

MINUTES
(Subject to Approval by the Committee)
Judiciary and Rules Working Group
Thursday, July 30, 2020
9:00 A.M.
EW20 (Remote Electronic Meeting)
Boise, Idaho

Cochair Lakey called the meeting to order at 9:04 a.m.; a silent roll was requested.

Members present: Cochair Senator Todd Lakey and Senators Abby Lee, Patti Anne Lodge, Kelly Anthon, Steven Thayn, C. Scott Grow, Don Cheatham, Grant Burgoyne, and Mark Nye; Cochair Representative Greg Chaney and Representatives Jason Monks, Ryan Kerby, Paul Amador, Christy Zito, Bryan Zollinger, Barbara Ehardt, Heather Scott, Bill Goesling, Linda Hartgen, Gary Marshall, Doug Ricks, Caroline Troy, Julianne Young, John Gannon, John McCrostie, Melissa Wintrow, and Muffy Davis; Legislative Services Staff (LSO) Ryan Bush, Jared Hoskins, Soren Jacobsen, Shelley Sheridan, Jennifer Kish, and Jackie Gunn.

Note: Presentations and handouts provided by the presenters/speakers are posted to the Idaho Legislature website <https://legislature.idaho.gov/sessioninfo/2020/interim>; and copies of those are on file at the Legislative Services Office in the State Capitol.

Opening Remarks

Cochair Senator Lakey summarized the charge of the working group is to address civil liability protections in Idaho and make a recommendation as to whether the working group feels there is a need for a special session. He noted that he did receive some suggestions that he believed were outside the purview of the working group's charge. Cochair Representative Chaney shared that meeting-related materials were posted at the Legislature's interim committee homepage.

Committee Discussion on Proposed Legislation and Possible Recommendation to the Governor for Special Session

Cochair Lakey opened discussion on proposed legislation and also on the topic of whether there is a need for a special session. He began by asking Cochair Chaney to review the most recent version of the draft they put together (DRRCB011). Cochair Chaney introduced draft [DRRCB011](#), and planned to move section by section through the draft. He explained that they crafted some of the language from earlier proposals by Senator Burgoyne, as well as language in the model legislation from Utah. His goal was to make sure we weren't going to authorize poor behavior, but rather we were going to allow people to do their best in a rational way and be able to move forward. Lawyers ask a jury to consider "what would a reasonably good person do under similar circumstances?" And, if something is happening under an emergency circumstance, "what would a reasonably prudent person do under an emergency circumstance?"

Cochair Chaney described the challenge a jury would face determining what was "reasonable" at a particular point of time, given the rapidly changing views of the scientific community regarding how this virus spreads. He noted, that unlike the Utah model, draft DRRCB011 has a bar that must be reached before there will be extra protection. He also stated that tying the legislation to an emergency declaration allows people to react quickly and appropriately. With draft DRRCB011, this heightened level of protection only kicks in when one is acting in good faith in determining if their conduct needs to be changed. They must be doing their best to assess the situation and react accordingly and that the protection is specific to the declared emergency.

Reviewing New Section 6-1608, Idaho Code, "Immunity from Civil Liability During a Declared Disaster or Emergency," Cochair Chaney summarized language in paragraph (1), stating that if you are following all the criteria laid out in this statute, then you are only liable if your conduct is

intentional, willful, or reckless. He continued by identifying the key details included in paragraphs (2) through (6). Cochair Chaney commented that in the early moments of any emergency, the intention of emergency response (private and public) is to get to a point of equilibrium. New Section 6-1608, Idaho Code, protects the doctors in some circumstances and the patients in some circumstances. In one respect, it provides less liability protection to medical professionals because it requires them to determine what a good faith effort is and apply it. The draft's statute is not a blanket protection. Cochair Chaney also detailed how the statute extends more protection than the Utah model to medical professionals. He closed his remarks by stating that the statute provides the teachers, parents, doctors, and business owners with the confidence to make appropriate decisions and attempt to move forward. **MOTION: Cochair Chaney moved to adopt draft DRRCB011 and prepare an RS to put forward for consideration to include as part of its report recommending a special session to the Governor.**

