

MINUTES
SENATE JUDICIARY & RULES COMMITTEE

DATE: Wednesday, March 09, 2016

TIME: 1:30 P.M.

PLACE: Room WW54

MEMBERS PRESENT: Chairman Lodge, Vice Chairman Nonini, Senators Davis, Johnson, Souza, Lee, Anthon, Burgoyne and Jordan

ABSENT/ EXCUSED: None

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.

CONVENED: **Chairman Lodge** called the meeting of the Senate Judiciary and Rules Committee (Committee) to order at 1:30 p.m.

MINUTES APPROVAL: **Senator Nonini** moved to approve the Minutes of March 9, 2016. **Senator Johnson** seconded the motion. The motion carried by **voice vote**.

RS 24691 **Senator Grant Burgoyne**, District 16, stated that **RS 24691** authorizes an interim committee to study the issue of the risk of bias in administrative contested cases. The Office of Performance Evaluations (OPE) conducted a study finding a 52 percent moderate to high risk of bias in contested cases (see attachment 1). **Senator Burgoyne** explained the process and purpose for administrative hearings and summarized the OPE report highlights (see attachment 1). The OPE recommended that the Legislature establish an interim committee to study the case changes, wherein the Legislature found the level of bias risk unacceptable. This legislation authorizes the Legislative Council to appoint an interim committee to conduct a study of potential approaches to mitigate the risk of bias in contested cases.

Representative Lynn Luker, District 15, concurred with Senator Burgoyne's presentation. He advised that a legislative study group was formed last year, but the OPE chose risk of bias in administrative contested cases as the focus of their study, so the Legislature did not continue with their study. The report is helpful as it narrows the focus of contested agency cases.

MOTION: **Senator Davis** moved to print **RS 24691** and send it to the 10th Order of Business. **Senator Souza** seconded the motion. The motion carried by **voice vote**.

S 1388 **Senator Davis** explained that within the last year an Idaho Supreme Court finding revealed issues with the interpretation of statute regarding tax deeds and their effect on third-party easement owners. He introduced Christopher Meyer, Idaho Association of Highway Districts.

Mr. Meyer told the Committee that when a property owner does not pay the tax bill for three years, the county will file a tax lien, receiving a tax deed for the property. In a December 2014 case, *Regan v. Owen*, the Idaho Supreme Court interpreted Idaho Code § 63-1009 to provide "absolute title, free and clear of all encumbrances." Previously, this was interpreted as being "free and clear of all mortgages" to allow the property to be marketable, and the mortgage holder was notified. The new finding destroyed third-party easements such as:

- private right-of-way,
- public roads and rights-of-way,
- utility easements,
- ditch rights, and
- conservation easements.

The third party in *Regan v. Owen* was not notified of the tax lien so was unable to respond. **Mr. Meyer** pointed out that although this case dealt with a private right-of-way, it would also be applicable in the above mentioned situations. He then advised that this bill will require notice to other interested parties in order to preserve interests that existed prior to the lien.

MOTION: **Senator Anthon** moved to send **S 1388** to the floor with a **do pass** recommendation. **Senator Lee** seconded the motion. The motion carried by **voice vote**.

H 439 **Representative Christy Perry**, District 11, pointed out that the Legislature previously recognized the cost of appellate representation in felony cases was a burden on Idaho counties. In order to reduce that burden while providing competent counsel for indigent defendants in appellate proceedings, the State Appellate Public Defender Office (SAPD) was established in 1998. She provided a summary of how the SAPD has functioned in the role of defending the indigent defendants and limitations that have been encountered.

H 439 amends Idaho Code § 19-870, explained **Representative Perry**, to provide that SAPD shall provide representation for interlocutory appeals and revise provisions relating to post-conviction relief and habeas corpus proceedings. The passage of the bill will establish in statute the historical practice by the SAPD.

Senator Davis asked what the role of the SAPD would be in the instance of ineffective assistance of counsel in a case brought in federal court. **Representative Perry** deferred the question to Sara Thomas. **Sara Thomas**, State Appellate Public Defender, said that the SAPD has no role in federal habeas corpus proceedings. She added that the SAPD does have an ongoing ethical obligation to cooperate with new counsel.

MOTION: **Senator Burgoyne** moved to send **H 439** to the floor with a **do pass** recommendation. **Senator Lee** seconded the motion. The motion carried by **voice vote**.

