stempel**

Professor Jeffrey W. Stempel, William S. Boyd School of Law, discussed his review of data on the pros and cons of specialized courts:

- \$ Specialized courts have become the fabric in the way business and modern judicial systems are handled.
- \$ This is a natural consequence of the division of labor generally seen in the practice of law and even government.
- \$ The specialized court experience has been a very positive one.
- \$ Family, probate, and bankruptcy courts, among others are just some examples of specialized court systems that have occurred and the business court is a natural outgrowth.
- \$ Business courts present an opportunity for a degree of specialization in the division of labor.
- \$ There appears to be a widespread commitment in our society to enforce contracts, property rights, et cetera, and this court system seems to be an avenue to pursue.

Limited experience with business courts has been very positive, he said, with the most obvious example of that being the Delaware Chancery Court. Professor Stempel noted in written materials he submitted (see Exhibit A) there is trend in a number of states toward having special commercial law rules, business courts or business divisions. He stated he has not been able to locate a definitive study of how those courts work and whether they are in fact dispensing a better brand of justice, or whether they are subject to some of the criticisms which will be discussed later in his testimony. The initial return seems to be a great satisfaction he said.

Professor Stempel commented that remarks from Judge Judith Kay, Chief Judge of the New York Court of Appeals, were very enthusiastic regarding New York=s commercial court division. It is:

- \$ A division for business disputes that was created by court rule rather than statute or legislation.
- \$ The parties themselves are allowed to designate matters that should come before the commercial division.
- \$ There is no minimum dollar amount.
- \$ Filings to New York=s commercial court, ratio of settlements, and the speed of processing all appeared to have increased, and there is some evidence that a significant number of business entities are actually selecting New York=s commercial division for forum clauses and contracts.
- \$ The New York judicial system has marketed this court as an alternative to arbitration or mediation clauses.

Professor Stempel said it would be difficult to prove if these courts are indeed dispensing a better brand of justice. He commented that North Carolina is another state with a special designated business judge who is assigned commercial disputes. And, he concluded there appears to be a large amount of positive support for this type of court.

Professor Stempel discussed the standard objections to specialization, which in his opinion are not particularly persuasive. He noted the two general objections are:

- 1 Capture - would the court become too narrow in its focus in adjudicating only certain types of disputes and lose sight of greater judicial principles that should be applied; and
- 2 Narrowness - would the business court become overly friendly to a particular interest group that has matters before it. He stated there is limited documentation regarding this objection with regard to modern practices and cited an example of a commerce court that was designed to review interstate commerce commission orders that existed for three years in the early twentieth century. Professor Stempel stated it was abolished largely because there seemed to be agreement that the railroad interest had effectively gained control of the court and the court was dispensing only pro-railroad decisions. He commented since then there has not been any other documented examples of this happening. The Delaware Chancery Court stands as a good example of a court with a degree of specialization that is regarded as being fair to both shareholders and management, he said. Additionally, one of the things that makes Delaware Chancery Court and similar courts resistant to the dangers of capture or undue narrowness is that it is not a super-specialized court. The Chancery Court of Delaware handles corporate government cases, as well as other matters providing for a variety of work, he said.

A key point, according to Professor Stempel, is that appeals are to a more generalist court, providing the benefits of specialization at the trial level in terms of expertise and efficiency. He stated in the event of any concerns that the court may become too overly friendly to a particular group, it would be subject to review by a general Supreme Court which would have the benefit of the business court's determination on the technical aspects of the issue, but would be able to curb any excesses. He stated another key point for this Sub-Subcommittee to keep in mind in designing this type of system would be to include some degree of flexibility in both the selection and reassigning of judges.

Professor Stempel addressed a question from the Subcommittee which included his views on jurisdiction, minimum damages amounts, and jury trials. He suggested:

- \$ Jurisdictional assignments could consist of whatever the committee members are comfortable with, as long as they are enforced.
- \$ The number of cases that are submitted to arbitration is dependent on the way judges administer the program, rather than what the ostensible law is on cases that would be submitted to arbitration. He used the example of a northern district in California where cases were to be arbitrated unless they were seeking over \$100,000 in damages. He said the custom then arose to avoid arbitration by pleading over \$100,000 in damages with a question asked policy. In comparison, he stated, Philadelphia had a court arbitration limit of \$50,000. If an amount over \$50,000 in damages was pled, the judge would ask for a reason and if the plaintiff could not provide a basis for that amount then the court would arbitrate. Professor Stempel noted as result during the 1970s and 1980s there was more arbitration taking place.