Senator Burgoyne stated his concern that immunity language in draft DRRCB011 essentially protects those who act in good faith, even when their actions are negligent. Additionally, he noted that those who believe that the threat associated with Covid-19 is overblown, will lose their rights to sue and collect damages under the draft legislation proposed. The education bill he submitted to the cochairs was to make a point about governmental overreach: if we are going to give a "get out of jail free card," we need to give a card to our parents for their kids. He emphasized that this is a complex issue and it deserves more time and thought than it is being given in the working group. He discussed the unintended consequences of draft DRRCB011. He contended that the draft does not provide any certainty for the schools. Senator Burgoyne reviewed his RS 28042. He stated that though he has reservations about providing liability immunity, its definition in RS 28042 is focused, narrow, and clear. He pointed to the liability immunity language on page 1, line 30 of draft DRRCB011, stating that he believes it includes breach of contract liability. He opined the Utah approach (RS 28042) is clearer on limiting the situation to "negligence" than draft DRRCB011. He asked the working group members to consider which piece of legislation, DRRCB011 or RS28042, is easier to understand, and suggested that the more difficult one to understand is going to raise more uncertainty for those conducting business affairs or carrying out governmental duties. **SUBSTITUTE MOTION: Senator Burgoyne moved if the committee votes to recommend a special session, that the committee put forward RS 28042 for consideration to include as part of its report to the Governor.**

Representative Gannon noted that the legislative intent language in draft RCCB011 is very broad and could be interpreted to include contracts, pointing to the language "a person shall be immune for acts or omissions in good faith." Cochair Chaney responded that standards of conduct are not applied to contract actions; for example, "acts or omissions" is not contract language. He sees no contract implication with the legislation. Referring to paragraph (2), New Section 6-1608, Idaho Code, Cochair Chaney stated the legislation was not intended to effect probate code requirements.

Senator Nye stated that he thought the charge of the working group was directed toward discerning the immunities for liability just on Covid-19. Cochair Lakey responded that their charge includes "protecting entities against legal liabilities due to consequences of a pandemic or other health care crisis." Senator Nye suggested the legislation should be limited to Covid-19, with broad immunities granted on that subject for schools, hospitals, health providers, and first responders and their staff until the pandemic is contained. He asked the group to consider a motion for special session on Covid-related immunities and get it worked out on the floor.

Representative Goesling asked that any provision addressing schools include institutions of higher education, because they are going to have some unique challenges with liabilities other than what we've seen in K-12 education; for example, paragraph (4), New Section 6-1608, Idaho Code, does not mention institutions of higher education. Representative Monks stated he could not support a motion that limits legislators to this piece of legislation and this piece of legislation only. They need to have the ability to propose other ideas and look at other concepts. He also asked the cochairs to restate the motions under consideration. Cochair Chaney discussed the recent comments

made by the governor related to calling a special session. He spoke to the custom of including a recommendation of a specific RS under consideration, one that would have clear support and would pass if presented to the respective committees in a special session.

Ms. Maulin remarked she reviewed the journals for the last two extraordinary sessions, held in 2015 and 2006, and in both cases there was a very specific RS/bill presented as a part of that extraordinary session. Cochair Lakey emphasized that he very much wanted to have a special session to address this issue and wanted to put forward a recommendation that would incentivize the governor to call a special session. Continuing, the cochair stated his hope that the consideration of the draft would go through the regular committee process, where possible minor adjustments could be made.

Representative Monks stated that he would not give away legislative authority to the governor by allowing him veto authority over what legislation is discussed in special session. He restated that he could not support a call for a special session that limits what the Legislature could consider. Cochair Lakey stated that though he shared Representative Monks concerns, the Legislature needs to move forward to a special session. Ms. Maulin stated that she just reviewed the proclamation from the Extraordinary Session held in 2000; she noted it was a much more general proclamation, one that considered issues rather than pieces of legislation. She added that the governor in 2000 was Governor Kempthorne. Cochair Chaney continued to urge the members to work to put forward a piece of legislation they feel comfortable advancing, stating that he did not believe they'd get a special session without it.

