

MINUTES
SENATE JUDICIARY & RULES COMMITTEE

DATE: Friday, March 11, 2016

TIME: 1:30 P.M.

PLACE: Room WW54

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

**ABSENT/
EXCUSED:** Senators Davis

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 Burgoyne** moved to approve the Minutes of March 2, 2016. **Senator Anthon** seconded the motion. The motion carried by **voice vote**.

**JUDICIAL
APPOINTMENT:** **Phone Interview with Reed W. Larsen, appointed to the Judicial Council (Council) by the Idaho State Bar.** **Reed W. Larsen**, attorney, testified concerning his appointment. **Chairman Lodge** inquired why Mr. Larsen wanted to be on the Council and asked him to identify his goals. **Mr. Larsen** answered that he respects the Council, has worked with the Council during his time with the Idaho State Bar and wants to continue the work that they have done. **Chairman Lodge** asked if there were further reasons Mr. Larsen felt he would be a good fit on this Council. **Mr. Larsen** noted that he has been practicing law for 31 years in work mostly related to trials. He stated that he has a good temperament to work with others and find solutions to problems.

Senator Jordan commented that one of the most difficult functions of the Council regards dealing with complaints. She asked how Mr. Larsen would deal with these complaints. **Mr. Larsen** indicated that it is important for the public and for individuals to know that complaints made to the Council are taken seriously. It is also important for sitting judges to know that they will get fair treatment in any complaint. He explained that his background in litigation will bring a well-balanced approach to the Council for these complaints.

Chairman Lodge commended Mr. Larsen on his 2015 State Bar Professionalism Award. **Mr. Larsen** indicated that he was inducted into the American College of Trial Lawyers while in Hawaii.

Senator Burgoyne highlighted Mr. Larsen's outstanding reputation and the high regard he has among other attorneys. He remarked that he has a great amount of confidence in the Council and in Mr. Larsen. He stated that Mr. Larsen will guard the need for judicial independence zealously while on the Council. He noted that this position calls for a sense of judicial discipline, strong judgment and a sense of justice, all of which Mr. Larsen possesses.

Chairman Lodge indicated that the Committee will vote on Mr. Larsen's appointment at the next meeting.

Relating to Sexual Exploitation of a Child by Electronic Means.

Representative Greg Chaney presented this bill that relates to "sexting" between minors. Idaho Code is silent on "sexting." He noted that the law that most closely resembles this bill is Idaho Code § 18-1507. He defined "sexting." Studies show that approximately 40 percent to 50 percent of high school students engage in this activity. This bill will remove the potential for a minor charged with "sexting" to be required to register as a sex offender. This bill does not approve of "sexting," but makes this crime a misdemeanor instead of a felony. He noted that this statute does not make exception for those who self-produce and distribute sexually exploitative material. **Representative Chaney** noted that the current statute has been successfully used to prosecute a similar charge of distributing obscene material to minors. The bill states that the distribution has to take place from Minor A to Minor B. If the content is spread to social media and has a farther distribution, then the Minors would be charged with a misdemeanor for a 1st offense and a felony for a 2nd offense. He noted that a redistribution of the material by the receiving minor would be considered a felony under current statute. The bill states that extortion, bullying or blackmailing regarding these communications would result in felony prosecution.

Senator Anthon asked if a minor participates in "sexting" on multiple occasions, would that ever result in a felony. **Representative Chaney** answered that if the "sexting" occurs on a one-to-one level, then it would never result in a felony. **Senator Anthon** asked what would happen under this bill if the intended recipient was an adult. **Representative Chaney** answered that this bill would not govern that situation and the minor would be back under the jurisdiction of Idaho Code § 18-1507. **Senator Anthon** asked if this is what is intended. **Representative Chaney** replied that the intent of Idaho Code § 18-1507 is to be a tool to protect minors. This bill simply exempts minors from the harsher punishment. **Senator Anthon** asked about the scenario where a 15-year-old sends a photograph to a 20-year-old and if this bill would protect the sender from prosecution. **Representative Chaney** responded that there would still be an ability to prosecute that individual under Idaho Code § 18-1507.

Senator Burgoyne asked for a walk-through of certain portions of the bill and how the offenses cited in this section would be prosecuted currently without this bill. He asked if all the conduct described in these portions would result in felony prosecution currently. **Representative Chaney** answered that the prosecutor may choose how to prosecute these offenses, but if there is a strict interpretation of the current law, all of the activities alluded to could be charged under Idaho Code § 18-1507 as felonies.

