



THE LEGISLATIVE LAWYER

“To Better Serve Their Legislatures”

Volume XVII,
Issue 1
Winter 2003

NCCUSL Gears Up For Legislative Action On Uniform Acts In 2003

By John M. McCabe

Legislative Director and Legal Counsel, NCCUSL

NCSL

Available on the
Web at:

[http://www.ncsl.org/
programs/legman/
legalsrv/lsshhome.htm](http://www.ncsl.org/programs/legman/legalsrv/lsshhome.htm)

To submit an article for
publication, please
contact the editor.

E-mail:

thomas.morris
@state.co.us

Telephone:

(303) 866-4218

Mail:

State Capitol, Room 091
Denver, CO 80203

INSIDE THIS ISSUE:

Uniform Acts
in 2003..... 1

NCSL's Standing
Committees..... 4

Shall or Must?..... 5

State News..... 7

Since 1892, the National Conference of Commissioners on Uniform State Laws (Conference) has promoted the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable and practical. However, the Conference can only propose; no uniform law is effective until a state legislature adopts it.

The Conference brings together more than 300 top legal minds in the country to develop nonpartisan uniform state laws. Commissioners are appointed in every state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands, either by the governor or the legislature. In addition, the principal legal officer of the bill drafting agency for each jurisdiction is an associate member of the Conference. All commissioners must be lawyers who are qualified to practice law. Although some serve as state legislators, most are private practitioners, judges, law professors or lawyers engaged in other pursuits. Commissioners donate their time and expertise as a public service and receive no salaries or fees for their work with the Conference.

Commissioners are deeply

committed to improving the law. Over the years, they have kept commercial law current with the times, worked continuously to better family law, resolved conflicts between the laws of the states, helped fend off federal preemption and championed the case of state government and the state legislatures. Since the Conference first convened 110 years ago, it

NCCUSL has promoted the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable and practical.

has drafted more than 250 uniform laws.

Family Law Legislative
Action Forecast for 2003

During the 2001-2002 legislative year, there were a number of encouraging legislative developments. The *Uniform Child Custody Jurisdiction and Enforcement Act* (UCCJEA) recorded five new enactments, bringing the total number of state adoptions to

31. This act revises the 1968 Uniform Child Custody Jurisdiction Act, which was adopted in every state, and brings it into compliance with the federal Parental Kidnapping Prevention Act. UCJEA limits child custody jurisdiction to one state, avoiding competing orders, and provides enforcement provisions for child custody orders. According to preliminary legislative reports from NCCUSL's state liaisons, introductions are expected in 10 additional states and the U.S. Virgin Islands during this legislative year.

The UCCJEA is only one of several uniform family law acts that will be widely introduced this year. The National Conference has just launched a Family Law Initiative that will focus legislative attention on several other family law acts in addition to the UCCJEA—the *Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act* (UIED-VPOA), the *Uniform Interstate Family Support Act* (UIFSA) and the *Uniform Parentage Act* (UPA).

From Alabama to Wyoming, some 20 introductions are anticipated for the UIED-VPOA, which was promul-

(Continued on page 2)

gated in 2000 and adopted in six states before it was amended this year. The act is a full faith and credit statute that empowers enacting states to register and enforce out-of-state domestic violence and anti-stalking protection orders. It establishes uniform procedures that enable courts to recognize and enforce valid domestic violence protection orders issued in other jurisdictions. Although numerous states have enacted legislation since the 1996 federal Violence Against Women Act (VAWA) underscored the need for enforcement of protection orders, these statutes vary greatly, both in the method and the extent to which the enforcement of domestic violence orders actually occurs. This has left interstate enforcement in disarray. The uniform act addresses these concerns and provides the basis for effective, consistent interstate enforcement.

The 1996 version of the *Uniform Interstate Family Support Act* was adopted in every state, the District of Columbia and the U.S. Virgin Islands. UIFSA prevents enforcement of child support orders from more than one state. Only one state at a time may issue or modify a child support order. Amendments that clarify many of the provisions of the act and increase its usefulness were added in 2001 and enacted in California, Washington and West Virginia. Because federal law required that each state adopt the 1996 version of UIFSA to receive federal funds, some states are concerned that enactment of the 2001 amendments could jeopardize a state's federal funding. However, an action transmittal from the federal Office of Child Support Enforcement (OCSE-AT-02-02) has allayed these fears, indicating the availability of an expedited waiver procedure that may be granted with respect to a state's planned adoption of UIFSA 2001. NCCUSL expects at least 14 states to introduce the UIFSA amendments this year; another 10 plan to introduce it if the federal law is updated. Legislative staff can obtain a copy of the OCSE Action Transmittal from the National Conference office in Chicago.

The fourth act included in the Family Law Initiative, the *Uniform Parentage Act* (2000), has been enacted in two states and is in place for introduction in

seven other states. The act, a revision of the Uniform Parentage Act of 1973, modernizes the law for determining the parents of children. Eight states have indicated the intent to introduce the act in 2003.

New Trust Code Project

The Conference's Family Law Initiative was modeled after the Uniform Trust Code Project, a multi-year effort begun in 2001 to enact the 2000 *Uniform Trust Code* nationwide. The project aims to provide legislators, trust and estate practitioners and the public with opportunities to learn about the Uniform Trust Code—the first codification of the law of trusts. In addition to a video, a newsletter and other updates and regional seminars around the country, a new Web site, www.UTCproject.org, has additional information about the UTC and a message board to assist those studying the code. The UTC was enacted in Kansas in 2002. With more than 30 states now actively studying the code, the Conference anticipates active legislative years in 2003 and 2004, with some 15 introductions planned for the current session.

Broad enactment of the *Uniform Athlete Agents Act* means that states are well on their way to stopping unscrupulous sports agents and making life significantly easier for legitimate ones.

Sports Business Focus

A very different law moving through the states, with 20 legislative introductions anticipated for 2003, is the *Uniform Athlete Agents Act* (UAAA), drafted by NCCUSL in 2000 with the support of the National Collegiate Athletic Association (NCAA). The act has been adopted in 16 jurisdictions; five states enacted UAAA in 2002. The Uniform Athlete Agents Act is designed to protect student-athletes and educational institutions by regulating the way sports agents deal with students in an initial agency agreement. It was drafted in response to a spate of scandals in the mid-

1990s, with headlines about college athletes accepting illegal inducements from unprincipled agents in violation of NCAA rules. Although almost half the states had laws pertaining to agents before the UAAA was promulgated, they varied greatly from state to state, and enforcement was spotty. Broad enactment of the UAAA means that states are well on their way to stopping unscrupulous sports agents and making life significantly easier for legitimate ones.

Alternate Dispute Resolution Acts

Substantial legislative action also is anticipated for two uniform acts dealing with alternate dispute resolution. The Conference anticipates some 20 introductions each for the 2000 *Uniform Arbitration Act* and the 2001 *Uniform Mediation Act*. The Uniform Arbitration Act revises an early act of 1956 and reflects new developments in arbitration law. The Uniform Mediation Act provides rules on the issues of confidentiality and privileges in mediation. It establishes a privilege of confidentiality for mediators and participants that prohibits what is said during mediation from being used in later legal proceedings.

Four New Uniform Acts Approved

The culmination of the work of the Conference takes place at its annual meeting each summer, when the Conference convenes as a committee of the whole. At its 2002 annual meeting last summer, four new uniform acts, as well as amendments to current uniform acts, were approved by the Conference. A uniform act must be considered at two annual meetings by all commissioners before it can be approved. After receiving the Conference's seal of approval, a uniform act is officially promulgated for consideration by the states, and legislatures are urged to adopt it.

An important new *Uniform Securities Act* (USA) will protect the public interest and should have the beneficial effect of making state regulation of the securities business more effective, thereby increasing investor confidence. The act encourages maximum cooperation among the states and coordination with federal regulators. State securities administrators protect investors by regulat-

ing securities sold within their states; by regulating those who sell them; and by investigating, sanctioning and prosecuting individuals and firms that violate the law. This function is crucial to promote the integrity of the financial markets and the formation of capital.