Representative Wintrow indicated she was uncomfortable with both of the motions on the floor and she was not convinced there was a deficiency in the law currently. She added that if she had to vote on either motion, she would vote for the substitute motion. Representative Davis echoed the comments of Representative Wintrow, opining that with this type of emergency the Legislature should not be creating broad brush permanent legislation on such a complicated issue. She stated that any legislation must be very clear and limited and she voiced her support for Senator Burgoyne's substitute motion.

Referring to draft DRRCB011, Representative Marshall observed that the legislative intent language is very broad and suggested the need to review Chapter 10, Title 46, Idaho Code, specifically Section 46-1008, Idaho Code. He concluded by indicating he shared some of the concerns expressed by Representative Monks. Cochair Chaney responded that legislative intent is not binding, but rather is an instruction to the courts to clarify how to apply the plain language. But where the plain language is clear, the language has no effect whatsoever. Cochair Lakey added that legislative intent is a guidance to the courts and it can't be contrary to the specific language in the statute because that is the applicable and binding language.

Representative Young indicated that she is supportive of addressing this issue right now. Schools and businesses need reassurance in terms of their ability to move forward. She is concerned about the loose language and the unintended consequences evident in the draft. She requested something narrow and specific in scope, something along the lines of what Senator Burgoyne has discussed. She doesn't want to incentivize the extension of the governor's declaration of emergency, so she does not want any proposed legislation tied to a declaration. She supports Representative Monks comments. **AMENDED SUBSTITUTE MOTION: Representative Young moved to ask the Governor to call a special session addressing the subject of Covid-19 liability and emergency declarations but not to tie it to a specific piece of legislation.**

Cochair Lakey expressed his support for language that reflects that everyone is important. He stated that draft DRRCB011 uses recognized standards. He opined that the present liability standard is not appropriate or sufficient in these types of emergency situations. He added that he believes that the potential for lawsuits is very real, as is the sense of urgency. Businesses need that protection and schools need to get back open. In his mind, schools are the driving force for action now. He mentioned his concern for limiting legislation to being Covid-19 specific, stating that this would put

the Legislature in the scenario of coming back to pass legislation every time there is a crisis. He opined draft DRRCB011 provides more certainty now, because the people who wish to sue the business owner or individual will have to meet a higher standard.

Representative McCrostie questioned that if we've been able to get by without a bill like draft DRRCB011 for so long, why do we need something so much broader in scope. And, he stated his concern for how fast this process has gone through. He preferred RS 28042 because it is more limited in scope. He opined legislators need to address the current challenges we are facing during this once in a lifetime situation, and it is the only way to really justify the special session.

Senator Lee stated her support of the original motion and the broad approach. She suggested that any emergency executive order would trigger these broad protections of people acting in good faith, so it would serve as a backstop for having the governor issue the order. She observed that she has not seen a perfect piece of legislation during her time in the Legislature, and she knows they will come back during the regular session and make adjustments to the language agreed upon in special session.

Representative Scott emphasized that it was their job as a Legislature to have the discussions, address these issues, and write bills. She agreed with Representative Monks and is not ready to turn over her responsibilities as a legislator to the governor. She suggested that the Legislature could incentivize the governor through Article V, Section 3 and 4, of the Idaho Constitution. She opined that the draft they were considering was written by one of the big lobbying groups that happen to represent many of the big businesses, and we need to look out for the small businesses.

Senator Thayn stated his support for a special session, as well as support for Senator Burgoyne's approach that is focused on Covid-19, and do something more expansive during the regular session. He also discussed his concern for the unintended consequences that might come from the language on page 1, lines 34 through 36, of draft DRRCB011.

Representative Ehardt stated her support for a special session and for draft DRRCB011. Though she appreciates Representative Monks concerns, she emphasized her focus must be on helping businesses, churches, and schools with protections. She asked the working group members to listen to the parents and the kids, adding that the special session needs to be convened so that the kids can get back to school and get back to practices that begin soon.

