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Plain Language and Accurate Language

BY JACK STARK

In the summer 2003 *The Legislative Lawyer*, Jerry Payne writes about my work on statutory drafting.¹ The gist of the article is that I threaten democracy in this country by advocating obscure statutory drafting rather than adhering to the principles of plain language. Working through two examples will perhaps make my position clear and will thus allow readers to evaluate it. I think that the issues will be more easily grasped if the examples are not statutes.

The first example is "Bret Favre and Michael Vick will never be on a football field at the same time." The point is that two offensive units do not participate simultaneously in a football game. The example adheres to the rules of plain language statutory drafting. For example, the words are familiar, and the sentence is brief. That sentence would easily pass a plain-language review. Its problem is that it is untrue. That is, it is inaccurate; it does not convey the writer's intended meaning. Favre and Vick certainly will be on the field simultaneously in pre-game warmups. It is probable that they will be on the field simultaneously after a turnover. That is, if the Falcons have a turnover, Favre might get on the field before Vick gets off. They likely will also be on the field simultaneously after the game, perhaps shaking hands. A review using plain-language principles would not uncover the error, because it would be using the wrong filter: checking the length of sentences and the commonness of the word choice, for example, rather than trying to ensure that the statement fulfills its purpose.

A revision that would work is "Bret Favre and Michael Vick will never participate in the same football play." A writer could discover it by subjecting the original attempt to a "reality check": determining its congruence with the actualities of football. To accomplish that the reader would evaluate the original version by imagining the exceptions to it that I mentioned.

Then he or she would develop a keener conception of the intended effect: stating, in a more particular way, the fact that the offenses of two football teams never play simultaneously. Then the writer would look for a way to express that fact, using Favre and Vick as illustrations. The new version, unlike the plain-language version, not only is accurate but also is as plain (easy to understand) as the plain-language version. It is accuracy, created by understanding and learning to work with the unique features of statutes, that I seek, not obscurity.

A second example is more likely to have become flawed because of the use of plain language principles rather than to have remained flawed because of the use of those principles in revision. It is "yesterday we paid off our mortgage." It is classic plain language, being the kind of remark that an ordinary person would make. Indeed, it has been uttered or written by thousands of ordinary people. Its problem is that it cannot be true. A mortgage, as lawyers ought to know, is a security agreement that a lender holds in order to have a claim against property that was acquired with money supplied by the lender. No one has ever, or will ever, pay off a mortgage. A buyer never has a mortgage; only lenders have them. Thus, expressions such as "I need a mortgage in order to buy a home," "mortgage interest," and "mortgage rates" are nonsense, in spite of their frequent appearance in newspapers and in ordinary speech. A plain-language writer, having heard or read that expression dozens of times, is likely to employ it automatically and, after checking its adherence to plain-language rules, would not revise it.

The accurate version of the nonsense sentence is, of course, "yesterday we paid off our home loan." Borrowers have home loans, not mortgages. Those loans bear interest, which has

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1. See "The Drafting Critique," *The Legislative Lawyer* XVII, no. 2:2.

a rate. Thus, the revision is accurate. Moreover, it either is as clear as the flawed version or, at worst, slightly more difficult to read because some readers, having seen or heard "mortgage" countless times in similar contexts, would expect to see it there. It might take them a very brief period of time to adjust to "home loan." However, "home loan" is certainly clear. The revised sentence is not hopelessly obscure, nor does it contain pompous jargon or neologisms.

Jery Payne's article, therefore, although interesting, is on the wrong track, because it appears to advocate plain language drafting. It also, although—or perhaps because—it probably was written according to plain language rules, is difficult to understand. For the same reason, it almost inevitably is inaccurate. That is, it misrepresents my position. Readers who wish to check my points can compare some federal regulations that have been revised into plain language with the original versions,

seeking to determine whether the meaning has been altered in the revision. I think they will find that it has. They also can see a comparison of an original and its revision, along with other material on plain language and also on reader expectation theory, at http://www.legis.state.wi.us/conference/shows/SeniorDrafters_files/frame.htm.



Report on the 2003 NCSL Annual Meeting

San Francisco, CA

BY MICHAEL CHERNICK, VERMONT

Despite the nationwide budgetary difficulties that have reduced travel opportunities, an attentive and enthusiastic contingent of legislative legal staff were in attendance at the 2003 NCSL Annual Meeting held in San Francisco from July 21-24. A varied offering of interesting sessions, under the auspices of the Legal Services Staff Section's Program Committee and other NCSL sections and committees, provided an excellent opportunity to explore ethical, procedural and public policy topics.

The section's seminars began with an afternoon of special interest to legislative attorneys. Entitled "Developing a Legislative Lawyer's Code of Conduct," the program featured Robert Marchant, an attorney with the Wisconsin Legislative Reference Bureau, who has written a law review article for the *New York University Journal of Legislation and Public Policy*. In his article and at the San Francisco seminar, Marchant proposed that a new professional ethics code be developed for legislative attorneys. The code would recognize the unusual circumstances of legislative legal practice, especially for nonpartisan counsel, who provide legal services for opposing individuals in the same legal matter. The panel's participants also included Alfred Speer, Clerk of the Louisiana House of Representatives, Peggy Kerns, of NCSL's Ethics Center, and moderator Bruce Feustel, now an NCSL staff member and a former Wisconsin Legislative Reference Bureau staff attorney.

Beyond the initial presentations, participants divided into groups where they examined the ramifications of a new ethics code and tackled various ethical scenarios in a legislative context. Questions raised included who is the client: An individual legislator, a committee, or the entire legislature? The different ways to answer this fundamental question have direct bearing on the potential development of a separate code for legislative lawyers. Additional discussion on whether the section should actively pursue the development of a new professional ethics code was scheduled for the Fall Development Seminar.