Senator Burgoyne asked how section 3B is different from 1A in the bill. **Representative Chaney** explained that section 3 goes into effect when an image goes farther than the original recipient. **Senator Burgoyne** asked for clarification regarding Minor B in the bill. **Representative Chaney** indicated that Minor B is the original recipient of a "sexting" message. Once that message is forwarded on by the recipient (Minor B) the situation becomes a felony for Minor B. **Senator Burgoyne** commented that this was not clear from the language of the bill. He asked if the Legislature wants the first offense of "sexting" on a one-to-one basis to be a crime rather than an infraction. **Representative Chaney** answered that in the discussions that led to the bill in its present form, the idea of an infraction was brought up. He noted that the Idaho Prosecuting Attorneys Association (IPAA) had representatives in the audience that would testify later on the bill.

Senator Souza asked if a minor sends a "sexting" picture out on social media, is it a misdemeanor the first time and a felony the second time, or is it a felony the first time. **Representative Chaney** answered that the first time would be a misdemeanor and the second time would be a felony. **Senator Souza** asked if the same consequences would apply to the initial receiver of a one-to-one communication who later puts that picture on social media. **Representative Chaney** for the recipient found in possession it is just a misdemeanor, but any distribution of these photos is a felony. **Senator Souza** asked what would happen if the recipient received the illicit communication unknowingly or did not know it was on their Facebook. **Representative Chaney** pointed out that the word "willful" is in the bill. There has to be a degree of consent. **Senator Souza** asked for clarification about the bullying section of the bill. **Representative Chaney** noted that **Senator Souza** was talking about ideas contained in sections 3B and 3C. The redistribution of the photo is a felony. To harass the original sender, or to blackmail that person, is a felony. These sections acknowledge that the original thought to send the picture is a product of poor judgement, but that these sections cover the malicious intent of others.

Senator Anthon noted that the willful possession mentioned on line 26 is a misdemeanor, but then the text goes to felony language. He asked why there is no language in the other sections about willfulness. **Representative Chaney** answered that it is virtually impossible to display volition without willfulness being displayed. **Senator Anthon** commented that he has received images that he does not willfully want and that this is pretty common. **Representative Chaney** explained that section 3B of the bill deals strictly with redistribution, not possession. There has to be a willful volition to act to redistribute. **Senator Anthon** noted that if a person sends a photo to someone's Facebook page, it is now arguably displayed for all the recipient's friends outside of the recipient's willful act. **Representative Chaney** noted that if you did not post the image yourself, but are instead tagged or it is posted to your wall, then you are still protected.

Senator Jordan indicated that the word "display" did not constitute redistribution in her mind, but if a minor saw a picture posted to his/her wall and then told friends to come look at the computer screen, that would be redistribution. She asked if there are freedom of speech issues embedded in this bill. **Representative Chaney** pointed out that obscenities of minors is a settled issue regarding freedom of speech. The State has every right to regulate obscene images of minor persons. He noted that this does not apply to adults. He reiterated that it is a felony currently to be in possession of these images or to show them to friends. He stated that this type of behavior will be adjudicated with reason and not just in a vacuum.

Senator Burgoyne stated that he has problems with the word "willful." He noted that there is no explicit language in section 3 that states the conduct has to be willful. There seem to be incongruencies between sections. He asked what crime is committed when two 17-year-old minors expose themselves to each other. **Representative Chaney** reiterated that the other sections require volitional acts. He replied that there is no crime when this happens. The only crime occurs when photos are proliferated. **Senator Burgoyne** stated that he had a problem with this bill in that two 17-year-old minors have not committed a crime when they expose themselves to each other in person, but having it be a crime if they use a cell phone. He remarked that this statute is not very understandable and may need better language. He is uncomfortable with the prospect of handing out a felony based on the lack of language for willfulness.

Senator Lee asked for clarification on the intention of the bill. She spoke about a bullying scenario where "sexting" pictures are used as blackmail. She asked if the person being blackmailed could open herself up to a felony if she goes to the police for help under the current statute. **Representative Chaney** answered that this was the case. Both the blackmailer and the person being blackmailed would be felons under the current statute.

Senator Souza asked for Representative Chaney's response to a hypothetical scenario for clarification on the bill. **Representative Chaney** responded that Senator Souza's understanding of the bill as stated in the hypothetical scenario is correct.

Senator Burgoyne remarked that stopping exploitation is important, but that this bill does not get to this issue. He reiterated that the lines between misdemeanors and felonies is not clear. He explained that young women will not appreciate the difference between misdemeanors and felonies and so they will not step up to fight the bullying. He stated that there needs to be a clear difference between stupid things that make people victims and things that are done on purpose.

TESTIMONY:

Holly Koole Rebholtz, Idaho Prosecuting Attorneys Association (IPAA), testified in support of the bill. She introduced John Dinger.