Representative Troy observed that if we don't provide the protections the insurance companies will pull out of the state, which will result in less competition, higher insurance rates, and our businesses and our schools will be unable to find insurance. She opined that this situation needs to be addressed by special session. Representative Gannon wished there could be more time to build a consensus within the working group. He opined that draft DRRCB011 needs to be modified so that it is crystal clear. At present, the draft will promote litigation because of the number of ambiguous terms that are in it. He stated his support for the amendment substitute motion, so we can come back to the table and get input from experts.

Senator Burgoyne stated his support for Representatives Monks and Young's amended substitute motion, and if it fails, he stated he would support his substitute motion. He opined that draft DRRCB011 is too broad and suggested that they need to use a scalpel. He agreed it is appropriate for the Legislature to meet in special session but emphasized the need to do no harm, to keep from legislating unintended consequences that will harm their constituents. He also opined that courts will pay attention to the legislative intent language in draft DRRCB011 because of the ambiguous terms.

Cochair Chaney debated against the amended substitute motion. He opined that a blind recommendation for a special session is not practical. He emphasized the governor can use the criteria of including an agreed upon piece of legislation in their recommendation to convene a special session. He stated he will not support the substitute motion, as the Utah version is way too open in some respects and way too closed in others. He commented that Representative

Scott was partially right, Mr. McClure assisted with the drafting of DRRCB011, but added that he assisted with the drafting as well. He explained the necessity for making the bar high before the heightened protections kick in. He stated his support for the original motion, and if that motion passes, his intention was to support a subsequent motion and attach that to a recommendation for a special session.

Senator Burgoyne urged support for Representative Young's amended substitute motion. Senator Lakey opined the crucial language in Utah's primary provision is flawed, too limited, and ambiguous. He added that the language in draft DRRCB011 is not ambiguous and it is broad with its protections but focused on its specific provisions for application.

Representative Young stated that she had just spoken with Mr. Alex Adams, Office of the Governor, reporting that he had opened the door to a special session with the understanding that there is consensus around the specific subject.

Senator Lee stated her support for Cochair Chaney's original motion. Representative Ricks asked if they could send both DRRCB011 and RS 28042 to the governor with their request for the special session and continue to invite the experts to testify. Cochair Lakey stated that it is possible. Cochair Chaney also agreed it is possible, but he suggested that if more time is necessary to come to consensus on the issue, it should be time spent by the working group via Zoom and not by the 105 member here at the Capitol.

Representative Troy asked if it is possible to have another meeting of the working group to provide more discussion on the motion. Cochair Lakey responded that it is possible but we have to address the urgency that exists. Cochair Chaney agreed that it is possible, as the cochairs are not trying to rush or overwhelm the members of the working group. Representative Zito emphasized the importance of the legislative body not to capitulate their voice as the elected representative of every citizen in their district. She remarked the gentleman on the second floor should feel the necessity of calling a special session so the voice of the people could be heard. She voiced support the amended substitute motion.

Representative Kerby stated that draft DRRCB011 has some tremendous strengths, and noted the critical importance of draft DRRCB011, paragraph (3) of, New Section 6-1608, Idaho Code. He stated that the governor has mentioned that he expects consensus when the members convene for a special session, and he opined draft DRRCB011 is the best way to go. He asked about the process of considering the various motions.

Ms. Maulin responded, clarifying that motions need to pass the Senate portion of the committee separately and the House portion of the committee separately. Looking at page 1, line 35, of draft DRRCB011, Senator Thayne asked for clarity on "how this language doesn't give more power to government entities to impose rules and regulations on school districts?" He also asked for clarity on "how this language doesn't actually increase the liability for businesses rather than decrease it?" Cochair Chaney responded that the fear right now is that you are strictly liable, where as the draft language says you have to make a good faith effort and thereby it takes some of the pressure off. Additionally, by including that provision in general you decline to insulate people who are blatantly and intentionally violating the law.