Another section-sponsored session was the annual U.S. Supreme Court Roundup, which Richard Ruda, the chief counsel for the Washington, D.C.-based State and Local Legal Center, has ably presented at recent annual meetings. His focus on federalism-related issues has always proved timely and informative. This year, meeting attendees had two opportunities to update their knowledge on federalism jurisprudence. In addition to our section's program, Ruda also appeared in a session with Hastings College of Law Professor Vikam Amar, a nationally recognized constitutional law authority.

In a session drawing wide interest, the Legal Services Staff Section, along with the Legislative Research Librarians, the Research and Committee Staff Section and the National Legislative Services and Security Association, cosponsored a

panel that debated "Homeland Securities and Civil Liberties." The panelists included a staff attorney from the Justice Department and an ACLU representative who, not surprisingly, espoused divergent opinions on the civil rights impact of the U.S.A. Patriot Act, federal executive orders and regulations adopted since September 11, 2001. Their conflicting perspectives were supplemented with the comments of Nevada House Speaker Richard Pekins, who addressed his perspective on the development of homeland security legislation in Nevada.

Beyond our section's sponsored seminars, many other educational sessions focused on topics such as parliamentary procedure, legislative redistricting, health care, intellectual property and Internet related topics. Among the plenary presentations was Princeton University Professor Dr. Uwe Reinhardt's timely talk on "Health Care Issues and Economics."

Between the educational sessions, section members did have the chance to socialize, most particularly at the section's informal gathering at the Thirsty Bear Restaurant. This early evening reception replaced the Dutch treat dinner held in prior years. Section members at the San Francisco gathering spoke eagerly of both the Fall Development Seminar to occur in Denver and the 2004 Annual Meeting to be held in Salt Lake City.



Legislative Drafting Resources

BY THOMAS MORRIS, EDITOR



Legislative drafting conventions can dictate certain formal aspects of the art of drafting statutes to such a degree that legislative legal services staff may feel that resources outside of one's own office or official drafting manual are either unavailable or inappropriate. Further, during legislative sessions workloads typically prevent drafters from accessing resources that might improve their long-term ability to accurately, clearly and efficiently draft statutes. However, the problems faced by drafters are often neither unique nor unprecedented, and solutions—or at least thoughtful analyses—are increasingly available online. LSSS members may wish to explore these resources during interim periods to determine their utility. This article supplements information otherwise available to LSSS members at <http://www.ncsl.org/programs/legman/legalsrv/resource.htm> in an effort to acquaint staff with online legal resources pertinent to the drafting enterprise (all information originates from the cited Web sites).

Capital Center for Government Law and Policy

The Capital Center for Government Law and Policy, located at the University of the Pacific's McGeorge School of Law, promotes effective government by "providing policymakers with nonpartisan information and analysis." Of general interest to LSSS members, the Center has the following subdivisions:

- The Institute for Legislative Practice, which "promotes effective law-making by federal, state and local legislatures by producing reports on pending or proposed legislation or initiatives, by leading major legislative reform efforts, and by providing testimony and consulting services to legislators and legislative committees;" and
- The Government Agency Resource Center, which publishes "in-depth studies and reports on topics of cur-

rent interest," a quarterly newsletter (including links to archived editions dating to October 2000), and the *California Initiative Review* (see http://www.mcgeorge.edu/government_law_and_policy/publications/index.htm).

The Comparative Legislative Research Center

The Comparative Legislative Research Center is part of the department of political science at the University of Iowa. The Center publishes the *Legislative Studies Quarterly*, an international journal "devoted to the publication of research on representative assemblies." The *Legislative Studies Quarterly* is the official journal of the Legislative Studies Section of the American Political Science Association. The goal of the *LSQ* is to "disseminate scholarly work on parliaments and legislatures, their relations to other political institutions, their functions in the political system, and the activities of their members both within the institution and outside" and to "contribute to the formulation and verification of general theories about legislative systems, processes, and behavior." More information about *LSQ* may be found at <http://www.uiowa.edu/~polisci/legstudiesquarterly.html>. The Legislative Studies Section also publishes a newsletter, archived issues of which (dating to January 1998) are available at <http://www.apsanet.org/%7EElss/Newsletter/Newsletter.htm>.

Journal on Legislation

Harvard Law School publishes the *Journal on Legislation* semiannually. The *Journal* specializes in the "analysis of legislation and the legislative process." The *Journal* also publishes a biannual issue on congress, including policy essays written by members of Congress. The *Journal's* Web site is <http://www.law.harvard.edu/students/orgs/jol/>. The Harvard Legislative Research Bureau, an affiliate organization of the *Journal*, pro-

vides "free legislative research and drafting services on a nonpartisan basis to legislators, government agencies, and non-government organizations."

Journal of Legislation and Public Policy

The New York University *Journal of Legislation and Public Policy* is a nonpartisan periodical that specializes in the analysis of state and federal legislation and that provides a forum for the discussion of contemporary legislative issues, focusing on "legislative reform and the organizational and procedural factors affecting the efficiency of legislative decision making." The *Journal* can be found online at <http://www.nyu.edu/pubs/jlpp/>.

Center for State Constitutional Studies

The Center for State Constitutional Studies at Rutgers-Camden is an "interdisciplinary institute dedicated to promoting public understanding of American state constitutions and of subnational constitutions in other federal systems through research and publications, lectures and conferences, consultation services, and educational initiatives. It conducts research dealing with American state constitutions and other subnational constitutions and disseminates this research through an extensive publications program. It also provides consultation services and presents public education programs on state and subnational constitutions." Its online publications include both occasional papers (<http://www-camlaw.rutgers.edu/statecon/page6.html>) and a newsletter with back issues available from the fall of 1998 (<http://www-camlaw.rutgers.edu/statecon/page8.html>).