Professor Stempel stated that the same factor would be at work if a jurisdictional amount was set for a business court. He said it will matter more whether that amount is taken seriously and enforced, than whether it is set at \$50,000, \$100,000, or \$200,000. It would be profitable to study New York's example if parties want to litigate a matter before a commercial court of business in Nevada.

Chairman James commented in Delaware the jurisdictional issue is solved by having equity versus law. He said they [Delaware] will never have the problem of jury trials. In [Nevada's] courts and arbitration system the case has to be nonbinding arbitration with a trial de novo. The Legislature becomes involved whenever a situation arises because the system is not working effectively. Chairman James commented there would be problems [in Nevada] because you cannot force arbitration, or limit the right to a trial de novo because that would interfere with the right to a trial by jury.

Professor Stempel agreed this is a serious issue and stated the federal courts are bound by the same problems involving the Seventh Amendment of the *United States Constitution*. According to Professor Stempel, to run an arbitration program effectively there will be a minuscule number of requests for trial de novo that will actually result in trial de novo. He said a request might be made for a trial de novo as a bargaining chip for settlement, for example, if they are not satisfied with the arbitration award. Concluding, he stated the number of times the case is actually tried is maybe one or one-half of 1 percent.

Chairman James stated that members would be interested in hearing Professor Stempel's opinion on the jurisdictional issue. He asked Professor Stempel about limiting the courts to equity cases with certain types of business cases having to Aweigh in to the court by virtue of the type of relief and the trial by jury issue.

Professor Stempel replied that he and Dean Morgan may possibly have different views on this issue. He stated, if Nevada used the example of the chancery model:

\$ There may not be enough work that would fall under the category of corporate governance or equitable relief in business litigation to make up the type of court that will bring some consistency and attractiveness to Nevada's jurisprudence on commercial litigation.

\$ Adding issues such as contract disputes, securities fraud claims, and corporate governance issues could make Nevada an attractive haven for businesses and he suggested crafting the jurisdiction widely.

Professor Stempel further stated:

\$ Nevada is not under some of the same restrictions that the federal system is regarding narrowing the right to jury trial.

\$ When there is an equitable action, it would be possible to obviate the need for a jury trial in those cases, but in matters involving requests for legal relief, breach of contract or fraud, for example, there would not be any way around the Constitution.

\$ He would still advocate a business court in this type of setting. Many contract interpretation cases can be decided as a matter of law and there are factual disputes.

\$ Even though Nevada has not followed the federal revolution in terms of greater use of summary judgment, there is still a great potential for that in the hands of a good judge who understands the issues.

\$ Many of these cases could be decided by summary of judgment or partial summary of judgment, and settlement could be effectively brokered by a court with the requisite expertise.

Dean Morgan stated he agreed with Professor Stempel and added:

\$ Delaware has a tremendous number of corporations chartered there.

\$ The Delaware Chancery Court spends most of its time on equitable matters involving corporations because of the amount of corporations that are chartered in that state. Until Nevada gains considerable ground in the corporate chartering area he said he shared Professor Stempel's concern that a court based only in equity might have insufficient work to do.

Chairman James asked why a dispute involving shareholders in a corporation would be heard in an equity court. Professor Stempel stated most often the relief sought has an equitable remedy. For instance an injunction to stop the management from what the shareholders regard as a breach in fiduciary duty or imposition of a constructive trust on assets that managers have deflected from the corporation would be examples.

Chairman James asked what would happen in an action where a shareholder is seeking to bring actual damages on a corporation and if damage cases can be heard in that court. Professor Stempel replied that damage cases can be heard

in that court. He stated the court does not hold trials of fact and it cannot award punitive damages.

Chairman James noted it was interesting the defendant could ask for a jury trial. Professor Stempel reiterated that Delaware's *Constitution* provides that jury trials will be held in the Superior Court and equitable actions are heard in the Chancery Court.