The Uniform Securities Act was originally promulgated by the Conference in 1956 and then substantially revised in 1985; most states have adopted one or the other version. The enactment of the federal National Securities Markets Improvement Act (NSMIA) in 1996 preempted some of the regulatory authority of the states. This fact, as well as the need to address recent advances in the technology of securities regulation and the increasingly interstate and international aspects of security transactions, prompted the Conference to draft the new act. The USA is designed to be consistent with current federal law. Although NSMIA forbids states from regulating certain aspects of the securities registration and reporting process, it does not diminish state authority to investigate and bring enforcement actions with respect to intrastate securities transactions.

The USA prohibits fraud in the sale of securities and imposes registration requirements for certain broker-dealers, investment advisors and their agents. It also imposes registration requirements for securities to be sold within a state and provides various sanctions as well as civil and criminal liability. The act also contains provisions on administration and judicial review and prohibits administrators, officers and employees from using information that is not public for their personal benefit.

The *Uniform Child Witness Testimony by Alternative Methods Act* deals with the use of alternative methods for taking testimony of child witnesses. Although states have used alternative methods for many years (the most common being the use of closed-circuit television testimony and videotaped depositions), state statutes governing the use of alternative methods vary greatly. They differ in the types of methods that may be used and in their procedural rules, including which factors may be considered by a court before allowing the use of alterna-

tive methods and who is authorized to be present with the child witness. In addition, most existing state statutes apply only in criminal proceedings that involve physical or sexual abuse.

The Conference drafted and promulgated this act to bring uniformity to this important area of the law. The uniform act provides procedures in the methods of taking the testimony of children in both criminal and non-criminal proceedings, permitting a child to testify outside the courtroom and the immediate presence of a criminal defendant. The uni-

The modern idea of tort responsibility has evolved slowly. Early common law had no tort apportionment. The inherent unfairness of this system caused many states to look for alternatives. In response, the Conference promulgated the Uniform Comparative Fault Act in 1977.

form act is broader than most of the existing state statutes by including both criminal and non-criminal proceedings. The act also provides the standards for a court to determine when it is appropriate to take child testimony by alternative methods. In a criminal proceeding, the court must find by clear and convincing evidence that the child witness will suffer serious emotional trauma, thus impairing the child's ability to communicate, if required to testify inside the hearing room or in front of the criminal defendant. In a non-criminal proceeding, the court must find by a preponderance of the evidence that an alternative method is needed to protect the best interests of the child.

If a court finds that it is necessary to use an alternative method, the court must list certain conditions, including the method by which the testimony is to be taken and a list of those allowed to be present during the testimony. The act also allows for cross-examination of child witnesses,

preserving the right of defendants in criminal proceedings, while at the same time providing for a relaxation of the standard in non-criminal proceedings, such as custody and visitation proceedings.

Uniform Acts Regarding Torts

The *Uniform Apportionment of Tort Responsibility Act* (UATRA) is the Conference's newest act dealing with the issue of comparative fault and tort responsibility. The UATRA governs the apportionment of tort responsibility in typical cases such as bodily injury, wrongful death and property damage cases.

The modern idea of tort responsibility has evolved slowly. Early common law had no tort apportionment, since the defense of contributory negligence—where the injured person's own conduct contributed at least in part to the injury—was a complete bar to recovering any damages. The plaintiff either recovered all of his or her damages, or recovered nothing.

The inherent unfairness of this system caused many states to look for alternatives. In the 1960s, most states abandoned the system of contributory negligence as a complete bar and proceeded to adopt some type of comparative fault system in which all parties, the injured included, were apportioned a percentage of the fault. In response to these changes, the Conference promulgated the Uniform Comparative Fault Act in 1977, which was a *pure* comparative fault system. Each party to the action, including the injured person, is assigned fault in accordance with his or her contribution to an injury. Since 1977, however, most states have moved away from the pure comparative fault system.

Now, 25 years later, the Conference has again responded to the current trends of the law by promulgating the UATRA, which uses a *modified* comparative fault system. Under the modified system in the new act, anyone seeking damages must show that his or her own contribution to the injury or harm is less than the combined responsibility of all other people (total responsibility should always equal 100 percent). If a claimant's share of the fault exceeds the combined fault

of the defendants, a claimant would be completely barred from recovering any damages.

The pure or modified comparative fault systems both require careful consideration of joint and several liability issues. The doctrine of joint and several liability allows injured plaintiffs to recover all their damages from any one or any combination of defendants, no matter how the fault is divided. The UATRA, except for specified exceptions, provides for several liability as a general rule.

Uniform Nonjudicial Foreclosure Act

The *Uniform Nonjudicial Foreclosure Act* (UNFA) provides procedures for mortgage foreclosures without judicial involvement. The basic premise of the UNFA is that nonjudicial foreclosures can be both fair to borrowers and efficient from the viewpoint of lenders, and hence is a superior form of foreclosure. In most cases, judicial involvement in foreclosure is unnecessary, simply because there is no dispute between the creditor and debtor.

The UNFA provides for three methods of foreclosure. The first is the conventional method by means of an auction sale. With this method, both evaluation

and liquidation are combined. The second method is foreclosure by negotiated sale, conducted in much the same way as other real property sales, with the property listed by the creditor with a broker. The third method is foreclosure by appraisal. This method does not liquidate the property, but leaves it in the hands of the creditor, who has the burden of liquidating it after the foreclosure is completed.

Information about the enactment status of Uniform Acts and legislative activities, updated regularly, can be found at the NCCUSL Web site, www.nccusl.org.

Electronic copies of all drafts of current uniform acts, including final approved drafts, can be downloaded from the NCCUSL Web site.

You also can call the Chicago NCCUSL Office at (312)-915-0195 to obtain hard copies of final approved uniform acts.

With each of the three foreclosure methods, sufficient protections have been included to assure the legitimate interests of all debtors and creditors. Whichever method is chosen by the creditor, the foreclosure cannot occur less than 90 days after giving the original notice of foreclosure. Under the act, the creditor must send out two notices, the first a notice of default, and the second a notice of foreclosure. Debtors are given 30 days to pay off their debts before a notice of foreclosure is given to them. Although foreclosures under this Act are expected to proceed without judicial involvement, a party has the right to seek and obtain the intervention of a court.

Along with these four new acts, the Conference also approved amendments to other current uniform acts, including amendments to key articles of the *Uniform Commercial Code*, the *Uniform Computer Information Transactions Act*, the *Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act*, the *Uniform Probate Code*, and the *Uniform Disclaimers of Property Interests Act*.



NCSL's New Standing Committees Create Opportunities for Staff

By Steve Miller, Wisconsin

The recent restructuring of NCSL's committee organization will provide new opportunities for legislative staff participation. Last summer, the conference merged the Assembly on State Issues (ASI) and Assembly on Federal Issues (AFI) into the Standing Committees of NCSL. The 15 standing committees address the major policy areas that legislatures face.

Formerly, the AFI developed policy for NCSL, underlying NCSL's congressional lobbying agenda. The ASI served primarily as a mechanism for information exchange between states and for training. Both AFI and ASI were com-

prised of several committees and taskforces, with quite a bit of duplication in subject matter. Staff participated only in the former ASI, not in the AFI. The merger removes this artificial separation between federal and state issues.

Typical work products of the committees will include books, Web pages, sessions at the annual meeting, PowerPoint presentation files and a variety of other outputs, including recommendations for NCSL policy statements. Such policy statements, once adopted at the annual meeting, become the basis for NCSL's congressional lobbying program. Under NCSL rules, staff may participate in

every phase of committee work except voting on policy. The reorganization recognizes staff's important role in interpreting and implementing federal policy.

The new committee structure serves as a complement to the staff section structure. Although staff sections are organized by professional discipline—such as legal services (LSSS), budget analysis, clerks and so forth—the standing committees address policy areas—such as transportation, education, banking or energy. Each of the 15 standing committees addresses matters of interest to some members of the Legal Services Staff Section.