Seton Hall Legislative Bureau

The Seton Hall Legislative Bureau is a

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Legal Services Staff Section Annual Professional Development Seminar

BY NANCY CYR, NEBRASKA

The Rocky Mountains served as the backdrop for the Legal Services Staff Section Annual Professional Development Seminar, held September 18-20, 2003, in Denver, Colorado. The dual-track seminar provided participants opportunities to fine-tune their bill drafting and legislative writing skills and to further study legal issues that regularly confront legislative staffers.

Writing for the legislative audience was the focus of Stan Stenerson, senior evaluator for the federal General Accounting Office. Stan presented a dynamic session on how legislative staff can organize and present material in a written document that clearly conveys information and enables legislators to make decisions.

The Honorable Rebecca Love Kourlis, Justice of the Colorado Supreme Court,

provided another seminar highlight as she presented her views of statutory interpretation as a member of the state's high court. Justice Kourlis encouraged bill drafters to continue to try to draft statutes using plain language and terms that private citizens can understand.

Finally, Paul Campos, Professor of Law and Director of the Byron White Center for the Study of Constitutional Law at the University of Colorado, inaugurated the staff section's Distinguished Scholar Lecture Series by challenging seminar participants with his ideas about the American legal system and the making of law.

Seminar participants also explored the similarities and differences in the organization, management, and responsibilities of legal staff in state legislatures; reviewed the latest developments in redi-

tracting; discussed the best strategies for ensuring quality control in legislative legal offices; and learned facilitation strategies to help bring about a meeting of the minds when drafting legislation, providing constituent services or moderating a meeting. Legal issues surrounding legislative rules and parliamentary procedure and the latest electronic and web-based legal research resources were also part of the agenda.

The Denver meeting marked the second year the Legal Services Staff Section offered the expanded dual-track seminar, which historically has been known as the Senior Bill Drafting Seminar. Next year's seminar is scheduled for September 8-11, 2004, in Burlington, Vermont. Mark your calendars!



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clinical education program devoted to the "interaction between the legal profession and the legislative process." The Bureau has both a journal section and a symposia section. The Bureau publishes the *Seton Hall Legislative Journal*, a nationally-recognized periodical that focuses on legislative, statutory, and regulatory topics written by state and federal legislators, judges, academics, practicing lawyers, and students. Abstracts of select articles are available online at <http://law.shu.edu/journals/legbureau/Leg%20Bur/articles.html>.

Statute Law Review

The Oxford University Press publishes the *Statute Law Review*, the principal objectives of which are to "provide a vehicle for the consideration of the legislative process, the use of legislation as an instrument of public policy and of the drafting and interpretation of legislation." The *Review*, al-

though primarily written from a British legal perspective, should nevertheless be of value to LSSS members. A sample version of a recent edition of the journal is available upon registration online at <http://www3.oup.co.uk/stalaw/scope/>. is required. A .pdf version of the current edition is available at <http://www3.oup.co.uk/stalaw/current/>.

American Legislative Exchange Council

The American Legislative Exchange Council is a "bipartisan membership association for conservative state lawmakers who shared a common belief in limited government, free markets, federalism, and individual liberty" based on the belief that the government "closest to the people was fundamentally more effective, more just, and a better guarantor of freedom than the distant, bloated federal government in Washington, D.C." ALEC publishes a wide variety of documents, including hundreds of

model state legislation acts. Its Web site is <http://www.alec.org/>.

Council of State Governments

The Council of State Governments helps states increase efficiency by "identifying the best new and creative approaches to significant state problems." The Council's Web site is <http://www.csg.org>. A valuable member benefit is STARS ("State Archives and Research Service"), a "fully searchable, easy to use online database that contains thousands of pages of materials on innovative state government programs, including research, analysis and 50-state surveys." STARS is available online at <http://www.csg.org/CSG/Products/state+archive+and+research+service/default.htm>.



STATE NEWS



ALASKA

Jack Chenoweth

The record of the first regular session that ended May 21 emphasized development—the approval of legislation directed at developing an economic base for the state, supporting business related to resource development, streamlining government processes to encourage business, and exploring options for further development. Legislators approved 154 bills and 35 resolutions and allowed to take effect an additional eight executive orders submitted by newly inaugurated Governor Frank Murkowski. Among major items approved: Amendments to the act intended to support development of the state's known reserves of North Slope natural gas; modifications to laws relating to review and authorization of resource development projects and the state's coastal management program; changes to the state's air quality permit program to more closely align that program with federal law; tax credits and royalty adjustments involving the development of oil and gas properties; a series of bills that set civil liability exemptions for people engaged in various activities; measures intended to provide assistance in filling positions in the teaching and nursing professions; and modifications of laws relating to the conduct of elections and the definition of lobbying. The state adopted a modified version of the Uniform Principal and Interest Act and made significant alterations to its Procurement Code. In addition, the Legislature approved a fiscal year state operating budget that, with Governor Murkowski's line item vetoes, appropriates just under \$6 billion from the state general fund, federal funds, and other sources.