In response to Chairman James' question regarding the Seventh Amendment and if it would be applicable to the state courts, Professor Stempel stated it would not be. He said it technically applies only in federal courts. He noted state courts are governed by the individual state constitutions. He commented Delaware could have a rule radically different from the federal rule and that would be acceptable under the *U. S. Constitution*. In many of the celebrated battles from the Delaware Chancery Court, he said, the court decides if it will allow a merger to go through. These cases are often in the stage of a preliminary injunction which is decided by judges even there is a jury trial or, he noted, there could be a full-scale trial on a permanent injunction. Following a preliminary injunction, if the losing side cannot have an aleatory review, a settlement is enacted. Delaware may have to go to a court jury trial for some of the factual issues, but often it never gets there because of the nature of the litigation.

Professor Stempel stated those are the main issues that are raised about specialized courts and noted increasingly people in government are finding illustrative ways to handle this issue because the movement is toward greater specialization.

Professor Stempel noted one other potential objection to specialized courts, is whether there will be top quality jurists. He stated people may be less attracted to specialized courts because they desire a variety of interesting work. But, he said, the federal circuit court is a semi-specialized court that hears patent and trade cases and gets excellent marks for its judges. He noted the tax court and the court of claims are also well regarded and there does not seem to be difficulty obtaining high quality jurists. Professor Stempel concluded that the salary, the working conditions, and staffing level have more to do with the interest in a judgeship rather than jurisdiction. He stated there is an interesting variety of cases in the area of business courts and it would make sense to tie in the jurisdiction with enough breadth that good judges would be interested in sitting on that court.

Dean Morgan added, the key to this [specialized] court and its attractiveness to potential businesses that might want to charter in Nevada is the quality of judges. Delaware has a large body of case law in place that businesses can look to for predictability and consistency. Further, Delaware's Legislature has a long beneficial working relationship with the chancery court and is responsive to decisions coming out of the court which are problematic to business. He noted the working relationship between business, the court, and the legislature in Delaware is well established. Dean Morgan is of the opinion this same kind of program could be developed in Nevada.

Chairman James commented the Subcommittee is not limited to just studying the business court. It will include modernizing and updating the Secretary of State's Office and making changes in the laws. He stated, if all of those things are put together it will present a more attractive package for businesses and that is the objective.

**IMPACT ON THE JUDICIAL BRANCH OF THE ADDITION OF A  
BUSINESS COURT, EFFORTS IN OTHER STATES TO ESTABLISH  
A COURT FOR BUSINESS DISPUTES, AND METHODS  
OF ESTABLISHING A BUSINESS COURT IN NEVADA**

**Robert E. Rose**

Robert E. Rose, Chief Justice, Nevada Supreme Court, stated that although his experience in the establishment of business courts is limited, he had the opportunity to talk with most of the chancery court judges at a Conference of Chief Judges that met in Wilmington, Delaware, last year. The topic of business litigation and business courts was the focus at the conference and has been a subject of debate at the national level, he said.

Chief Justice Rose referred to remarks (see Exhibit B; which includes items 1 and 2) sent to the Sub-Subcommittee members regarding the establishment of business courts in Nevada. Chief Justice Rose noted that at least seven states have established such courts, including Delaware, Illinois, New Jersey, New York, North Carolina, Virginia, and

Wisconsin. He referred members to Aitem 1@ (within Exhibit B) and said after studying four states' business court systems, it is his conclusion that Delaware would be a poor example to follow because Nevada has equity and law combined and Delaware's structure of appointing judges is different from Nevada's. He said the example New York provides would be a good one for Nevada to follow. He read Athe goal to be accomplished@ from his memorandum of written remarks (see Exhibit B - page 1) and discussed Apaths to accomplish this goal@ (see page 2 of Exhibit B). Chief Justice Rose stated the three paths through which the goal of establishing a business court in Nevada could be accomplished are:

- C Pass a constitutional amendment establishing the business court;
- C Pass a law directing that a business court could be established in Nevada and provide the necessary funding for it;  
or
- C Pass a legislative resolution stating that the establishment of a business court is in the best interests of Nevada, and state how the business court should be constructed.