The reorganization will strengthen NCSL in a number of ways. With fewer overall committees, NCSL's resources can focus on the primary issues facing legislatures. Under the new structure, legislative staff may contribute to the issues agenda. Also, in the simplified structure, better coordination will exist between NCSL's information exchange function and training activities with the policy agenda.

By time this issue goes to press, a series of letters will have been sent to new legislative leaders in every state, and to agency staff directors to solicit appointments to the various committees. To become involved, review the jurisdiction of the various committees for subjects in your interest area. Let your legislative leaders or staff directors know of your interest. Travel is not required for participation. A great deal is accomplished by telephone conference and e-mail.

Of course, if you can travel, you should consider attending the next meeting of the standing committees in Boston, April 25 to 27. Some of the sessions planned for Boston include privacy and e-mail; wetlands, watersheds and mercury pollution; emergency preparedness and small-pox vaccinations; education of poll

workers; and Internet voting. For a full description of the sessions in Boston, see NCSL's Web site, <http://www.ncsl.org/>. A Web page that fully describes the Boston meeting will be posted soon on that site.



NCSL's NEW STANDING COMMITTEES

Agriculture and Rural Development
 Budgets and Revenue
 Communications, Technology and Interstate Commerce
 Economic Development, Trade and Cultural Affairs
 Education
 Energy and Electric Utilities
 Environment and Natural Resources
 Financial Services
 Health
 Human Services and Welfare
 Labor and Workforce Development
 Law and Criminal Justice
 Legislative Effectiveness and State Government
 Redistricting and Elections
 Transportation

Shall or Must?

By Jack Stark

One of the more interesting and, although it does not at first seem so, one of the more important recent developments in legislative drafting is the controversy about whether drafters should stop writing "shall" and instead write "must." Indeed, some have proposed that all the "shalls" in certain states' statutes be replaced with "musts." Pressure from non-drafters has brought this issue to the fore. In response, drafters have considered the implications of various courses of action, and some drafters have thought more deeply not only about those two verbal auxiliaries but also about the functions and meaning of expressions that include those two words.

The importance of this controversy arises from the fact that nearly all statutes perform one or more of only five functions. With a few exceptions, statutes forbid, authorize or require particular kinds of behavior, state conditions or consequences related to one of those behavioral directives or perform more than one of those five functions. Statements of conditions describe the test that deter-

mines whether the related behavioral directive applies, and statements of consequences describe the results of following, or failing to follow, the related behavioral directive. Thus, the controversy about "shall" and "must" is about the proper way to state one of the three behavioral directives, a problem that arises in regard to important decisions about phrasing that drafters frequently make and to thousands of words in the statutes.

The advocates of plain language have applied the pressure to replace "shall" with "must" in the statutes. Drafters should long ago have rejected that movement's attempts to influence the way that they practice their difficult art. Those advocates fail to recognize that different kinds of writing exist. One does not write a telephone book the same way that one writes a love letter, a sonnet the same way that one writes a memo and, most pertinent to this debate, a statute the same way that one writes anything else. That failure leads inexorably to another error: believing that the simplistic and mechanical application of a few

rules will invariably result in good writing. They justify their attempt to persuade drafters to use their principles by asserting that ordinary people (those who are not specialists in the law) should be able easily to read statutes.

However, as Brian Hunt points out, the audience for statutes consists not of ordinary people but of lawyers, judges and the people who administer the statutes. He further asserts that ordinary people cannot best be served by trying to make the statutes clearer (easier for ordinary persons to read). Rather, Hunt contends, ordinary readers can best learn the law by means of carefully written explanatory material, such as brochures and forms, and by consulting experts in the law. Also, even if plain language principles could make statutes clearer, reading statutes would not inform ordinary people of the law that a statute expresses, because those persons would not know the related statutes, constitutional provisions, court cases and rules. That is, trying to communicate the law to ordinary people by making statutes clear is a fool's errand.

Finally, and perhaps most important, making statutes clear will almost certainly make them inaccurate, that is, make them convey unintended behavioral directives rather than the directives that they are supposed to convey. One can see sufficient evidence that this flaw occurs almost inevitably by examining some failed attempts to rewrite statutes and regulations in plain language. Those failures occur because the tactics that drafters use to write legislation accurately (dealing also with related statutes, using statutory units effectively, meticulously connecting behavioral directives to conditions and consequences, etc.) differ almost totally from the tactics that are used to draft legislation clearly (write short sentences, use ordinary language, etc.) Accuracy is far more important than clarity, because people who request drafts expect that the behavior they wish to induce will actually occur. An accurate statute, no matter how difficult it is for ordinary persons to read, is a success. An inaccurate statute, no matter how easy it is for ordinary people to read, is a disaster.

In addition to attacking the theoretical underpinnings of plain language and the failure of its practitioners to write statutes that are both accurate and clear, one can question those practitioners' empirical assumptions about "shall" and "may." They write little, if anything, about the way that one determines the speech patterns in ordinary language. That forces people who wish to identify the word or phrase that ordinary people would use to express a particular idea to rely on their own experience listening to ordinary people speak. I admit that I rarely have heard "shall." However, I also have not heard "must" very often. I have often heard persons who wish to utter a requirement either soften it (e.g., "I will need that memo by noon") or harden it (e.g., "Clean your room!").

Moreover, switching to "must" flies in the face of convention. For decades using "shall" as the auxiliary in verb phrases was the conventional way to write a statute that required a particular form of behavior. That convention is reflected in statutes. For example, the 1988 (before the plain language supporters began to make headway there) Minnesota statutes contained 86,847 in-

stances of "shall" and only 6,042 instances of "must." In contrast, using "must" is conventional in Britain, Canada and Australia, and drafters in those countries ought to follow that convention. Legislative drafting is one of the more highly conventional forms of writing, deriving conventions from statutes, constitutions and drafting manuals. Drafters ought not flout conventions on a whim.

The most serious consequence of flouting conventions is eliciting an unwanted response from the audience for statutes, especially from judges. For example, a Minnesota judge who, in the early 1990s, after reading hundreds of instances of "shall" in the statutes, began to see "must" where he or she would expect "shall" had a problem of interpretation. Logic suggests that if two words appear in similar contexts, and especially if one seems to be supplanting the other, a new meaning for the unexpected word ought to be inferred. To put in the vernacular the most reasonable response that a judge could make to that state of affairs, "shall" states a requirement more strongly than does "must." Contrast "thou shall honor thy father and thy mother" to "you must remember this: a kiss is just a kiss." To describe the same response in judicial jargon, "shall" is mandatory and "must" is directory. A judge who thought along those very rational lines would make many interpretations that do not convey the drafter's meaning.

Some drafters have adhered to a moderate position on this issue, eschewing both the unvarying use of "shall" and the unvarying use of "must." They use "shall" to state almost all requirements and use "must" to state conditions and to address requirements to things. Examples of the latter two options are "there must a quorum" and "a fee must be paid." However, in the first of those examples the "condition" is not stated as such because it is not connected to a behavioral directive. A revision that makes the connection would also eliminate "must": "if a quorum is present, the committee may conduct business." The second example has the same problem in addition to the problem of issuing a behavioral directive to an abstraction, an entity that is incapable of responding to

it. That example should be rewritten thus: "if the applicant pays the fee, the clerk shall issue the license." In other words, using "must" in those situations does not make sense. The best course of action is to avoid "must" altogether.

Faced with the possibility or actuality of a switch from using "shall" to using "must," what can a drafting agency do? In all cases, it should resist accepting a mandate to use "must." If it has both words in its statutes, it can add a statute proclaiming that in the statutes the two words have identical meanings. That will make obvious the silliness of performing the conversion, but it will also prevent some unwanted interpretations. Then, the agency should insist on using "shall" exclusively and "must" never. The next move depends on the number of instances of the two words in the statutes. If there are only a few instances of "must," it would be worth having a bill enacted that would replace them. A mass replacement to "shall" will not work. The two examples above indicate that that tactic will result in statutes that have the correct verbal auxiliary but are otherwise flawed. Rather, drafters need to examine each instance of "must." If there are many such instances, replacement becomes an onerous task that might not be worth the time and trouble.