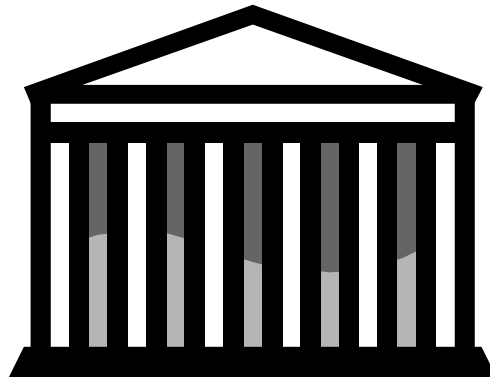
COLORADO

Debbie Haskins

Our big news is that our office has a new director starting October 1. After conducting a national search, the Committee on Legal Services recommended to the executive committee of legislative leadership that they select Charley Pike, deputy director of the Office of Legislative

Legal Services and the Revisor of Statutes, as our new director. The executive committee appointed Charley to be the new director. It is a bittersweet time for us in the office as we say good-bye and thanks to Doug Brown, who was the director for 23 years, and say hello to Charley, who we know will help carry on our office's tradition of providing high-quality, nonpartisan bill drafting and legal services to the Colorado General Assembly. Charley has been with OLLS for 31 years.

We are calling this the "year of litigation" because we have five pending lawsuits in which the General Assembly is a party and four lawsuits challenging the constitutionality of bills recently enacted by the General Assembly.



We have previously mentioned the *Grossman v. Dean* lawsuit in which the former minority leader sued the former speaker of the House, the General Assembly, and individual committee chairs over a House rule that allows for a "supermotion" to be made. The rule was originally contemplated to allow a minority member to try to get his or her bill out of committee. The rule provides that if the motion is made it is always in order but if the motion fails it has the effect of postponing the bill indefinitely. This time the motion was used by majority party members and three bills sponsored by minority party members were killed. The issue is what "consideration of the merits" under our state constitution means and whether the courts should decide a question relating to a legislative rule of procedure that was properly adopted in accordance with the

constitutional authority of the General Assembly to establish and interpret its own rules of procedure. The Court of Appeals heard oral argument August 19.

Editor's note: The Court of Appeals issued its opinion October 23, holding that consideration on the merits "... contemplates, at a minimum, some interactive consideration by members of a committee and that each measure must be so considered before being voted on by the committee on its merits." Accordingly, the court partially reversed the trial court's dismissal of the action, finding that although the rule was valid, its application in this case—in which the committee voted without any testimony or discussion—violated the constitution. Leadership has announced that it will not appeal the decision. The published opinion is available at <http://www.courts.state.co.us/coa/caseann/2003q4/10-23-03.htm>.

A second lawsuit involves vetoes. The General Assembly passed a joint resolution authorizing a lawsuit against the governor over his veto authority and whether he can veto an appropriation contained in a substantive law bill. Oral arguments have been scheduled for this case next summer.

In addition to these two cases, there are three redistricting lawsuits. The issue presented in *Keller v. Davidson* is whether the General Assembly has the authority to redistrict the congressional districts after the court has issued a redistricting plan. A state senator, Sen. Keller, and a constituent in one of the newly drawn districts filed an action in Denver District Court seeking a declaration that the congressional redistricting plan enacted in the last three days of the session violated the order of the court adopting the redistricting plan, violated the Colorado constitution, and violated other Colorado constitutional provisions, statutes, and rules regarding the way the redistricting bill was adopted. A five-day trial was scheduled for the fall; however, when the plaintiffs amended their complaint to add claims based on violations

of the federal constitution, the defendants (the General Assembly and the secretary of state) filed a motion to remove the case to federal district court. The case at this point is now in federal district court.

Meanwhile, the attorney general and the secretary of state are at odds over whether the attorney general has the authority to sue the secretary of state. The attorney general filed suit against his usual client, the secretary of state, seeking an injunction against her from implementing the redistricting bill and asking that the court enforce the earlier court-drawn redistricting order. The secretary of state filed a counter claim saying the attorney general had no authority to seek this injunction. Several amicus briefs have been filed in these cases. These two cases were heard in oral argument in the Colorado Supreme Court on September 8 to a standing room-only audience of legislators and party representatives, including some visiting Texas legislators who have been involved in their own redistricting drama. Stay tuned for the continuation of this story.

Lawsuits challenging litigation passed by the General Assembly have been filed over bills passed on carrying concealed weapons and state preemption of local firearm regulations, a budget bill that eliminated Medicaid for legal immigrants, school vouchers, and a bill requiring teachers and students to recite the pledge of allegiance. The first three cases are slowly making their way through the courts. A Denver U.S. district judge granted a temporary injunction against the enforcement of the pledge of allegiance law on August 15. On August 22, the attorney general's office asked the judge to extend his temporary injunction through the end of the next legislative session to allow time for the General Assembly to revise the law. The judge granted the injunction, indicating that the problem with the law was that it compelled the recitation of the pledge in contravention of a U.S. Supreme Court decision, *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

Interim committees are meeting to decide what to do with welfare reform—with regard to which Congress has failed to reach a decision—and trying to deal with blood alcohol content ("B.A.C.") limits and whether the state really wants to lose

all of that federal highway money (these bills have been killed before). Our state budget situation remains bleak and we are trying to do more with less.

DELAWARE

Rich Dillard

Although the House and Senate are not due to return to regular action until the second Tuesday in January, the Senate met in Special Session at the end of September to (hopefully) confirm three judicial appointments.

One appointment is to fill a spot on Chancery Court made vacant by a vice-chancellor's appointment to the state Supreme Court. Another appointment is to fill a vacancy in Superior Court made by an unexpected—and so far unexplained—death, believed to be the first death of a judge in office in at least 20 years. The third appointment fills a Family Court vacancy made by a promotion to Chief Judge of Family Court.

The only bill rumored to be considered in the Special Session is the .08 B.A.C. legislation (already passed by the House) so that Delaware beats the October 1 deadline and avoids the withholding of federal construction funds.

