

MINUTES  
**SENATE JUDICIARY & RULES COMMITTEE**

**DATE:** Monday, March 05, 2012

**TIME:** 1:30 P.M.

**PLACE:** Room WW54

**MEMBERS PRESENT:** Chairman Darrington, Vice Chairman Vick, Senators Davis, Lodge, McKague, Mortimer, Nuxoll, Bock, and LeFavour

**ABSENT/  
EXCUSED:**

**NOTE:** The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

**Chairman Darrington** called the meeting to order at 1:35 p.m. and asked if there were minutes to approve.

**MOTION** **Vice Chairman Vick** moved, seconded by **Senator Mortimer**, to approve the minutes of **February 27, 2012** as written. The motion carried by **voice vote**.

**RS 21461** **Relating to Child Custody. Robert L. Aldridge** presenting the RS for Mark San Souci, explained that a great many attorneys and perhaps judges are not aware of the Servicemembers Civil Relief Act (SCRA) which has very broad application and some strict reservations on what can be done. The first part of this legislation provides that if there is petition for modification of a child custody order and it may be subject to the SCRA because one of the parties is a service member as defined in that act, then the Court determines that it complies to the action. If the modification is in the best interest of the child, and the party member is deployed, the Court can enter a temporary decree which automatically expires upon the termination of deployment. This is an attempt to give some guidance to the Court with respect to those who are deployed.

**MOTION** **Senator Mortimer** moved, seconded by **Vice Chairman Vick**, to print **RS 21461**. The motion carried by **voice vote**.

**S 1339** **Relating to the Idaho Trade Secrets Act. Jason Risch**, representing Premier Technologies, Inc., explained this bill would revise the Idaho Trade Secrets Act to clarify that one violates the Act when he or she takes possession of or retains a misappropriated trade secret. The bill explains the damages recoverable when there is a violation of the act and allows an award of reasonable attorney fees to a prevailing party. In the Act that was written in 1985, misappropriation is defined as stealing trade secrets or if you use them. He said that what happened to Premier Technologies, Inc. was employees were hired by a competitor. Before those employees left Premier, they downloaded a hard drive full of information. The hard drive had all of their trade secrets including employee information, including how they do what they do. Premier struggled with the fact that the people were still working for the company while they downloaded the information; however, they won the case brought against those people. The argument was that while employed, they had taken the hard drive to the competitor so they didn't steal it and they didn't use it. **Senator Davis** interrupted and said didn't the new employer give it to their lawyers who held it so the new employer didn't actually access the information on the hard drive. **Mr. Risch** said they did actually access the information, but they did give it to their lawyers. He said it was wrong to retain it so they have added "retention" to the verbiage in statute.

**Senator Bock** commented that it seemed to him that the Judge made a mistake and now there is reaction that something is wrong with the law when there is not. He said he didn't have a problem with adding the word "retention" even though it was unnecessary. The area of concern to him was in reference to "rebuttable presumption" as it is used in different ways. He said the fact that it is proven, then the effect is to shift the burden to the other side. **Mr. Risch** said that once there was a misappropriation, a rebuttable presumption is created. He agreed that the phrase is used in other ways in other statutes. This added language was needed because of the necessary proof that someone retained something. **Senator Davis** mentioned that once proven, must there be a separate action that proves harm. He further stated whether the language is in the bill or not, neither decreases nor lowers the burden of proof for the complaining party. **Mr. Risch** said no it would not.

**Mr. Risch** said they added the attorney's fees provision to the violation of this act which were not adopted in the 1985 version. He explained the amendment to the bill replaces (4) to remove "attorney" and state that all persons acting in concert are liable of this violation. The verbiage came from Idaho's Negligent statutes.

**Doug Sayer**, owner of Premier Technologies, Inc., said there was a loss of equity when secrets were stolen which was on their financials, and they had trouble gaining the confidence of investors, including their bank. They recognized where the loss occurred and they wanted to pursue this so other businesses would not go through the same. He said they had spent almost three million dollars in the last four years pursuing this. If the statute had been in effect as it is proposed, it would have changed that significantly. In this case, it is very difficult to come forward and produce a damage claim where someone merely retained the trade secret. It's easy to pursue a damage claim when someone is using it, selling it, and actively competing with you. In this situation, they intended to do harm and one of the methods was by taking the trade secrets. **Vice Chairman Vick** asked how this would have changed if retention had been in statute. **Mr. Sayer** said the Judge actually cut the damage claim in half and the jury had a unanimous verdict. **Senator Davis** commented on the kind of damages they incurred and the fear of the new company poaching their good employees. **Mr. Sayer** responded that the new company's plan and strategy was to steal contracts and take them back to Utah. When asked if they were successful in persuading the court that they were entitled to attorney's fees, Mr. Sayer said that post trial motion is still pending.

**Kurt Holzer**, representing the Idaho Trial Lawyers Association, explained that they support some of the bill, but they do have objections to the bill. One is the addition of the "rebuttable presumption" language, and they have suggested to remove the changes with that language. **Senator Davis** asked what if the legislature meant that if a case of a trade secret misappropriation was once proven, it created a rebuttable presumption that the complainant was harmed. **Mr. Holzer** said that if someone can claim harm, they must show harm. He said the language opens up the wall for punitive damages where punitive damages aren't appropriate. **Chairman Darrington** asked if Mr. Holzer agreed that a "rebuttable presumption" is something that is presumed to be the case and the other party has to rebut it regardless of where it occurs within the law. **Mr. Holzer** said there is a portion of the definition in all areas of the law, but in the Idaho Jury Instructions, there are 6 or 7 pages of explanations and its flexible language with many uses.