The capitulation by some agencies to the Plain Language School on this point has two unfortunate results. One is that many statutes now are susceptible to an incorrect interpretation. The other is that any capitulation to that school is a precedent for further capitulations. The next one might be something as ludicrous as a limit on the number of words that can be put in a sentence. The only benefits that occur because of this pressure are the opportunity to resist the plain language zealots and the opportunity that the possibility or actuality of switching from "shall" to "must" and the necessity of devising a response either to the pressure to do so or the results of having done so force drafters to think more incisively about their craft. The problems outweigh the benefits because there are many other—and better—ways to embark on the task of more incisively understanding legislative drafting.



STATE NEWS



COLORADO

Debbie Haskins

We have completed our new member orientation program for newly elected legislators. Once again, our orientation program featured mock committee and mock floor sessions and was well-received by our new members.

Like many states, we are experiencing budget difficulties. We have had to cut 4% from the current budget and expect to take another 6% cut. One effect is that you won't see many Colorado staff at NCSL events this year, since our travel budget has been cut.

Our office has continued to develop an in-house CLE program of courses presented by our staff. Some of the courses have included ethics, the initiative process in Colorado, small claims court, home rule, Medicaid spending, HIPAA rules, and updates on U.S. and Colorado supreme court cases. We usually get 15 to 18 hours of credit each year, which helps since we have a 45-hour credit requirement for attorneys every three years. We also have produced general training courses for all staff on topics such as writing basics, time management and delegation of work.

We also have implemented the use of periodic e-mails to staff that contain a tip or reminder of some work aspect. These are sent out to educate staff about some particular point or remind them about some task that we may only perform once a year. We send out a "tip of the week" on things like bill deadlines, how to handle duplicate bill requests, protocol on delivering a bill to the floor and how to draft a cash fund section. We recruited staff to write tips on different topics. We also have an "issue of the week" program where we write a description of potential rule review issues that someone on staff has found with a rule adopted by a state agency. In our rule review program, we review rules adopted by state agencies

to see if the agency has lived within its statutory authority. This issue of the week program was implemented to help provide continuing education for our staff about what constitutes rule review issues. We archive the tips on our home page so that staff e-mail storage is not cluttered and future access is available.

Mona Heustis, a long-term staff member of the Office of Legislative Legal Services and our office manager, has been selected to be the Secretary of the Senate. Mona is a graduate of the Legislative Staff Management Institute. Although we will miss Mona, we are very excited for her as she assumes her new position with the Colorado Senate. Congratulations, Mona!

DELAWARE

Rich Dillard

The Delaware legislature has been out since June 30, but one of 2002's more controversial pieces of legislation became law just before Thanksgiving (most bills become law immediately upon signature of the governor). Delaware's almost total ban on smoking in public places is touted as being on par with an earlier ban in California. Some legislators already are calling for a revisiting of the issue when the 142nd General Assembly convenes in January.

On the election front, a House minority caucus attorney lost her job by becoming a member of the House minority caucus. Melanie George won an open seat created by the redistricting of the legislature this year. A House majority caucus attorney was elected to be the Sussex County Recorder of Deeds. John Brady had been the elected Sussex County Register in Chancery, but that elected position had been replaced by an appointed one as of this year's elections. Another House majority attorney was re-elected as a Levy Court

(County Council) Commissioner.

FLORIDA

Edith Elizabeth Pollitz

The result of the 2002 elections in Florida is that both houses of the Legislature remain in Republican control. Republican Governor Jeb Bush was re-elected for a second term. Nine constitutional amendments were adopted, some of which were initiated by initiative petition. Florida does not have a mechanism for adoption of legislation by initiative. This sometimes results in some unusual additions to the state constitution, such as the animal cruelty provision (Amendment No. 10) that limits specified confinement of pregnant pigs. This amendment provides for criminal penalties for violation and is self-executing, unlike many constitutional amendments that require legislative action to execute constitutional provisions. After the School Code was completely overhauled and renumbered last year, Amendment no. 11 passed, requiring a statewide governing board to manage the State University System (something akin to the old Board of Regents that was scrapped). The Legislature is required to "make adequate provision to ensure that, by the beginning of the 2010 school year," school class sizes are reduced per specifications in Amendment No. 9. Voters also approved voluntary universal prekindergarten education.

The newly constituted Legislature met in its organizational session on November 19. Both houses are updating information systems. The House is using Word-based document production (using Lawmaker for drafting) with the hope of a paperless process, and the Senate in the midst of a major technology project.

IDAHO

Katharine Gerrity

During the first week in December, the 57th Idaho Legislature convened for its new member orientation and organizational session in preparation for the 2003 session, which began on January 6. Following conclusion of the 2002 legislative session, various committees and task forces met during the interim to continue their work. Some highlights include the following.

The Electronic Commerce Committee wrapped up its term with a recommendation that any future legislation involving e-commerce or other electronic technology be referred to the respective commerce and human resources standing committees. The committee also identified topics that warrant additional study, including LATA boundary lines, rural tax initiatives, broadband infrastructure development and accessibility, privacy issues and siting concerns related to wireless towers.

The Natural Resources Interim Committee continued to monitor various state and federal cases, particularly those affecting water in the state of Idaho during what has been an extensive period of drought. Other issues of major concern to this committee included the continuing Snake River Basin Adjudication, conjunctive management efforts between various water users in the state, the problem of private and public illegal ground water use and assorted ESA issues.

The Electric Utility Restructuring Interim Committee continued with its consideration of alternative energy sources and the potential for a state electricity transmission authority.

Idaho's Health Care Task Force considered various reasons for rapidly rising costs of health insurance. The task force also addressed citizen complaints of insurance charges for emergency health care services provided by out-of-network physicians and a proposal to extend coverage of the Children's Health Insurance Program (CHIP) by providing "access cards" to CHIP en-

rollees. The access cards would be used in the same way as debit cards, and enrollees would be able to use the cards to purchase health insurance coverage on the private market.

During meetings of the Educational Achievement Standards Task Force, the Idaho Board of Education reported on sources of revenue and expenditures relating to the development and implementation of educational achievement standards in the state. The process of developing and implementing standards, and creating assessments to test student progress, is recognized as a series of progressive steps in a continuing process.



Finally, Idaho's Legislative Council named a new task force to conduct a study of campaign financing for judicial elections. The group includes ex-officio members from the Idaho State Bar, the League of Women Voters, the Secretary of State's Office and the Idaho Judicial Council. The members also received input from a resource panel of judges.

KANSAS

Norman Furse

Interim studies are concluding in preparation for the 2003 legislative session. Subjects studied by legislative committees this interim include the legal necessity of extending the tax credits for property taxes timely paid on commercial and industrial machinery and equipment to railroad property; regulation of "payday" loans and entities that make such loans; review of group health insurance premium increases; a

study of the "drug court" concept and alternative sanctions for drug offenders; licensing and regulation of private security guards; the rights of a natural father in an adoption situation; terrorism and terroristic activity; multi-dwelling unit issues related to cable communications; school district budget forms and budget reporting practices; and the restoration, renovation and use of the Capitol and grounds. The 2003 Kansas legislative session began Jan. 13, 2003.

KENTUCKY

Ann Zimmer

As reported in the last issue, the Kentucky General Assembly met twice in 2002, first in regular and thereafter in special session, but could not agree upon a budget for the 2002-2004 fiscal biennium. Before adjourning each session, the House and Senate both passed versions of a budget that were similar, except for a provision funding partial public financing of the 2003 gubernatorial election, which the House supported and the Senate opposed.

The General Assembly will meet again in regular session in 2003. This will be only the second annual session held in an odd-numbered year since the passage of a constitutional amendment in 2000 authorizing annual sessions to be held in odd-numbered as well as even-numbered years. Before 2000, the General Assembly held only a 10-day "organizational" session in odd-numbered years to elect legislative leaders, adopt rules of procedure and organize committees. Now, the General Assembly meets every year beginning on the first Tuesday after the first Monday in January. In even-numbered years, the session is restricted to sixty legislative days and may not extend beyond April 15. In odd-numbered years, the regular session begins with the organizational session, is restricted to 30 days and may not extend beyond March 30.