Correction: Last issue's submission included introduction dates in the 141st and 142nd General Assemblies. What I submitted was 5/1/01 in the 141st and 5/1/03 in the 142nd. What was published was 5/1/03 for both General Assemblies.

FLORIDA

Edith Elizabeth Pollitz

There has been little vacation for lawmakers and legislative staff this summer in the land of sun and beaches. Following



the end of regular session at the beginning of May, legislators have been called back for four special sessions. Earlier ones dealt with and resolved several difficult issues, but medical malpractice is the one that kept folks coming back for more, albeit at the governor's request. The fourth special session (Session "D", convened in August) since the spring regular session produced medical malpractice legislation that, while not palatable to all parties, was acceptable enough that a majority could vote for it. The medical malpractice bill that finally passed is Senate Bill 2-D, signed into law by the governor as chapter 2003-416, and available for perusal at www.flsenate.gov. The bill includes a \$500,000 cap and a rate freeze for several months.

IDAHO

Katharine Gerrity

During a meeting of Idaho's Legislative Council in late May, a number of interim committees were authorized to study issues relating to energy, natural resources and judicial elections. In addition, leadership also authorized a task force on sales tax to examine Idaho's sales and use tax structure in light of the evolution of the state's economy from a products to service based economy, and to recommend changes to the structure to make it more relevant to that evolution in today's global economy.

The Energy Interim Committee met in June to discuss various topics of interest, including escalating natural gas prices, the federal energy bill and incentives for siting green power projects such as wind power. The Committee formed a subcommittee that met in late September to review legislative proposals for encouraging alternative energy sources and anaerobic digesters with the intent of making recommendations to the full Energy Interim Committee.

The Natural Resources Interim Committee met in June and again in August. The meetings were primarily held in executive session to consult with legal representatives regarding ongoing mediation efforts relating to pending federal reserved water rights litigation in the Snake River Basin adjudication. The state has been engaged in mediation efforts with the Nez Perce Tribe for several years.

The ongoing Health Care Task Force met in July and again in August. During the meetings, members were updated on the status of the Individual High Risk Reinsurance Pool and the implementation of the Idaho Access Card program. The program, administered as an extension of the Children's Health Insurance Program (CHIP), is intended to provide subsidized premium assistance for children and employees of small businesses whose family incomes fall within certain federal guidelines. The group also discussed trends and rate increases in individual and small group markets.

Idaho's Joint Millennium Fund Committee met in August. The Committee was established in 2000 as a repository of all funds received by the state under the Tobacco Master Settlement Agreement. The Committee is charged with reviewing grant applications, providing funding recommendations to the Legislature and annually reviewing project expenditures. As a result of revenue shortfalls requiring transfers into the state's general fund, tobacco settlement funds have presently been depleted. However, another settlement payment is expected in April 2004.



The Task Force on Sales Tax met in July and again in September to begin examination of the history of Idaho's sales tax, particularly as it relates to various exemptions and exclusions. The group established criteria for use in its evaluation of each exemption and exclusion and was briefed about trends in the services and goods sector, economic analysis and Idaho's sales tax structure as it compares to the sales tax structure of other states.

INDIANA

George Angelone

Indiana continues to struggle with its general reassessment of real property. Indiana's property tax system was declared unconstitutional. The reassessment manuals were significantly changed to correct a historic under-assessment of older residential buildings and, in some cases, farm land. The distribution of 2003 tax bills has been delayed in many counties, which has resulted in increased borrowing costs for these communities. Some counties elected to use a state law that allows "provisional" tax bills to be sent before the assessment process is completed. Many home owners are receiving higher tax bills than they had been accustomed to receiving. A variety of proposals to protect affected taxpayers from the effects of the new assessment scheme are being suggested. A public question concerning a constitutional amendment will be presented to the voters at the 2004 general election. If adopted, the amendment would authorize the legislature to partially or fully exempt a broad range of business and homestead property from property taxation.

In early 2003, the legislature transferred the economic development responsibilities of the Department of Commerce to a quasi-independent corporation. The legislation provides for the transfer to become effective July 1, 2005. The legislation also requires the staff to recodify and revise Indiana law to reflect the transfer. The staff is rewriting 150 sections of law. Numerous policy issues have arisen in the course of drafting this corrective legislation. All of these issues are being brought to a committee of four legislators who were appointed to supervise the project. These policy issues have resulted in a number of inquiries to other states about their economic development policies. The Indiana staff wants to thank all those who responded to our surveys for their help.

Indiana Governor Frank O'Bannon suffered a massive stroke on September 8, 2003, and died September 13. The state constitution provides for the Lieutenant Governor to assume the post of "Acting Governor" whenever the Governor is incapacitated. Transfer of power is initiated by filing a petition with the Indiana Su-

preme Court. Both the Speaker of the House of Representatives and the President Pro Tempore of the Senate are required to sign the petition. The Court then has 48 hours to determine the matter. Legislators of both parties have offered their prayers and sympathy for Governor O'Bannon's family. Lieutenant Governor Joseph Kernan was sworn in as governor September 13.

KENTUCKY

Ann Zimmer

A lawsuit was filed in January of 2003 by 16 students from eight Kentucky school districts against the president of the Senate, the speaker of the House of Representatives, and the governor. The suit asked the court to declare unconstitutional the state's statutory structure and applicable provisions of the law for funding the common schools in Kentucky. The suit also seeks to compel the governor and the General Assembly to devise a budget that will give schools a sufficient appropriation of funds and priority over all other state services.

This lawsuit, *Young v. Williams*, deals with many of the same issues that were brought in an earlier lawsuit that prompted the state Supreme Court to declare the state's school system unconstitutional. That decision, *Rose v. Council for Better Education, Inc.*, 790 S.W. 2d 189 (Ky. 1989), led to the 1990 Kentucky Education Reform Act. Although the pleadings in *Young* are similar in many respects to those in the *Rose* case, there are significant differences both in the issues now surrounding education funding in Kentucky and in the way the General Assembly now regards suits of this type.