**Mr. Holzer** referred to the amended language in the latter part of the paragraph (4) "...were acting in concert or when a person was acting as an agent or servant of another party." This changes the law of years when principals are responsible for acts of their agents. This makes a person jointly liable with the boss and it doesn't have any requirement that the agent had any knowledge of what he did. Therefore, the proposed amended language has a very substantial problem. He said it appeared that the lawyers in Mr. Sayer's case were bad guys and this is a response to them as opposed to the general role of a lawyer. Mr. Holzer said he would work with the sponsors on the amended language, but it is far too broad as it is written. **Senator Bock** asked if they were afraid if a client brought in stuff knowing he may be sued, and the lawyer takes the case and now has a file, but didn't know he was violating someone's rights. **Mr. Holzer** said that the attorney/client privilege would not insulate the attorney if the attorney moves from acting as an advisor and counselor to a participant in the action.

**Mr. Risch**, in summary, said that because of his client's situation, they recognized that there was a problem in Idaho's statute. He pointed out that the amendment removed attorney and referred to an agent. Anyone who has knowledge or has deliberate reckless disregard of the facts would be held accountable. **Senator Bock** asked if Mr. Risch and Mr. Holzer were going to work together on drafting and refining the language to be acceptable. Mr. Risch said they would.

**MOTION**

**Senator Davis** moved, seconded by **Senator Bock**, to send **S 1339** to the **14th Order** for amendment. The motion carried by **voice vote**.

**H 403**

**Relating to Abandoned Motor Vehicles.** **Lt. Colonel Ralph Powell**, Idaho State Police (ISP), explained this legislation would put into statute the requirement for tow truck drivers, operators, and owners on ISP tow rotations to have criminal history background checks through both Idaho and FBI databases. State and national checks would allow for more comprehensive and thorough assessments of those companies and their representatives requesting to be included on ISP tow rotations. There would be no fiscal impact to the state as the one time cost would be borne by the tow company. Lt. Col. Powell said he worked through ISP Procedure changes with Randy Coleson, President of the Idaho Towing and Recovery Professionals Association and Mr. Coleson supports the bill.

There was a brief discussion of the reasons for adding this protection and not leaving it up to the tow company. Any criminal action or not passing the background checks would result in being removed from the rotation list. Lt. Col. Powell said they were not measuring competency or ability as they have a clear set of standards in procedures, but this will provide an additional standard from the federal level.

**MOTION**

**Senator LeFavour** moved, seconded by **Senator Lodge**, to send **H 403** to the floor with a **do pass** recommendation. The motion carried by **voice vote**.

**H 497**

**Relating to DNA Testing.** **Matthew Gamette**, Idaho State Police Forensic Services Quality Manager, explained this legislation amends Idaho Code, § 19-4902, relating to post-conviction DNA testing conditions and cost. He said if the type of testing requested by the defense, prosecutor, or ordered by the court is not a test that the ISP forensics lab is currently qualified to perform, the ISP shall not be required to outsource the testing or in any way pay for the testing expenses. The most common DNA testing method, the standard nuclear DNA short tandem repeat testing, meets the investigative needs in most cases. This type of testing offered by ISP allows the ISP lab to use the National DNA Index System, commonly referred to as CODIS.

The ISP Forensic Services labs do not offer mitochondrial DNA testing or Y-STR testing, specialty DNA tests not offered by ISP Forensic Services (ISPFS) due to the costly and time-consuming validation process, the extremely high reagent costs, and the low demand for these specialty tests. If specialty DNA tests are required before a trial, it is the responsibility of the petitioner to send and pay for the tests at a private lab. This amendment sets up the post-conviction tests to be performed in the same manner as the "pre-trial" tests. The intention of the amended wording is to clear up the legislative intent of this statute. We believe the intent of the original legislation was to have the state forensics lab provide the service if possible, not to require ISP or ISPFS to pay for post-conviction testing that is not offered by the ISPFS lab.

**Senator Davis** said he had concern with the meaning of "currently validated" which is added to the bill on page 2. **Mr. Gamette** said they had undergone extensive scientific procedure to make sure the instrumentation and the reagent used in that process meet quality control standards. **Senator Davis** asked what "currently" meant; the date the statute is adopted, the day the court considers the petition for post-conviction relief, or only that process that is validated on the day the Governor signs this bill into law. **Mr. Gamette** responded that the way it was intended is that at the time the test is requested the laboratory has that method currently validated as a procedure. In answer to Senator Davis question of who does the validation, Mr. Gamette said the validation process is directed by the quality assurance program of the Lab. **Senator Bock** also had some concern that a judge might also not understand what they meant by "currently validated" and would like to see that defined clearly in the statute. There was some discussion of the different types of DNA tests with more thorough explanations from Cindy Cunningham of the ISP Forensic Services Lab.

**MOTION**

**Senator Bock** moved, seconded by **Senator Davis** to send **H 497** to the **14th Order** for amendment. The motion carried by **voice vote**.

There being no further business, **Chairman Darrington** adjourned the meeting at 3:08 p.m.

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Senator Darrington  
Chairman

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Leigh Hinds  
Secretary