In the 2003 regular session, it appears that the General Assembly will again address the question of the budget, and

that the House will compromise by agreeing to delete public financing for gubernatorial elections. However, passage of a budget may face an additional hurdle because of the more stringent voting requirements for revenue bills presented in odd-numbered year sessions. Bills raising revenue or appropriating funds need a three-fifths vote of the membership of both houses in sessions held in odd-numbered years, but only a 51% majority in those held in even-numbered years.

There are, moreover, recent estimates of a shortage in expected state revenues of \$145 million for 2003 and \$365 million for 2004.

As we also reported in the fall, when the end of the 2001-2002 fiscal year approached with no budget in place, the governor issued an executive order, declaring that "a state of emergency exists in the Commonwealth" that poses a "serious imminent risk of harm" to the administration of justice and the protection of public health and safety. In conjunction with the emergency order, the governor implemented a "spending plan" for the 2002-2003 fiscal year to provide for the continued financing of state government. The governor's spending plan incorporated those provisions of the budget that had been agreed upon by both houses but had not been enacted into law.

Also at that time, the state treasurer filed a declaratory judgment action seeking court approval of his expenditure of state funds under the governor's plan. The treasurer asked the court whether he could expend state funds in the absence of a biennial budget enacted by the General Assembly.

The president of the Senate joined the lawsuit, questioning, among other things, the governor's authority to spend state funds on other than essential government services and whether the governor had the authority to suspend state statutes or whether that authority is reserved to the General Assembly. Questions also were raised about which government services are essential.

In the November 2002 election, Kentucky voters ratified two amendments to the Kentucky constitution, one providing for designation of a division of Circuit Court as a Family Court, and one amending and repealing some sections of the constitution that deal with corporation law.

LOUISIANA

Clifford Williams

On November 5, Louisiana voters approved a constitutional amendment that changed the state's annual regular legislative sessions, effective in January 2004. The amendment swaps the years in which the general sessions and the limited or so-called "fiscal" sessions occur, extends the length of the limited sessions, and expands the subject matter permitted during limited sessions.

Major changes the amendment makes are to:

- Provide for general sessions in even-numbered years and limited sessions in odd-numbered years. The amendment reverses the years in which the general and limited sessions are held.
- Extend the length of the limited session from 30 legislative days in 45 calendar days to 45 legislative days in 60 legislative days.
- Change the limitations on subject matter that can be considered in the limited sessions. Each member may prefile up to five bills that are not within the subject matter limitations of the session (the exception applies only if the measure is prefiled, not if introduced after the session begins). Members may introduce an unlimited number of local or special bills if the proposed introduction of the bill has been advertised in advance as required by the constitution. A few changes in the fiscal matters that may be introduced in the limited session also were made, primarily by authorizing introduction of

measures to levy, authorize, increase, decrease or repeal a fee or dedicate revenue.

The newly adopted amendment moved the general sessions to even-numbered years in response to a particular problem created by a 1993 constitutional amendment. The governor and the Legislature are elected for four-year terms in the odd-numbered year prior to the year of the presidential election. Thus, the newly elected governor and legislature have been unable to deal with many campaign issues until more than a year after they take office unless a special session was called to deal with the matters. With the change, the regular session immediately following election of a new legislature and a new governor will be general in nature. The new amendment also changes:

- The deadline for prefiling bills to the 10th calendar day before the session. (It had been the Friday before the Monday the session begins.) The requirement that constitutional amendments (without exception) must be prefiled at least 10 days before the session remains unchanged.
- The deadline for introduction of bills. During a general session, the deadline will be the 23rd calendar day (rather than the 30th) and during both general and limited sessions the deadline for introduction is changed from midnight to 6 p.m. The introduction deadline in limited sessions remains the 10th calendar day.
- Deadlines for third reading and final passage of bills. The deadline during limited sessions will be the 42nd legislative day or 57th calendar day, whichever occurs first. During general sessions, it will be the 57th legislative day or the 82nd calendar day, whichever occurs first. The deadlines also are changed from midnight to 6 p.m. Provision for waiver of these deadlines by two-thirds vote of both houses was retained.

MAINE

Margaret J. Reinsch

Curtailment of allotments In November, the Maine Legislature convened at the call of outgoing Governor Angus S. King (I) in a post-election special session to deal with a \$228 million FY03 budget gap. One of the issues that was part of the discussions leading to the special session was the extent of the governor's authority to make spending cuts without any involvement of the Legislature. The attorney general had responded to questions in June with a memorandum that outlined Maine's balanced budget requirement and the governor's power of "curtailment of allotments."

Maine's constitution imposes limits on the state's indebtedness. Article IX, section 14 prohibits the state from creating debts or liabilities that, when combined, exceed \$2 million at any one time. The attorney general has previously stated that the language "guarantees that the State budget will be balanced and precludes deficit financing." (Op. Atty. Gen. 83-8, p. 3).

To ensure that the state operates within its means as required by the constitution, Maine statute gives the governor authority to "temporarily curtail allotments equitably so that expenditures do not exceed the anticipated income and other available funds." The statute goes on to provide that "[n]o allotment may be terminated pursuant to this section." In addition, curtailments must be made "consistent with the intent of the Legislature in authorizing these expenditures" as far as "practicable" (5 MRSA '1668). This language gives the governor the authority to curtail allotments for the purpose of reducing expenditures to meet the requirement of not spending more than the anticipated revenues. It does not, however, require the governor to make any curtailments. It also does not allow the governor to curtail allotments for other than budgetary reasons.

The only judicial interpretation of this curtailment authority can be found in a Superior Court decision (which was not

appealed to the Maine Supreme Judicial Court) in which an 80% reduction of the Maine Child Care Voucher Program was challenged. The reduction, made pursuant to an executive order, resulted in termination child care payments for approximately 700 children. The court denied the requested injunction, finding that: 5 MRSA '1668 was not an unconstitutional delegation of legislative authority; there was no unconstitutional or illegal impoundment of funds that was violative of the appropriations process; and the reduction did not violate the "equitably," "no termination" or "legislative intent" provisions of '1668. *Butterfield v. Department of Human Services*, Superior Court, Kennebec County, docket no. CV-91-92 (January 17, 1991).

Using this judicial interpretation of an application of section 1668, the attorney general reiterated that the governor does have authority to curtail allotments. The governor issued two executive orders curtailing allotments: Executive Order 06 FY01/02 (issued June 19, 2001) and Executive Order 01 FY02/03 (issued July 1, 2002). Although the attorney general's memorandum did not analyze any particular curtailment, the attorney general did successfully defend the state in court in at least one challenge to the curtailments.

Some members of the Legislature then discussed whether the Legislature should pass a budget that includes language recognizing—and therefore ratifying—the curtailments made by the executive department. What would be the result if the emergency budget made no mention of the curtailments ordered by the governor? The attorney general, in a brief question and answer session with the Joint Standing Committee on Appropriations and Financial Affairs, mentioned that, from the perspective of defending the state when sued because funding was reduced, including the curtailments in the final budget would be preferred. Once the Legislature meets, however, the question of curtailments becomes moot because the Legislature can then make any changes it determines are appropriate, including reversing some or all of

the cuts (assuming the final result is still a balanced budget). The curtailment power is meant to be a temporary mechanism to ensure that agencies do not spend money that is not available; final decisions as to what is to be spent in the long term are made by the Legislature.

The final Supplemental Budget adopted at the First Special Session by the 120th Legislature and signed by Governor King includes adoption of almost all the curtailments in general language, referencing the "financial orders" through which the curtailments were accomplished (see Public Law 2001, chapter 714, Part A, Section A-1). Further cuts, reductions and adjustments were made in addition to the savings the governor identified through the curtailments. The budget, closing the \$228 million gap, was signed by the governor on Nov. 18, 2002, and goes into effect Feb. 13, 2003. The newly elected 121st Legislature will be wrestling with more cuts in the weeks and months to come for both FY03 and the upcoming biennium.