In the *Rose* case the plaintiffs alleged and the court found that the system of funding among the various school systems in Kentucky was inequitable. Today, 13 years after enactment of the Education Reform Act, Kentucky has generally achieved equity of funding among the various school districts. The plaintiffs in *Young* now allege that the funding for all school districts is inadequate.

In the *Rose* case, the Kentucky Supreme Court made no findings regarding the

constitutionality of individual Kentucky statutes when it declared that the state's system for funding and administering education was unconstitutional. In the present case, the General Assembly has filed interrogatories asking the plaintiffs to specifically identify the Kentucky statutes they believe to be unconstitutional. It also appears in the present case that the plaintiffs are contending that the budgets the General Assembly has passed for the last 12 years have been inadequate in the amount of funding provided for all schools. The complaint seeks to compel the General Assembly to raise and appropriate enough money to "sufficiently" fund the schools.

The General Assembly sought to be dismissed from the current lawsuit, citing Section 43 of the Kentucky Constitution, which is identical in all material respects to the Speech and Debate clause of the United States Constitution. The clauses provide that state and federal legislators are generally immune from civil or criminal actions for acts committed or statements made in their official capacities. The Kentucky court has denied the legislative leaders' motion to dismiss, citing several state Supreme Court cases following *Rose* that allowed legislators to be sued in lawsuits challenging the constitutionality of legislative acts.

In the 2003 regular session, the General Assembly amended the Declaratory Judgment Act (KRS 418.075) to prohibit legislators and legislative organizations from being made parties without their consent to any lawsuit challenging the constitutionality or validity of statutes or regulations. The amendment became effective June 24, 2003.

LOUISIANA

Clifford Williams

On April 19, 2000, 14 parish coroners filed an action against the State of Louisiana seeking past due and future extra compensation allegedly owed them pursuant to the provisions of La. Revised Statutes 33:1559. The statute provides that the state shall pay a monthly, supplementary amount of \$548 to each coroner, *payable from funds specifically appropriated for that purpose*. However, no such funds have been appropriated by the Leg-

islature for such purpose.

The state district court ruled that the statute places a mandatory obligation upon the state to pay the amounts due the coroners pursuant to the statute and ordered the state treasurer to pay the supplements. The district court, with the court of appeals affirming, reasoned that the word "shall" created a contract between the state and the coroners and also created a mandatory obligation on the part of the state to pay the supplements. The state Supreme Court refused to hear the state's appeal.

The latest action in the suit has been the filing of a writ of mandamus by the coroners directed to the governor, the state treasurer, the Joint Legislative Committee on the Budget, the House Appropriations Committee and the Senate Finance Committee to appropriate the funds necessary to satisfy the judgment of the district court. The district court judge has ordered the plaintiffs to amend their petition to include all legislators, ruling that the named committees do not have the final say on appropriations.

Assuming the district court's ruling will stand, as it appears it will, the next question to be answered is: Can the court order the Legislature to appropriate the funds? The state, in its opposition to the writ, argues that the separation of powers prevents the judicial branch from ordering the state treasurer to pay the amounts due. The appropriation of monies is a legislative function, not a judicial function.

In other news, the primary election for all statewide offices and legislative offices was to be held on October 4, 2003. For many of the current members, those who are already re-elected by virtue of the fact that no one qualified against them and those who may be re-elected, this will be their last term. The constitution provides that a legislator may serve only three consecutive terms.

MARYLAND

Sherry Little

In addition to establishing standing, statutory and other legislative committees that are essentially permanent and ongo-

ing, the General Assembly periodically creates task forces, commissions and committees to study specific issues and concerns. Usually, these groups consist of legislative members and others appointed by the governor to represent appropriate interests in the public and private sectors. The groups generally function over a relatively short period of time and terminate when their purposes are fulfilled.

The Department of Legislative Services staffs many of these special groups as part of its responsibilities in its overall work for the General Assembly; some examples follow:

- The Joint Legislative Committee to Study and Make Recommendations about the State's Emergency Medical Response System is a reconstitution and expansion of an earlier study panel. Maryland's system, reflecting



the problems of trauma centers everywhere, faces growing financial difficulties and declining participation among physicians who are burdened by uncompensated care, insufficient Medicaid and managed care reimbursement, lost revenues and rising medical malpractice insurance premiums. A report is due by the end of this year with a final report December 1, 2004. As a stopgap measure, the General Assembly authorized, for two years beginning this past July, a \$2.50 annual surcharge on motor vehicle registrations to help defray the costs of uncompensated care and reimburse trauma centers for their costs in providing on-call physicians.

- The Task Force to Study Efficiency in Procurement is to consider a wide range of criteria, including outsourcing and privatization, to increase efficiency

and cost savings. The task force, slated to present a comprehensive report by the end of this year, is composed of legislators, other state officials and private sector individuals with expertise in information technology, construction, commodities, human or health care services, correctional services and engineering, architectural or other professional services.