Representative Perry detailed the history leading up to this bill beginning with the 1963 Supreme Court decision of *Gideon v Wainwright* that said all people have a right to counsel regardless of their ability to pay. This right was extended to the individual states through the equal protection clause of the 14th Amendment. She identified a number of changes that have been made and laws that have been passed. The Public Defense Commission (Commission) was established to address the inadequacies in the public defense system and the costs thereof. The goals were:

- ensure constitutional defense to Idaho citizens equally across the State,
- ensure quality of services through the creation of standards, and
- maximize existing resources such as courts, counties and the Odyssey case-management system.

The major issues to be considered were:

- administration,
- funding, and
- oversight and enforcement.

Senator Todd Lakey, District 12, explained that this bill is the result of a three-year effort by stakeholders. Based on their ideas and concerns, it seeks to establish consistency for public defense across the State. He stated that the bill is only a start with respect to funding. **Senator Lakey** emphasized that the Legislature needs to be committed to continue to fund the public defense services as we adopt specific standards for Idaho's public defense system.

Senator Lakey detailed the provisions of the bill dealing with

- case load,
- independence of representation,
- communications with clients,
- education and training, and
- supervision of defense attorneys.

He indicated that these are the foundational principles upon which the Commission will, through negotiated rulemaking, develop the specific standards for caseload, workload, training and the type of case a particular attorney can handle. The bill will maintain services at the county level and establish a voluntary grant process wherein the counties can apply to the Commission for additional funds if needed.

Senator Lakey said the Commission will continue to provide education. The Commission is responsible for review and analysis of whether the counties are meeting the particular standards that apply to them. Under this bill, if a county is not functioning properly, the Commission can become involved in a process to correct the deficiency. If the situation cannot be rectified, the Commission ultimately can take control in order to protect the State's responsibility to provide public defense.

Senator Davis inquired if there are other states using a similar process. **Senator Lakey** replied that the Commission investigated the programs of other states and decided to use Michigan as the model. **Senator Davis** asked if the rules are subject to legislative review. **Senator Lakey** responded that they are. **Senator Davis** expressed concerns with regard to counties wanting to run their own program. **Senator Lakey** related that the proposed system allows for negotiation and assistance to remedy a situation when a county is out of compliance. This allows the county to maintain control if they comply and the State to have legal protection if necessary.

Senator Lee asked if the Idaho Bar Association (IBA), rather than the Commission, could oversee this process since it deals with a specific group of attorneys. **Senator Lakey** answered that the IBA deals with professional rules and ethics, but not for analyzing this type of situation or for enforcement.

Senator Johnson asked about the temporary procedures and how long they stay in place. **Senator Lakey** explained that it is until formal rules, forms and standards are in place. It enables the counties to establish temporary rules to get grant money this year.

TESTIMONY:

Former Representative Darrell Bolz, Chairman of the Public Defense Commission, advised that he had written to the Governor in support of this bill (see attachment 2). He stated that this is an initial step and the Commission will continue to work with the Legislature to make improvements.

Daniel Chadwick, Executive Director, Idaho Association of Counties, stated that the counties could not reach a decision to support or to oppose the legislation. **Mr. Chadwick** complimented Representative Perry, Senator Lakey and Mr. Bolz on their patience and commitment to the work. He emphasized that all involved need to rely on the rules.

Kimberly Simmons, Public Defender, Vice President of Idaho Association of Criminal Defense Lawyers, stated that the Association is in favor of **H 504**. She stated that the bill addresses deficiencies in the current system and is a necessary step for public defense reform in the State.

Kathy Grismeyer, Idaho American Civil Liberties Union (ACLU) public policy strategist, spoke in support of the bill and provided background information on the issues (see attachment 3). She stated that this legislation provides standards for public defenders, makes available grant money that can be awarded to counties and holds counties accountable when they are not in compliance. She pointed out that this is a foundational first step in addressing systemic inadequacies with the current system. **Senator Johnson** asked Ms. Grismeyer if she will be part of the process. **Ms. Grismeyer** stated that she hoped to be able to personally attend as part of her role with the ACLU as policy strategist and serving as the Legislative liaison. She stated that she has attended Commission meetings in the past and plans to continue doing so throughout this process, so yes.

Robin Crisler, ACLU, shared his experience as a criminal defendant. He emphasized the need for a proper defense and is in support of **H 504**.

Senator Burgoyne explained his experience as a public defender and believes that public defenders believe in the rule of law in order to examine a case thoroughly and determine if there actually has been a crime. He stressed that this legislation is extremely important.

MOTION: **Senator Burgoyne** moved to send **H 504** to the floor with a **do pass** recommendation. **Senator Nonini** seconded the motion. The motion carried by **voice vote**.

ADJOURNED: **Chairman Lodge** adjourned the meeting at 2:40 p.m.

Chairman Lodge
Chair

Carol Cornwall
Secretary