Chief Justice Rose offered the cooperation and support of the judiciary to work with the Legislature on a plan to establish, by court order, a business court in Nevada in a format that would be agreed upon by both entities. He suggested the Supreme Court appoint a business court task force consisting primarily of district court judges and civil attorneys that would make recommendations relative to how a business court division of the existing district courts could be created in Clark and Washoe Counties. He stated this task force would then develop a plan to present to all of the district judges at the Millennium Leadership Conference in May 2000 and provide final recommendations to the [S.C.R. 19] Subcommittee before June 30, 2000.

Chief Justice Rose presented a scenario of how a business court could be created within the existing structure.

- \$ Two district courts in Clark County and one district court in Washoe County could be designated to hear only business and commercial cases. He noted this is how business courts were established in North Carolina and New York. Chief Justice Rose said a major specific to be addressed would be which case will be assigned to the business court. (See Exhibit B, page 3 for complete written remarks.)

He commented that New York struggled with this issue and decided that the business court should regulate itself. New York courts, he said, have the option to accept or reject a case if it is not sufficiently business oriented and does not require complex case management. Chief Justice Rose directed the committee members to item 2 (within Exhibit B) which is a breakdown of the contractual cases filed in Clark County in 1999. He stated the number of judges needed is directly influenced by the number of cases in each category that would be used in defining a business court's jurisdiction. Chief Justice Rose called attention to item 2 (included in Exhibit B), and noted the AContracts/Accounts/Judgments@ category totals 3,960 cases. He suggested since collections and enforcement of judgments are not necessarily processed by a business court, that category should not be included adjusting the total number of cases to 1,687. Allowing for approximately 30 percent of those cases that will not be answered, he said, a total of 1,181 cases remain. In looking further at those categories, he said, there are cases that would also not be considered business litigation and several hundred of the AOther@ category would also not be appreciable. This reduces the total number of cases to under 1,000. Therefore, according to Chief Justice Rose, two district court judges could hear the cases in Clark County. He noted since Washoe County has approximately one-half the caseload of Clark County, one judge would be necessary. Chief Justice Rose commented that Delaware appropriates a great deal of judicial assets into the business court and that is why they are so effective. The judges in Delaware have a caseload of approximately 200 cases per year.

Chairman James asked if the 30 percent of cases that would not be answered would still apply if the collection cases were removed. Chief Justice Rose replied that in general terms the caseload would still be approximately 1,000 cases per year that would potentially qualify to be heard in a business court. Chairman James commented he was interested in hearing about Chief Justice Rose's plan for a task force that would present recommendations back to the Subcommittee.

Chief Justice Rose continued with the major specifics to be addressed:



- C The procedure for assignment and competence of district judges to a business court;
- C The ability to take prompt action; and
- C Access to the business court.

Chief Justice Rose proposed that any litigant from Clark and Washoe Counties could request their case be handled by the business court. The judge from that division would rule on whether it should be processed. And, he stated, the determination would not be appealable. He noted litigants in other areas of the state could have their cases transferred to these business court divisions if the district courts agreed to the transfer.

In conclusion, Chief Justice Rose read from page 4 (Exhibit B) which expressed his support for a business court in Nevada and stated that a plan could be in place so that the Legislature could act on it during the 2001 Session.

Chairman James commented that the critical issue raised by Chief Justice Rose regarding the timing of establishing a business court because of the constitutional issue is one that would need to be decided. He stated some good points were made regarding ways to accomplish this in terms of the separation of powers. Chairman James noted the suggestion in subsection 3 of page 2 (Exhibit B) is one the Subcommittee needs to seriously consider. Chairman James requested that Chief Justice Rose proceed with the appointment of a task force. He stated this would be a necessary process before recommendations were made by the Subcommittee to the Legislature. He asked for comments from the members on this issue.