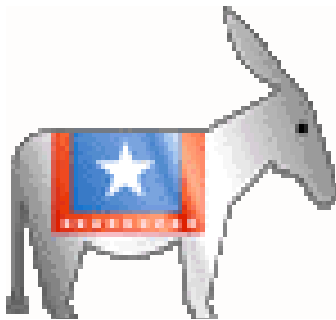
MARYLAND

Sherry Little

When the Maryland General Assembly convened on Jan. 8, 2003, many significant changes became effective. A new speaker, Delegate Michael E. Busch (D-Anne Arundel County) will have officially succeeded the current Speaker of the House, Casper R. Taylor Jr. (D-Allegany County), who lost his reelection bid by 76 votes. Speaker Taylor, a 28-year veteran of the House, was the longest serving speaker in recent memory, having been elected to the post in 1994. Also on opening day, Delegate Adrienne A. Jones became the first African American female to serve as Speaker Pro Tem. Other changes include the establishment of a new committee with jurisdiction over health and health insurance matters and the appointment of the first Indian American, Delegate Kumar P. Barve, as House Majority Leader.

In the Senate, President Thomas V. Mike Miller Jr. (D-Prince George's County) began his 16th year as president; his is the longest tenure of any Senate president in Maryland history. President Miller recently announced the appointment of all new committee chairmen for each of the four principal Senate standing committees. Such sweeping action is unprecedented, but was necessitated by the fact that two of the four previous chairmen were not reelected and two did not run for re-election. President Miller also will have new vice chairmen for the principal committees and has named a new majority leader, Senator Nathaniel J. McFadden, to replace retiring leader Clarence W. Blount.

On a broader note, 2003 membership turnover among the 47 Senate members was 25.5%, and among the 141 House members it was 33% for a total of 59 new legislators—12 in the Senate and 47 in the House of Delegates. Although



the 2002 elections yielded a high turnover rate, in 1994 the turnover rates were even greater with 40% in the Senate and 43% in the House—a total of 80 new legislators between the two chambers. On a partisan note, the 2003 Senate will be made up of 33 Democrats and 14 Republicans, a gain of one on the Republican side. In the 2003 House, the Democrats will hold the majority with 98 members, but the Republicans picked up 8 seats; Republicans in the House now number 43.

Despite all the changes in the General Assembly membership, the major shift in power in Maryland politics will result from the inauguration on January 15, 2003, of Robert L. Ehrlich Jr. as governor, the first Republican to hold

the post since Spiro Agnew took office in 1967. (Governor Agnew later served as vice president under former President Nixon.) Governor-elect Ehrlich defeated Lieutenant Governor Kathleen Kennedy Townsend with 51% of the vote. Townsend garnered 48% of the vote, while support for the Libertarian candidate accounted for 1%. Governor-elect Ehrlich is completing a fourth term in the U.S. House of Representatives; earlier in his career, he served as a two-term member of the Maryland House of Delegates. Facing a looming state deficit of upwards of \$1.7 billion, Governor Ehrlich is required to submit his proposed budget for the executive branch to the General Assembly on January 17. Under the Maryland Constitution, the General Assembly's budget authority is restricted to deleting funds from the executive budget. The legislature may not add to the executive budget or move funds from one agency to another.

MISSISSIPPI Ted Booth

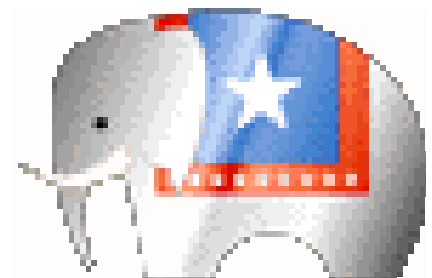
The Mississippi Legislature recently completed an extraordinary session called for Sept. 5, 2002. The extraordinary session, which dealt with medical malpractice issues and general tort reform, ended on November 26. The regular session of the Mississippi legislature convened on Jan. 7, 2003. As in many states, the state budget will be a major concern for legislators, because revenue collections have not met the expectations of forecasters. Also of importance to legislators and citizens will be the upcoming elections. Voters will go to the polls in 2003 to select all 122 members of the House of Representatives and all 52 members of the Mississippi Senate. Statewide elected officials will also be elected in 2003.

MISSOURI Russ Hembree

The November election resulted in major changes to the political landscape in

Missouri. When the 92nd General Assembly convenes on January 8, Republicans will control both legislative chambers for the first time in 48 years. A combination of term limits, redistricting, and a popular president led to an increase for the Republicans in the Senate from an 18-16 majority to a 20-14 margin, and a change from an 87-75 majority for the Democrats in the House (with one vacancy) to a 90-73 Republican majority.

New and returning members will confront a deteriorating state budget situation, with budget experts predicting that approximately \$500 million in additional revenue or new spending cuts will need to be made for the next budget year. Additional issues include changes to the public education funding plan, transportation funding and accountability of the state department of transportation and implementation of performance-based budgeting for state departments.



The recent election also saw the approval of home rule charter changes for the City of St. Louis, the exclusion of partial legislative terms for purposes of term limits and approval for municipal utilities to conduct joint projects without Public Service Commission regulation. Measures rejected by the voters include collective bargaining rights for firefighters and other public safety personnel, a tax increase of 55¢ per pack of cigarettes and 20% on tobacco products and a call for a state constitutional convention.

NORTH CAROLINA

William R. Gilkeson

The First Veto Legislative lawyers in other states will no doubt find this strange, but North Carolinians marveled this November at a historic event—our first veto. Since North Carolina was admitted to the Union in 1789—indeed, since it declared its independence from England in 1776—no governor had ever vetoed a bill enacted by the General Assembly.

Not until 1997 did the governor even have the power to veto a bill. A constitutional amendment enacted in 1996 brought North Carolina in line with the other 49 states that provide for gubernatorial veto. But James B. Hunt, the longtime governor who had urged this change, served out his fourth term, from 1997 to 2001, without exercising the power. His successor, Michael F. Easley, held back from vetoing any bills passed during the longest legislative session in history, that of 2001.

Then, one Sunday afternoon in early November 2002—the Sunday before election day—it finally happened.

The key documents of North Carolina's first veto are archived with museum-exhibit appropriateness on the General Assembly's Web site at: <http://www.ncleg.net/html2001/Bills/S1283Veto/sb1283Veto.html>.

Note the handwritten veto message, dated 2:40 p.m. that Sunday afternoon, and the large "VETO" stamped diagonally across the last page of the bill. The original was stamped in red ink. All those touches attest to Governor Easley's sense of historical moment.

The bill Governor Easley vetoed was Senate Bill 1283. One might think the first bill vetoed would involve major constitutional issues. The late Terry Sanford said in later life that if he had had the veto when he was governor in the early 1960s, he would have used it to stop the notorious Speaker Ban Law, which prohibited anyone from being allowed to speak on a state university campus who "is known to advocate the

overthrow of the Constitution of the United States." Senate Bill 1283, instead, was a bill in which the General Assembly made appointments to various public offices. In North Carolina the tradition is for the governor to make numerous appointments with no legislative confirmation necessary, and for the General Assembly to make numerous appointments to boards and commissions with no input from the governor. Every session produces a bill, passed near the end, in which the General Assembly makes scores of appointments to such things as the N.C. Board for the Licensing of Soil Scientists and the State Board of Therapeutic Recrea-



tion Certification. Ordinarily, these routine appointments bills are exempt from the veto. In order to garner enough votes for passage, the proponents of the veto constitutional amendment in the 1990s had to include a number of exemptions, one of which was "Every bill . . . in which the General Assembly makes an appointment or appointments to public office and contains no other matter . . ."

Senate Bill 1283 was snagged because it dealt with other matters. In addition to making appointments, the bill also changed the terms and the number of members of certain boards and commissions. The additional items gave the governor the authority to veto the bill. Nonetheless, the objections he cited in his veto message had to do not with the additional items, but with the appoint-

ments themselves—the items that, if they had appeared alone in a bill, would have been beyond his reach. He objected that some of the appointees did not meet statutory qualifications. Two, he said, were deceased. (In fact, both were alive when the bill passed.) Probably more important was his assertion that "the bill mistakenly makes six appointments that are required to be made by the governor."