- The Joint Nonprofit Health Service Plan Oversight Committee will be established to examine and evaluate the ability of nonprofit health service plans that carry the BlueCross BlueShield trademark to meet certain community health needs. The committee is one component of legislation enacted this year that responded to the intent of CareFirst BlueCross BlueShield, the state's largest nonprofit health service plan, to convert to a for-profit company and to be acquired by WellPoint Health Networks, Inc., and the subsequent ruling by the Maryland insurance commissioner that the proposed transaction was not in the public interest due to several disqualifying factors. The legislation reaffirmed the mission of nonprofit health service plans such as CareFirst to provide affordable and accessible health insurance in Maryland. It also revamps the board of directors and limits the annual compensation of the chairman and board members, enhances the investigative authority of the attorney general with respect to these nonprofit health service plans and provides for the insurance commissioner's oversight of executive compensation. In addition, CareFirst may not attempt another for-profit conversion within the next five years. The insurance commissioner and attorney general are required to determine whether any conduct identified in the commissioner's rejection of the CareFirst conversion violated the state's insurance law or another provision of federal or state law.
- The Study Commission on Public Funding of Campaigns in Maryland, created in 2002, was extended until June 2004 to continue the study of public funding of state legislative and statewide candidates for office. The commission requested additional time to explore the universe of policy initia-

tives related to public financing of campaigns and their implications on the state's campaign finance system. The commission must report its findings and recommendations by December 31, 2003.

- The Task Force to Study the Reorganization of the Department of Health and Mental Hygiene and the Task Force to Study State Retiree's Health Insurance Liabilities are new this interim, as is the Department of Natural Resources Special Funds Workgroup. The Task Force to Study Public School Facilities and the Task Force to Study Moving Overhead Utility Lines Underground are continuing from last interim.
- The Housing Article Review Committee, the Economic Development Article Review Committee and the Human Resources Article Review Committee were created as part of the practice related to the ongoing nonsubstantive statutory revision work of the department that began more than 30 years ago. Each proposed article review committee, appointed by the presiding officers of the General Assembly, is an independent, objective group of non-legislator attorneys selected for their expertise, and the committees review the revision work products that are developed by the Department of Legislative Services legal staff. When that review is complete, the revision is submitted as a bill to the General Assembly for passage as a new, revised article of law embracing the broad subject for which each article review committee is named.

MISSISSIPPI

Ted Booth

In the 2003 election year in Mississippi, all 122 House members and 52 Senators



are up for re-election. In the House, eight incumbents have been defeated in primaries. In the Senate, one incumbent has lost his seat. The general election will be held on November 4, 2003.

When the 2004 Legislature comes to town in January, it will face lower revenues than expected. Mississippi, like most other states, is suffering from lagging collections. At this time, the Legislative Budget Committee is conducting hearings regarding how funds should be allocated to state agencies for the next fiscal year. Their recommendations will be announced in early November.

MISSOURI

Russ Hembree

State budget difficulties, combined with the political differences between a Democratic governor and a Republican-dominated General Assembly, have resulted in the convening of the second special session of 2003. Called by the governor to provide more funding for education by closing corporate tax loopholes and amended to include certain nursing home employment issues, the special session began September 8 and ended September 12 with passage of only the nursing home bill.

Veto session began September 10, with override attempts made on several of the governor's 29 vetoes of regular session bills. Successful override motions were made on a bill to allow concealed weapons, a bill to require women to wait 24 hours before having an abortion after visiting a doctor and a bill that prohibits certain lawsuits by the state and political subdivisions against gun manufacturers and dealers.

The next regular session of the 92nd General Assembly is scheduled to convene on January 7, 2004.

NEW HAMPSHIRE

Paul W. Lindstrom

The New Hampshire General Court's Internet site has added live audio of Senate sessions to its menu. The site began carrying live audio of House sessions in 2001, and includes archives of Web

casts.

During the 2003 session, the legislature amended the New Hampshire consumer protection act to prohibit dormancy fees, latency fees, administrative fees and service charges that have the effect of reducing the value of a gift certificate.

A new statute enacted in 2003 addresses concerns about prerecorded political telephone messages by requiring that the caller provide identifying information in the message or through a live operator. The statute also prohibits delivery of prerecorded political telephone messages to people on any federal do not call list. Violators are subject to equitable relief, including an injunction, and to civil penalties and damages.

NEW JERSEY

Frank Parisi

On July 31, 2003, the New Jersey Supreme Court upheld the validity of the 2001 legislative redistricting plan by reversing an Appellate Court decision and reinstating the initial judgment of the Superior Court.

The issue in *McNeil v. Legislative Apportionment Commission of the State of New Jersey*, 177 N.J. 364 (2003), was whether an existing political boundary requirement in the New Jersey constitution could be validly enforced without violating the supremacy clause of the United States Constitution. The legislative redistricting plan, approved by a majority of the members of the Apportionment Commission in April 2001 and the basis for legislative elections held subsequently, divided the cities of Newark and Jersey City, the two largest in the State, into three legislative districts each. This had been the practice of mapmakers since New Jersey adopted a constitutional amendment in 1966 establishing a new method for conducting legislative redistricting. The plaintiffs, including two incumbent legislators, argued that the plan was in violation of Article IV, Section II, paragraph 3 of the state constitution, which provides that no municipality should be divided into more than two legislative districts. After the plan was invalidated by an Appellate Court on the grounds that it did violate the state con-

stitution, the Supreme Court granted the commission's petition for certification, stayed the Appellate Court's judgment and reversed.

In a split decision, the Court found that although the plan did violate the restriction in Article IV, Section II, paragraph 3 of the state constitution, the commission had acted correctly. "[T]he literal language of our State Constitution with respect to political boundaries for counties and the two largest municipalities has to be breached based on the Supremacy Clause" to comply with federal law. "The source of federal preemption lies not only in the federal constitutional mandate of one-person one-vote, but also in the VRA [Voting Rights Act], which is designed to protect and advance the opportunity of minorities for full participation in the electoral process and their opportunity to elect representatives of their choosing." The Superior Court "... correctly concluded that the New Jersey Constitution's municipal boundary requirement, as interpreted by this Court for more than a century, is not enforceable against Newark and Jersey City."