John Dinger, Ada County Prosecutor, testified in favor of this bill. The cases Mr. Dinger usually works with are adult internet crimes against children. He spoke about the usual process that "sexting" cases follow. He noted that most of these situations are taken care of outside of the judicial system by parents. If parents do not take care of it, then the case goes to diversion. In diversion, the phone of the juvenile is taken away and that minor is required to take a sexual boundaries class. In order for this diversion to take place, there has to be a misdemeanor charge associated with it. He noted that charging a minor under Idaho Code § 18-1507 is rare. This is reserved for the most extreme cases. This bill would help minors avoid registration as sex offenders. Children as young as 10 years old have been "sexting." **Mr. Dinger** explained that a deterrent needs to be there so that a victim's life will not be compromised forever. Otherwise, bullying and blackmail can occur. This is child pornography and can ultimately get into the hands of predators and lead to molestation.

Mr. Dinger noted that everything has to be willful and have intent. He stated that he would not prosecute for possession if someone sent an explicit picture and the person receiving it deleted it. Prosecutors would look at the circumstances surrounding a picture. He commented that this bill would not apply to the situation when a child sends pictures to an adult. Usually the children in these cases are viewed as the victims, and victims are not charged. There have only been two cases in his career where Mr. Dinger has sent the child to be prosecuted.

Senator Burgoyne asked about the willfulness issue. **Mr. Dinger** responded that intent deals specifically with distribution to others. He talked about the "reason to believe" language and how that applies to social media. **Senator Burgoyne** asked if there would be anything wrong with amending the bill to provide more defined language so that the perpetrators can be prosecuted, but not the children or victims. **Mr. Dinger** stated that this would be a better question for Representative Chaney. He reiterated the IPAA's support for this bill.

Senator Jordan asked if any minor has been charged as a felon or if there is a possibility of this happening. **Mr. Dinger** commented that in Ada County not one of the boyfriend-girlfriend scenarios has been prosecuted under the current statute. The only case where a minor has been charged with a felony is in the case of a child prostitution ring and this was the only way to stop the minor from sending out these pictures.

Senator Souza noted her appreciation for the work done on this bill to remediate "sexting." She asked about the possibility of placing language in the bill to address the difference between one-to-one sharing verses sharing the picture on social media. She referred to the earlier scenario regarding the three middle school children and asked what would happen to the them under the current statute. **Mr. Dinger** answered that in the scenario provided, the first minor made the choice about taking a picture of her body. The boy who received the picture and then sent it on is more abusive, because it is not his body in the picture. He stated that currently all three would be charged with felonies. **Senator Souza** indicated that she is concerned with intent of individuals. There needs to be more education regarding this "sexting" problem to make children aware of the consequences.

Senator Anthon asked for clarification of the function of the bill. He asked about the difference in age mentioned in section 2. **Mr. Dinger** stated that this section is looking at the possessor of the image and not the sender. He explained that the three year indication language prevents the scenario where a much older minor is asking a much younger minor to send explicit pictures. **Senator Anthon** asked about cases where the minor sending these types of pictures to adults is not the victim and how these minors are charged. **Mr. Dinger** answered that he did not know because those cases were referred to the juvenile prosecutor. He reiterated the rareness of charging a minor under the current statute.

Representative Chaney noted that he had spoken with a juvenile public defender who describes the initial charging for these actions as more commonplace. He reiterated his perspective on the intent language. He spoke about the worst case scenario for charging a minor currently is that the minor is charged with a felony that carries sex offender registry with no chance for expungement. He commented that this bill is a better way of doing business than the current statute. Improvements can be made as time goes by, but this is a good step in the right direction.

MOTION: **Senator Jordan** moved to hold **H 555** in Committee. **Senator Burgoyne** seconded the motion.

SUBSTITUTE MOTION: **Senator Lee** moved that **H 555** be sent to the 14th Order for possible amendment. She stated her concerns with the bill in its current form. **Senator Anthon** seconded the motion. He commented that something needs to change in the bill to take the charging of a minor in this situation out of the hands of the prosecutor. He remarked that the Idaho Supreme Court has said that there must be the same language throughout the bill. **Senator Souza** stated that Representative Chaney did a good job of describing the problems with the current situation.

Senator Johnson asked Senator Jordan what the purpose was to hold the bill in Committee. **Senator Jordan** responded that she thought the bill might need more work than what the 14th Order might allow. She noted that if the other senators are willing to work towards amending the bill, then she is agreeable to that. **Senator Burgoyne** agrees with Senator Jordan and will support the substitute motion. He commended Representative Chaney for bringing this legislation.

**VOTE ON
SUBSTITUTE MOTION:**

The substitute motion carried by **voice vote**. **Senator Lee** will be the sponsor.

H 521

Relating to Limited Use Immunity for Minors in a Medical Emergency.