John Fowler, Chairman, Executive Committee, Business Law Section, State Bar of Nevada, and advisory member of the Sub-Subcommittee, stated he was of the opinion that Chief Justice Rose's proposal would void the five-year delay, and the problems associated with obtaining such major changes through the Legislature and a vote of the people. He asked if an application by a litigant requesting a case be heard in the business court would be handled at the initiation of the pleadings proceedings and if the court would have some list of general jurisdiction areas. In reply, Chief Justice Rose stated he had not looked at the detail of other states as to their specific jurisdictional requirements. He suggested possible language that could be used, such as, Acommercial and business matters shall be processed by the business court division of the civil court including, but not limited to, corporate governance, litigation flowing from business transactions matters, commercial law or matters involving the commercial code.@ He stated the wording could also be open-ended to provide some discretion. Mr. Fowler commented the wording used on page 4 (see Exhibit B), Athe determination by the court of its own jurisdiction would not be appealable,@ would be desirable. Chief Justice Rose stated the intent is to avoid having the process delayed by endless appeals that would challenge the exercise of discretion.

Chairman James stated he had been advised that he could direct a letter to Chief Justice Rose asking if he would be willing to proceed with the task force he had proposed. Chairman James stated it would be a benefit to the Sub-Subcommittee and there did not appear to be many other alternatives to the lengthy constitutional process.

### **ADDITIONAL CONSIDERATIONS REGARDING THE CREATION OF A BUSINESS COURT IN NEVADA, INCLUDING METHODS OF CREATING THE COURT AND THE POSSIBLE IMPACT IN NEVADA**

#### **John Fowler**

John Fowler (previously identified) stated he appreciated the efforts of Chief Justice Rose regarding establishing a business court in a relatively short period of time using the cooperation of both the legislative and judicial branches of government. He commented the creation of a business court presents questions:

- \$ How many judges should be assigned to each district in the State of Nevada;

\$ How many additional judges would be required; and

\$ How extensive their calendars would be.

He said it is obvious there would be plenty of work for business judges to do. According to Mr. Fowler, the attractiveness of creating this court by rule would be the judges with full jurisdiction as district court judges, including the statutory and constitutional power, to conduct jury trials.

Mr. Fowler discussed his view on how the jurisdiction should be divided. He stated:

\$ Delaware has a unique system because of their Constitution and the continued division of equity and law in their state.

\$ Most litigants are seeking equitable remedies but some have fraud causes of action.

\$ Fraud is a classic cause of action and the Constitution, along with the appropriate case law, would indicate it must be tried by a jury if demanded.

\$ Clear definitions of the type of cases heard by a business court are needed. Personal injury cases, tort cases, probate guardianship, trust administration, et cetera, could be ruled out.

Chairman James expressed his support at having a criteria for cases that would be handled by the business courts, as well as leaving the decision to the judges as to what cases they would handle.

#### Scott Anderson

Scott Anderson, Deputy Secretary of State, Commercial Recordings, and advisory member to the Sub-Subcommittee, discussed how this issue will affect the Secretary of State's Office. He commented the Secretary of State supports the idea of creating a separate business court that will focus on business matters and the interpretation of Nevada's business statutes. He said customers of the Secretary of State's office indicated they would choose Delaware over Nevada because of the lack of a business court in Nevada. He commented the Delaware Division of Corporations promotes itself as having a number of advantages, one of those being the chancery court and the substantial case law that has been accumulated over the years. He noted Nevada offers other advantages, such as, no corporate income tax, no personal income tax, and other benefits which Delaware cannot offer. He noted customers are advising the Secretary of State's Office that a court system is a consideration when comparing states.

Chairman James reiterated that previous testimony by Dean Morgan and Professor Stempel had indicated in their opinion this essentially was not the reason why businesses do not come to Nevada. He asked Mr. Anderson if that is what he was hearing from potential customers. Mr. Anderson testified that comments had been made indicating corporations were rarely advised to form in Nevada because this case law exists in other states and the corporations can rely on legal precedents. Mr. Anderson noted he did not know how substantial the impact would be initially on the number of corporations choosing Nevada over Delaware, but in his opinion there would be an increase in the number of filings received.

Chairman James commented that our law is somewhat similar to Delaware, so once the business court is in place, and the justices became more familiar with applying the principles, the Delaware case law could be used. He noted case law from other states could be relied upon once the jurist are handling these matters on a daily basis.