The same day it passed Senate Bill 1283, the General Assembly adjourned its 2002 session. The governor did not veto the bill until almost a month later. The state constitution says if the governor vetoes a bill when the General Assembly is not in session, he must call a special session within 40 days after adjournment to give the General Assembly an opportunity to override his veto. Otherwise, the bill becomes law over his veto.

The timing of all these procedural details—untested as they were and coming as they did so close to the election—gave rise to speculation. What was the governor up to? Did all this have anything to do with his frustrated efforts to persuade the General Assembly to pass a lottery? Was there any tie-in to the Republican election gains? (Governor Easley and both houses of the 2001-2002 General Assembly were Democratic. For 2003, Democrats keep the governorship and the Senate, but Republicans gained tenuous control in the House.)

However, the drama fizzled. The governor called the special override session. The legislative leadership decided not to contest the veto, announcing to the membership that no action would be taken in the special session, so they need not all even make the trip to Raleigh.

The first veto was formally received by the Senate and referred to its Rules Committee, where no action was taken. The session adjourned. Presumably, the General Assembly will attempt another appointments bill in 2003. North Carolina lost its distinction of being the only state with no vetoed bill in its history.

OHIO

Richard L. Merkel

The following provisions of H.B. 402 of this General Assembly may be of interest to other state legislators. Prior to Sept. 1, 2002, an employer had to secure from each minor covered under the state Minor Labor Law a valid age and schooling certificate, which had to be kept on file and made available for inspection by enforcement officials. H. B. 402 requires a superintendent of a school district or chief administrative officer of a nonpublic or community school that issues an age and schooling certificate on or after Sept. 1, 2002, to file the certificate electronically with the director of commerce. After that date, the act eliminates the requirement that an employer keep the certificate on file in the workplace and make it available for inspection and requires, instead, that an employer thoroughly review a minor's age and schooling certificate. After that date, H.B. 402 also specifies that only electronically filed certificates are valid to prove lawful employment of a minor under the state Minor Labor Law.

S.B. 223 may also be of interest outside Ohio. S.B. 223 requires the administrator of workers' compensation and public self-insuring employers, as appropriate, to pay the costs of conducting specified diagnostic services to investigate whether a peace officer, firefighter or emergency medical worker sustained an injury or occupational disease when coming into contact, through specified means, with another person's body fluids while in the performance of one's duties or when responding to an emergency. Diagnostic services have not been covered in the past because only "injuries" and "occupational diseases" have been covered, not tests to discover whether an "injury" or "occupational disease" has occurred or been incurred.

Both houses have concurred in the passage of Am. Sub. S.B. 281, which addresses medical malpractice issues, and Am. Sub. S.B. 120, which addresses tort reform.

Am. Sub. S.B. 281 requires every clerk

of a court of common pleas to file an annual report with the Department of Insurance containing specific information dealing with civil actions upon a medical, dental, optometric or chiropractic claim pending in the court; provides a four-year statute of repose for such claims with an exception for foreign objects left in the body and claims discovered in the fourth year after the occurrence of the act or omission involved; provides a procedure for a defendant in an action involving such a claim to file a motion to determine the existence or nonexistence of a reasonable good faith basis for the plaintiff's claim; generally permits a defendant to introduce evidence of collateral benefits to the plaintiff as a result of the damages; limits noneconomic damage recoveries in such actions to the greater of \$250,000 or an amount equal to three times the plaintiff's economic loss to a maximum of \$350,000 for each plaintiff or a maximum of \$500,000 for each occurrence and, if the defendant's losses are for permanent and substantial physical deformity and similar serious injuries, \$500,000 for each plaintiff or \$1 million for each occurrence; states that the procedures regarding the recovery of damages must be applied in a jury trial only after the jury has made its factual findings and determination as to the damages; provides a procedure for the probate court to review contingency fee arrangements if the attorney's contingency fee exceeds the noneconomic damages limits; specifies a procedure for periodic payment of future damages; creates a nine-member Ohio Medical Malpractice Commission to study the effects of the act, investigate problems posed by, and the issues surrounding, medical malpractice and submit a report to the General Assembly not later than two years after the act's effective date; and requires the superintendent of insurance to study the feasibility of a Patient Compensation Fund to cover portions of medical malpractice claims.

Am. Sub. S.B. 120 provides that a defendant is jointly and severally liable in a tort action if that defendant is liable for more than 50% of the fault involved in the action or committed an inten-

tional tort; provides an affirmative defense for each party in a tort action from that specific percentage of the tortious conduct that proximately caused the injury or loss that is attributable to one or more people from whom the plaintiff does not seek recovery in this action; provides specific rules for contribution among tortfeasors; provides that the contributory fault of a person does not bar the person as plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other people, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other people from whom the plaintiff seeks recovery in this action and of all other people from whom the plaintiff does not seek recovery in this action; requires the court to diminish the total amount of the compensatory damages that would have been recoverable by an amount that is proportionately equal to the percentage of tortious conduct determined that is attributable to the plaintiff; provides that express or implied assumption of the risk may be asserted as an affirmative defense to a product liability claim and is a complete defense to the claim, but that express or implied assumption of the risk may not be asserted as an affirmative defense to an intentional tort claim; and provides that contributory negligence or other contributory tortious conduct may be asserted as an affirmative defense to a product liability claim.

PENNSYLVANIA

Stacey Connors Mosca

Legislation that would bolster Pennsylvania's defenses against terrorism was approved by the General Assembly prior to the adjournment of the legislative session in November. This legislation creates a comprehensive counterterrorism program, giving the Pennsylvania Emergency Management Agency, counties, regional counterterrorism task forces and other parties better abilities to manage counterterrorism efforts over the long term without creating extensive new regulations.

The General Assembly also passed legislation that would extend PACE and PACENET prescription drug benefits to thousands of senior citizens who could have lost coverage because of small cost-of-living adjustments in their Social Security checks. The legislation extends by one year a moratorium barring the state's PACE prescription drug benefit from expelling seniors whose Social Security cost-of-living increases push them over income eligibility limits. It also will ensure that about 1,700 seniors remain on the PACENET program—which allows seniors with slightly higher incomes to purchase prescription drugs with a larger copayment. Money to fund the additional benefits will come from the state's tobacco settlement fund.

In addition, legislation was approved that would enact numerous election reforms in the Commonwealth, making vast improvements to the manner in which elections are conducted in Pennsylvania. The passage of this measure comes on the heels of the federal Help America Vote Act, which was signed into law by President Bush in October.

TEXAS

Leonard Reese

The speaker of the House of Representatives and the lieutenant governor are the two most powerful positions in the state of Texas. During the next legislative session, the Texas house will have a Republican majority for the first time since 1872. Voters elected 88 Republicans and 62 Democrats to the house in the November general election. Rep. Tom Craddick, the longest-serving Republican in the house, has announced that he has sufficient support to be elected speaker when the Legislature convenes Jan. 14, 2003. Former Land Commissioner, Republican David Dewhurst, was elected lieutenant governor and will lead the Senate, which will be composed of 19 Republicans and 12 Democrats.

The lieutenant governor has the power to select the committee chairmen and

the committee members. In recent history, the lieutenant governor has had the power to dictate the legislative agenda for the Senate, deciding what legislation makes it to the Senate floor. In many ways, this position holds more power than the governor. The powers of the speaker are analogous to those of the lieutenant governor.

The major issue for the next Legislature to face is a state budget shortfall that could reach \$12 billion. Tax increases seem to be off the table since, during election campaigns, most office seekers promised voters no new taxes. Other issues that will be addressed include school finance system reform, homeowner insurance reform and lawsuit reform.



UTAH

Gay Taylor

Utah's sixth Special Session started on December 18th to deal with a \$117 million budget deficit for the current fiscal year. Before we "retire" some of our legislators, we will have one more special session to cut state budgets and make revenue transfers. This is a very painful process.

Utah is examining its initiative process because the Utah Supreme Court held unconstitutional that part of Utah's law that required a percentage of voters from 20 of Utah's 29 counties to approve an initiative being placed on the general election ballot. A legislative committee has devised an alternative to replace the stricken language. A number of other legislators also are considering alternatives.