Ms. Maulin responded to a question posed by Representative Scott offline regarding meeting process by stating that an objection or a point of order is sent directly to the meeting staff member, who in turn moves it to the top of the queue for the chairman to address next. Representative Kerby stated he planned to support the first motion but he asked if none of the three motions pass, might the group continue to create motions. Senator Lakey agreed that they could do that. Senator Grow stated he too sees the necessity of meeting in special session to consider some form of limited liability, and is particularly concerned about the schools, hospitals, and businesses. He remarked that if we start with draft DRRCB011, though not perfect, it would be a beginning point. Representative Gannon asked about the limits that would be placed on the Legislature when they meet in special

session. Ms. Maulin responded, quoting the language in Article IV, Section 9, of the Idaho Constitution, which states "the governor may, on extraordinary occasions, convene the legislature by proclamation, stating the purposes for which he has convened it; but when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation...".

Representative Gannon asked if there were any Supreme Court interpretations of that provision. Ms. Maulin agreed to research and provide a response to Representative Gannon's inquiry after the meeting. Representative Marshall spoke to the interpretation of the word "subject" in Article IV, Section 9, Idaho Code. He opined that the subject is the issue and not the specific piece of legislation. Senator Burgoyne agreed with Representative Marshall that the language is extraordinarily clear that the Legislature, if called to special session, has the power to amend or radiator cap the draft or RS stated in the recommendation to the governor.

Senator Lakey called for a vote on the amended substitute motion by Representative Young. **AMENDED SUBSTITUTE MOTION: To ask the Governor to call a special session addressing the subject of Covid-19 liability and emergency declarations but not to tie it to a specific piece of legislation.**

In the midst of the vote, Cochair Chaney reported that Ms. Maulin contacted the Attorney General's office, who provided a quick, informal opinion that the Legislature is not bound by the recommendations in the proclamation, so long as the legislators are in the subject area. After experiencing technical difficulties with Senator Lodge's audio feed, Representative Monks raised a point of order, asking if Senator Lodge's vote could be considered by a visual signal of either thumbs up or thumbs down. Mr. Ryan Bush answered that the decision rested with the cochairs. Cochair Chaney asked for a unanimous consent vote that Senator Lodge's visual signal be accepted as her method of voting for the duration of the meeting. Senator Lakey called for a **UNANIMOUS CONSENT REQUEST: That Senator Lodge's votes cast be based on her visual indication in favor or against.** Representative Scott indicated she could not see the visual, and Senator Lakey responded that it was his understanding that the members and the public would be able to see Senator Lodge visually. The unanimous consent request vote passed. Senator Lakey returned to the vote for the amended substitute motion after Senator Lodge's vote was confirmed by video stream feed and accounted for. The motion failed.

Senator Lakey called for a vote on the substitute motion by Senator Burgoyne. **SUBSTITUTE MOTION: If the committee votes to recommend a special session, that the committee put forward RS 28042 for consideration to include as part of its report to the Governor.** The motion failed by a majority vote.

Senator Lakey called for a vote on the motion by Cochair Chaney. **MOTION: To adopt draft DRRCB011 and prepare an RS to put forward for consideration to include as part of its report recommending a special session to the Governor.** The motion passed by a majority vote.

MOTION: Cochair Chaney moved to recommend a special session consistent to the committee's responsibilities and mission for the purposes of considering legislation. Senator Lakey called for a vote on the motion by Cochair Chaney. The motion passed by majority vote. Cochair Chaney clarified that this motion is the second prong of their charge. Senator Burgoyne asked about the ability to consider amendments to the language of the legislation put forward in the recommendation, either before or at the special session. Cochair Chaney stated that the Legislature would be able to do what they wished with the legislation at the special session with the ability to amend. Senator Burgoyne asked if a minority report could be attached to the recommendation. Cochair Chaney answered yes, but explained the report would be completed and submitted by the end of the day. The motion passed by a majority vote.

The meeting was adjourned at 12:15 p.m.