Mr. Anderson stated that was the position of the Secretary of State's Office and a business court would be an additional benefit to what Nevada has to offer corporations coming into the state. In conclusion, he stated a business court would have a positive impact on the Secretary of State's Office in generating revenues.

Discussion ensued regarding changes necessary in:

\$ What information can be disclosed to the public by the Secretary of State's Office;

\$ Advantages of filing in Nevada; and

\$ Items to be presented to the Subcommittee during future meetings.

Bob Shriver, Executive Director, Commission on Economic Development and advisory member to the Sub-Subcommittee, stated his agreement with the recommendations made by Chief Justice Rose concerning a business court. He noted that in addition to the tax structure and desirable geographic location, the establishment of a business court in Nevada would be beneficial to the long-term goals of attracting and retaining corporations in the state and providing them a business environment within which to prosper.

**RECOMMENDATIONS FOR CHANGES IN NEVADA=S BUSINESS LAWS  
TO ENCOURAGE CORPORATIONS AND OTHER BUSINESS ENTITIES  
TO ORGANIZE AND CONDUCT BUSINESS IN THIS STATE**

**John Fowler**

John Fowler presented a list of potential changes to the law. He stated his goal is to have a comparison of Title VII *Nevada Revised Statutes* with the correlative provisions of the Delaware Code to see whether changes are necessary. That work has not yet begun he said. Referring to a handout distributed to members (Exhibit C) he noted the possible addition to Nevada=s statutes of a domestication procedure whereby a foreign corporation can be domesticated in Nevada as opposed to moving a corporation here by merger. He explained the merger procedure would be one in which a foreign corporation could form a Nevada subsidiary and then merge itself into the subsidiary. Another way to do this, he noted, would be to domesticate into the state and then become a Nevada entity.

**Ian Burns**

Ian Burns, President, Nevada Technology Council (NTC) and patent attorney in private practice provided background information to the Sub-Subcommittee members about the Council stating the NTC is a nonprofit corporation devoted to advancing economic development and diversification through technology and entrepreneurship. Some of the projects NTC is currently working on include:

- C Support of the ballot question arising from Senate Joint Resolution No. 12 of the 69<sup>th</sup> Session (File No. 129, *Statutes of Nevada 1999*), which would amend the anti-investment clause of the Constitution;
- C Conducting venture capital seminars for entrepreneurs and angel investors;
- C Support of venture capital legislation;
- C Selection of the inventor of the year for the State of Nevada; and
- C Acting as a member of the advisory board for the Office of Science, Engineering, and Technology.

Mr. Burns gave his support to establishing a business court in Nevada. The adoption of a business court, in NTC=s opinion, would attract more business to Nevada, bringing in technology and knowledgeable workers and substantially increasing the resources in the state. Mr. Burns noted that in the field of patent law there is a specialized court, the Court of Appeals for the Federal Circuit (CAFC). He stated things were very unpredictable prior to the court=s adoption in the 1080s. Mr. Burns noted since that time there is more consistency in the rulings, the body of case law is more predictable and it is easier to advise clients on the enforceability of a patent. He discussed comments made by clients represented by NTC who have not yet established operations in Nevada because they are not convinced that our court system is reliable and predictable. Mr. Burns noted a trend with out-of-state clients with substantial intellectual

property assets to license the property in other states and direct the license revenue back into Nevada.

Mr. Burns is of the opinion that the Legislature=s abilities are limited with respect to intellectual property because it generally consists of patents, trademarks, and copyrights and most of that body of law is dominated and preempted by federal laws. He further noted Nevada has good laws on trademarks. However, Mr. Burns stated the Legislature can have a significant impact in the growing area of electronic commerce and the Internet.

Mr. Burns recommended the following action for the Legislature:

- C Foster electronic commerce by protecting the privacy of consumers. He stated *Nevada Revised Statutes* (NRS) 205.498 provides privacy protection to Internet subscribers, however, this law does not appear to apply to consumers;
- C Foster Internet and electronic commerce by passing legislation to prevent cyber fraud and address loopholes that exist for cyber fraud; and
- C Require certain agencies to adopt Internet access.

Mr. Burns commented State Government agencies could improve consumer=s access to their offices and afford them the opportunity to conduct routine business via the Internet. If this occurred, he said Nevadans would become more knowledgeable about the Internet and the state=s image to Internet businesses would be friendlier.