Nate Fisher, Association of Students of University of Idaho, explained that **H 521** provided limited immunity from misdemeanor charges for minor consumption and minor possession of alcohol when there is a need for medical help. This bill does not provide protection from any concurrent crimes or actions such as driving under the influence, disorderly conduct, property damage or illicit drug use. This bill was prompted by deaths that could have been prevented by phone calls to 911. He noted that surrounding states, except Wyoming, have passed similar bills and ten other legislatures are currently looking at legislation similar to this (see attachment 1). He explained that this bill was created after exploring the possibility of addressing the issue on the city level revealed that the State level is the proper place for this legislation. He noted that the major four year educational institutions have worked together on this bill, as well as the IPAA, the Fraternal Order of Police, the Sheriffs' Association and other groups. He noted that a petition to pass this bill has received approximately 1,500 signatures and more than 200 comments. **Mr. Fisher** highlighted a study from Cornell University relating to the injuries from unreported alcohol consumption. Fear is a leading cause for students to not call 911. Those institutions that have implemented an amnesty policy have seen an approximate 51 percent increase in calls to emergency medical services. He talked about educational efforts currently taking place on college campuses.

Chairman Lodge asked if Mr. Fisher talked to trial lawyers about this bill. **Mr. Fisher** responded that he did and there was some concern about civil claims, but they decided they are comfortable with the current language of the bill.

Senator Lee asked what happens if police respond as intended in this bill and they find other substances. **Mr. Fisher** answered that section 2 of the bill addresses this topic by stating that there is no immunity beyond the minor in possession or minor consumption of alcohol charges.

MOTION:

There being no further questions, **Senator Lee** moved that **H 521** be sent to the floor with a **do pass** recommendation. **Senator Souza** seconded the motion. The motion carried by **voice vote**. Chairman Lodge will be the floor sponsor.

H 503

Relating to Trust Deeds and the Definition of "Trustee." Representative

Luke Malek presented this bill. This bill clarifies previous legislation by providing a more specific definition of "trustee."

Senator Anthon asked what the problem was and why this bill is necessary. **Representative Malek** answered that there was a legal case regarding a title to real property between a mechanic's lien claimant and the purchaser of a home under the non-judicial lien. The trustee sale of the home occurred while the lien's action was pending in the judicial system. The court decided in favor of the purchaser and held that the trustee was the owner of real estate under Idaho Code § 45-1502. **Senator Anthon** asked if this case concerned a creditor. **Representative Malek** replied that it was a foreclosure. He deferred to Hillary Vaughn.

TESTIMONY:

Hillary Vaughn, Attorney and Underwriting Counsel, First American Title, spoke in favor of this bill. She stated that the goal of this legislation is to return to prior Park-West case law. Legislation from last year provided that a trustee is not the owner or reputed owner of real estate for the purpose of foreclosure of a mechanic's lien action. She reiterated that this bill simply better defines "trustee." **Senator Anthon** asked about trustees acting in a fiduciary capacity. **Ms. Vaughn** answered that this bill does not touch fiduciary. This bill talks specifically about trustees under a deed of trust.

Senator Burgoyne asked if the bill language is meant to address foreclosure issues. **Ms. Vaughn** replied that this language primarily arises in the context of foreclosure. **Senator Burgoyne** asked what other contexts this bill would deal with. **Ms. Vaughn** explained that the concern is with the trustee being identified as the owner or reputed owner of real property and how this would apply to land-use actions and other judicial concerns. **Senator Burgoyne** asked if the current language is meant to address foreclosure issues. **Ms. Vaughn** asked for clarification on the question. **Senator Burgoyne** commented that this bill is aimed at amending previous legislation. Does that previous legislation deal solely with foreclosure issues? **Ms. Vaughn** indicated that the previous legislation deals with the role of a trustee under a deed of trust. **Senator Burgoyne** asked if the powers are triggered by foreclosure. **Ms. Vaughn** responded that the powers are triggered by the grant of the trustee. **Senator Burgoyne** commented that in a foreclosure with a mechanic's lien, property is sold or is auctioned for exactly the same price as on the deed of trust. He asked how in a case like this hypothetical one, what happens under the new language being added to the current Idaho Code. **Ms. Vaughn** answered that nothing different would happen in this scenario. The only thing that would be different is that if a lien claimant sought to foreclose, they would also name the trustee as one of the necessary parties of interest in closing the action.

MOTION:

There being no further questions, **Senator Anthon** moved to send **H 503** to the floor with a **do pass** recommendation. **Senator Burgoyne** seconded the motion. The motion carried by **voice vote**. Senator Anthon will be the floor sponsor.

ADJOURNED:

There being no further business, **Chairman Lodge** adjourned the meeting at 3:30 p.m.

Senator Lodge
Chair

Carol Cornwall
Secretary