The "Original" Gerrymander

Furthermore, the Supreme Court held that to "... construe strictly the language of Article IV, Section 2, paragraph 3 would result in inequalities due to the packing of minorities into fewer districts. Packing, in turn, would dilute minorities' ability to elect representatives of their choice." The Court recognized that "...

the Commission divided Newark and Jersey City into three districts, as it has done in the past, in order to achieve the salutary objective of unpacking by permitting the minority voters not only to elect representatives in safe districts but also by creating coalition and influence districts."

A federal court reviewing the plan in May 2001 had ruled in *Page v. Bartels*, 144 F.Supp. 2d 346 (D.N.J. 2001), that the commission's plan establishing three districts in both Jersey City and Newark did not involve vote dilution. In June 2001 in *Robertson v. Bartels*, 148 F. Supp. 2d 443 (D.N.J. 2001), the federal court found that the commission's plan satisfied all applicable federal and state criteria for legislative redistricting.

PENNSYLVANIA

Stacey Connors Mosca

Pennsylvania's 2003-04 budget is still not resolved. Although the legislature passed the budget in March, Governor Rendell exercised his line-item veto authority to eliminate or reduce certain appropriations in the bill. These issues still had not been resolved as the legislature returned to session in September.

A comprehensive re-write of Pennsylvania's driving under the influence law is expected to be considered by the General Assembly this fall. Of primary importance is legislation aimed at reducing drunk driving fatalities and preventing the loss of federal transportation funding by reducing the B.A.C. standard from .10 to .08. Pennsylvania would lose 2 percent of its federal transportation funds if it does not adopt the .08 BAC limit by October 1, 2003. The funding cutback would increase to 8 percent if the .08 standard is not adopted by 2007. In addition, a substantive re-write of the DUI statutes has been proposed. This legislation would create a new three-tiered system of penalties for violators based upon their B.A.C. at the time of arrest. The proposal also redraws certain requirements for evaluation and treatment designed to provide more timely and direct avenues for treatment to begin on drivers who are diagnosed with a real addiction problem, and clarifies that insurers must provide coverage in compliance with current state mandates on treatment. The

legislation proposed also requires that repeat offenders get an ignition interlock restricted license upon completion of their regular license suspension. Currently, an offender was able to "opt out" of the ignition interlock requirement by serving an additional year of regular license suspension, which is impermissible under the federal statute.

WEST VIRGINIA

Mark McOwen

The Legislature's regular session adjourned March 16. Governor Wise convened an extraordinary session in June, primarily to address critical fiscal and other issues arising from the state's workers' compensation system. After adjournment, the session concluded July 1 when consensus was reached on legislation addressing those issues. Provisions of the bill (SB2013) include revisions of the structure of the workers' compensation administrative agencies; revised and new provisions for the administration of the rights, duties and responsibilities of employers, employees and the providers of ancillary services; changes in benefits available to injured employees; fiscal measures providing revenues to address workers' compensation fund liabilities; and revised and new provisions for administrative and judicial review of contested claims.

During the extraordinary session, the Legislature also amended statutes that remain the subject of litigation. Following the amendment of the statutes authorizing the issuance of \$3.9 billion in general revenue bonds to reduce an existing unfunded liability in state pensions funds, the state treasurer and the auditor have filed a legal action challenging the issuance as prohibited by the state constitution without the ratification of the voters of the state. And in a separate case, following the amendment of the statutes authorizing the issuance of bonds secured by certain "video lottery" revenues to provide economic development grants, actions have been filed challenging not only the legality of the grant distributions but the constitutionality of the statutes authorizing the "video lottery" activities as well. Both cases are currently pending judicial decision. Finally, in an unrelated case, a motion is still pending to recon-

sider a circuit court's decision in the state's education finance case that approved the state's approach to funding its education system.

The Legislature continues to meet monthly for study of various topics during the interim period between regular sessions. Each year, the Legislature schedules at least one of its monthly interim meetings in a venue outside the state capital. This year's out-of-town meetings were held during July in Parkersburg, West Virginia, and during September in Lewisburg. The remaining interim meetings will be held here in Charleston.

The second regular session of the 76th Legislature will convene January 14, 2004. To monitor legislative activity, you may visit the West Virginia Legislature's Web site at <http://www.legis.state.wv.us/>. For toll-free access, dial 1-877-56LEGIS.

WYOMING

Karen Ashcraft Byrne

The summer for Wyoming's Legislative Service Office has been busy, with research, committee meetings held in Cheyenne and around the state, agency rule reviews and bill drafting. We have already received more than 100 bill requests. The 2004 session is a budget session that will last no longer than 23 days unless Governor Freudenthal declares a special session. It starts February 7, 2004.

Our office hired two new attorneys, Gerald Laska and Kristin Siegel.

Information on Wyoming's interim work and the session can be found on the Wyoming legislative Web site at <http://legisweb.state.wy.us/>. When bills are approved by sponsors for pre-filing they will

be on our Web site also.

Our office recently finalized the paperwork to trademark a new official logo that is also shown on the Web site. Management Council adopted a design that incorporates the Wyoming Capitol, the state flower (Indian Paintbrush), and a rope filigree in a blue, gold and red background, with a gold banner at the bottom of the design. Development of the logo is



part of the ongoing efforts of the Wyoming Legislature to encourage the involvement of Wyoming citizens in the legislative process. The purpose of adopting a logo for the Legislature was to promote the legislative branch of government and to help identify the legislative branch as a unique entity within state government. We hope the logo will help Wyoming citizens identify documents that are produced by the legislative branch of government and aid in civic education efforts to explain the legislative process to citizens of Wyoming.



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