Mr. Burns concluded by advising the state do not adopt any new taxes. As his clients and industries now look at Nevada as being very business friendly with its favorable tax environment.

Responding to Assemblyman Brower, Mr. Burns stated that none of his clients had mentioned any specific proposed tax increase.

Senator James discussed the Senate Committee on Judiciary=s work last session on a high tech crime bill (Senate Bill No. 485, Chapter 530, *Statutes of Nevada 1999*) that made it a crime to send a computer virus in Nevada. He asked Mr. Burns to explain what Nevada could do to enact laws that would be consistent with what is being done elsewhere in the country so that this state can have a privacy law that is not a Adead letter law.@ Replying, Mr. Burns stated that a big issue in Internet laws is jurisdiction. The Legislature should create a statute providing for a cause of action for a vendor in the state that is misusing information. He noted cyber fraud presents some problems because it is difficult to sue someone in another country and bring recourse. Mr. Burns concluded providing the statute would improve the image of Nevada and help it to become more Internet competitive. Responding to Chairman James= request, Mr. Burns indicated he had some information from other states that he would forward to the Subcommittee.

## **Mark Tratos**

Mark Tratos, Nevada Attorney, stated, in his opinion, there are a number of changes in intellectual property laws that could be addressed during the next legislative session. He expressed his support for the proposals presented by Chief Justice Rose.

Mr. Tratos referred to previous testimony by Professor Stempel regarding the issue of business courts being criticized when it was perceived they were being controlled or dominated by a particular industry. Mr. Tratos stated in Nevada the gaming industry is prominent, and district court judges are elected. He commented committee members should give attention to a potential underlying problem that could be raised when any significant industry contributes to the election campaigns of elected individuals. He noted businesses should not have to fear favoritism when looking to Nevada and its business court. He suggested an appointment type process for business court judges.

Mr. Tratos discussed Nevada=s Aright of publicity@statute (NRS 597.770 through 597.810). He explained the rights to publicity are an area of intellectual property that specifically gives every individual the right to control the commercial exploitation of their name, voice, likeness, and persona. Nevada had some opposition in the process of creating the right of publicity statute because live stage performances, and appearances on television and film were

exempted. He noted Nevada was the only state with this exemption and there was a great deal of discussion in the academic community as to the viability of the legislation after it was passed. He commented this statute was created for two reasons: (1) a property right should not take precedence over a First Amendment right; and (2) the historic tradition in theater has to be considered. Mr. Tratos commented last year California rewrote its right of publicity statute following Nevada law. And, he said, Nevada has been active in leading the nation in other matters involving intellectual properties.

Mr. Tratos is of the opinion Nevada's trademark act is defective because it does not include the Uniform Trademark Act. He noted provisions such as the dilution theory (Title 15, *United States Code*, Section 1125[c]) allow for famous trademarks to be protected when applied to noncompetitive goods or services. Mr. Tratos commented it is important for industries that spend millions of dollars branding their products or services to have this protection. In order to attract companies such as Microsoft, Nike, and Coca Cola, there must be specific provisions included so trademarks cannot be diluted. He stated without that provision these industries, which spend millions of dollars on specific properties, are continually being confounded with additional businesses opening who are noncompetitives using competitive terms. Mr. Tratos said this happens particularly in cyber fraud situations where, for example, casino names are routinely used on Internet gaming sites. He stated over 35 cyber fraud cases have been filed in the last two years. According to Mr. Tratos, state laws contained anti-dilution provisions it would be easier to prove this type of cyber fraud is injuring trademarks in the state.

Mr. Tratos discussed other areas of intellectual property that are unique to Nevada. He commented that Nevada's Uniform Trade Secret Act (NRS, Chapter 600A) has not been readdressed for some time. He noted one of the continuing problems is with the rapid development of the Internet and the dissemination of information where even trade secrets become public domain. Mr. Tratos suggested the Trade Secret Act should be addressed specifically to look at electronic commerce and the impact and prevention of imparting trade secret information, via the Internet. Further, he suggested specifically addressing the diminished potential of injury to a trade secret holder by prompt action. Mr. Tratos noted business courts will allow immediate conjunctive relief. Intellectual property, he said, is about the controlling of the creation of the mind which is routinely jeopardized when someone disseminates information that is either held as a trade secret or is in an early stage of patenting in which there is no public disclosure. Mr. Tratos noted prompt action and equitable injunctive relief would prevent the dissemination of information. He commented that the question intellectual property owners have when a client's rights need protection, is how quickly a hearing can be held. Mr. Tratos stated the creation of a special business court would speed up the process and cause businesses in other states to look at Nevada favorably.

Mr. Tratos discussed two additional areas he thought should be considerations for the Legislature: Business-to-business transactions have increased significantly over the Web. He recommended looking at models created in other states such as, Oregon and Utah, on electronic signatures. He stated businesses would consider Nevada progressive in its electronic commerce development if there were enforcement of electronically signed contracts. Mr. Tratos said these issues cannot be ignored in attracting nonpolluting businesses that use the Internet as their focal hub of distribution. Chairman James commented on the electronic mailing of contracts and suggested the Subcommittee study the Oregon and Utah laws.

Discussing the film and television industry, Mr. Tratos stated there were a number of meetings held during the last five months that addressed state support to make Nevada a more attractive home for the film and television industry. He noted significant advantages in Las Vegas including fiber optics that enable high definition television broadcasts to be piped through our cable system. He said these unique opportunities need to be fostered by some legislative enactments. Further, Mr. Tratos recommended reducing or eliminating the sales tax on products film makers purchase in Nevada, if those products remain in Nevada after the filming concludes. He stated the products could be donated to organizations or schools that are promoting high tech issues or they could be used for other film projects.

Mr. Tratos also suggested finding another source of sales tax. He stated under current sales tax statutes there is an exemption for venues of 2,750 seats or greater. He suggested eliminating that exemption in exchange for creating new exemptions that would encourage other intellectual property businesses such as the film and television industry to come into the state.

Senator James stated he thought there was a subcommittee studying tax exemptions. He informed Mr. Tratos that a report with recommendations for legislation to be voted on at the last meeting would be helpful.

Scott Anderson testified that the Secretary of State's office would be working directly with the State Bar Association on any statutory changes that are necessary for the upcoming session.

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### **PUBLIC TESTIMONY**

There was no public testimony.

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### **DISCUSSION OF RECOMMENDATIONS**

No action was taken on this agenda item.

Chairman James stated he would draft a letter to Chief Justice Rose requesting him to appoint a task force to provide proposals and make recommendations to the Sub-Subcommittee for action.

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### **ADJOURNMENT**

There being no further business, Chairman James adjourned the meeting at 12:02 p.m.

Exhibit D is the Attendance Record@ for this meeting.

Respectfully submitted,

Sally Trotter  
Senior Research Secretary

Allison Combs  
Principal Research Analyst

Approved By:

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Senator Mark A. James, Chairman

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Date

### **LIST OF EXHIBITS**

Exhibit A is a document submitted by Jeffrey W. Stempel, Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas, entitled AThe Feasibility of Commercial Court for Nevada.@

Exhibit B consists of the following documents:

- 1 Memorandum dated January 7, 2000, by Robert E. Rose, Chief Justice, Nevada Supreme Court, containing remarks to the Legislative Subcommittee for the Examination of the Business Court and Business Laws in Nevada regarding Establishment of a Business Court in Nevada.
- 2 Two-page document labeled AItem 1@ containing information regarding the creation of business courts in Delaware, Pennsylvania, New York and California.
- 3 Letter labeled AItem 2@ dated January 6, 1999, to Chief Justice Robert E. Rose from Charles J. Short, Court Administrator, Eighth Judicial District Court with attachment of Civil Cover Sheet Statistics 1999.

Exhibit C is a List of Proposed Corporate Law Changes, January 6, 2000, prepared by the State Bar of Nevada, Executive Committee, Business Law Section, John Fowler.

Exhibit D is the AAttendance Record@ for this meeting.

Copies of the materials distributed during the meeting are on file in the Research Library of the Legislative Counsel Bureau, Carson City, Nevada. You may contact the library at (775) 684-6827.