VIRGINIA

John Garka and Mary Spain

2002-2004 Budget The most important issue faced by the 2003 session that began January 8 will be the 2002-2004 biennium budget gap, which is currently estimated to be in excess of \$1.1 billion. The nationwide recession and slow-growing economy have affected Virginia since the summer of 2000 and have caused Virginia's revenues during the past fiscal year to fall well below the official forecast. For the fiscal year ended June 30, 2002, Virginia's general fund revenue actually declined 3.8 percent. This decline is the largest since the department of taxation started to keep such records.

The \$1.1 billion gap is over and above the \$3.8 billion gap the General Assembly closed during the 2002 session and the \$857.7 million in appropriation reductions Governor Warner proposed on Oct. 15, 2002. At that time, the governor used the authority granted in the Appropriations Act to reduce agency appropriations by up to 15% in every agency in the executive branch, which resulted in approximately 1,837 layoffs, excluding higher education. Governor Warner's plan, in addition to the layoffs, resulted in the closing of DMV offices, shorter hours at ABC stores and the state library, increases in tuition at virtually all Virginia's state universities and colleges, elimination of the \$101.4 million appropriation included for state employee pay raises and a reduction in a variety of local aid programs. As painful as the cuts and increased tuition and fees were, the 2003 session will need to take additional steps to reduce the Commonwealth's expenses.

On Dec. 20, 2002, Governor Warner presented his blueprint for the next round of budget cuts by proposing his amendments to the existing 2002-2004 Appropriations Act. The only known is that the package will surely lead to a great deal of debate and discussion about how to reduce the impact of these cuts on the citizens of Virginia and on the services they are provided. Additional cuts are likely to include abolish-

ing specific agencies or consolidating certain agencies, eliminating certain governmental functions, reducing funds for previously untouchable items such as standards of quality funding for elementary and secondary education or for Medicaid purposes, creating an early retirement option to reduce the size of the workforce and lower the state's payroll, using the available resources of the "Rainy Day Fund" and any other option that could be used to deal with the shortfall, whether on the expenditure side or on the revenue side. Clearly, with each succeeding series of cuts, the budget decisions the governor and the General Assembly will be forced to make will be increasingly painful and will have more affect on the Commonwealth and its citizens.

WEST VIRGINIA
Mark McOwen

The Legislature's monthly interim meetings on various study topics continued through the fall and will conclude in January. Meanwhile, following the first election since redistricting legislation was passed in 2001, the 100-member House of Delegates will have 22 new members, and the 34-member Senate, with only half its membership up for election, will have seven new members. A primary concern for these and returning members during the upcoming session will be fashioning the fiscal year 2004 budget under the strain of anticipated significant revenue shortfalls. Issues addressed during the 60-day session also may include civil justice reform and coal truck weight limitations.

The first regular session of the 76th Legislature convened Jan. 8, 2003. To monitor legislative activity, visit the West Virginia Legislature's Web site at <http://www.legis.state.wv.us/>.

For toll-free telephone access, dial 1-877-56LEGIS.

WISCONSIN
Steve Miller

As the new session begins, the Legislature will continue to look for ways to balance the state budget. For some, school aids and local government aids remain controversial—yet tempting—targets. For the first time in several years, both houses of the Legislature are controlled by one party, and the governor is of a different party. Campaign finance still kindles a warm subject for legislative discussion. These and related issues promise an interesting new year.

WYOMING
Karen Ashcraft Byrne

Twenty-three new state legislators were elected on Nov. 5, 2002. Wyoming only has 90 legislators so that is quite a change. Republicans still will dominate both houses but Wyoming elected a Democratic governor for the first time in eight years, so it should be an interesting four years.

Wyoming's term limits will take effect for the first time in the 2004 elections, so we will have a big turnover of legis-

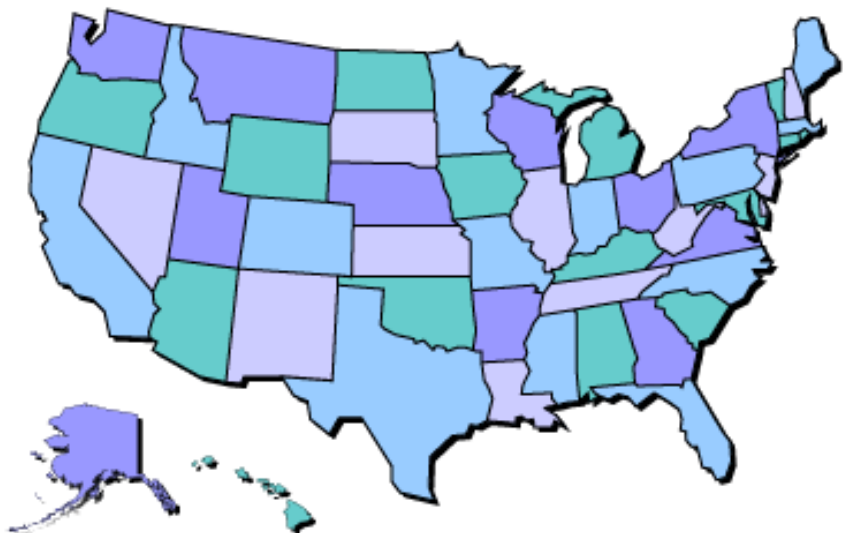
lators then, as well.

We are starting to get very busy with bill drafts. We expect to have between 600 and 700 bill drafts prepared for the 2003 session that starts on Jan. 14, 2003. Wyoming is one of the few states that will not have a budget deficiency for 2003-2004. The state actually has surplus money.

The Legislative Service Office's Web site concerning Wyoming's legislative process, <http://legisweb.state.wy.us>, will again have audio broadcasts for the 57th legislature session. Presently, interim committee information and committee draft legislation are available on the site.

The office had an in-house training program on anti-discrimination policies and laws in November 2002 to educate employees about the Legislative Service Office's new anti-discrimination policy.

The office is involved in finishing interim committee work so staff can concentrate on individual members' legislation.



**National Conference of State Legislatures
LEGAL SERVICES STAFF SECTION
Executive Committee Members**

Chair:
Pam Ray *pray@state.nm.us*

Vice-Chair:
Richard Merkel *rmerkel@lsc.state.oh.us*

Past Chair:
Teresa Beck *tbeck@mail.house.state.ms.us*

Secretary:
Brian Weberg *brian.weberg@ncsl.org*

Newsletter Editor:
Thomas Morris *thomas.morris@state.co.us*

Diane Boyer-Vine *diane.boyer@legislativecounsel.ca.gov*

Michael Chernick *mikec@leg.state.vt.us*

Nancy Cyr *ncyr@unicam.state.ne.us*

John Fellows *jfellows@le.state.ut.us*

Bob Nelson *robert.nelson@legis.state.wi.us*

David Savelle *savelle.david@leg.state.fl.us*

Larry Shapiro *larry.shapiro@po.state.ct.us*

LSSS CORRESPONDENTS

We are fortunate to have a dedicated and reliable group of regional and state correspondents who supply us with state news, articles and other input for *The Legislative Lawyer*. The Legal Services Staff Section thanks all of you for your effort.

Regional Correspondents

Great Lakes	John Rowings	<i>rowings@iga.state.in.us</i>
Mid-Atlantic	Rich Dillard	<i>rdillard@legis.state.de.us</i>
Mountain	Karen Ascraft Byrne	<i>kbyrne@state.wy.us</i>
New England	Brian Leven	<i>bleven@leg.state.vt.us</i>
MidWest	Scott Harrison	<i>sharrison@unicam.state.ne.us</i>
South Central	Norm Furse	<i>normf@rs01.wpo.state.ks.us</i>
South	Joseph A. Barnes	<i>joseph.barnes@legislature.state.tn.us</i>

**State News Editor: Edith Elizabeth Pollitz
State Correspondents**

AL Karen Smith	LA Clifford Williams	ND Jay Buringrud
AK Pam Finley	ME Margaret Reinsch	OH Rich Merkel
AZ Don Thayer	MD Sherry Little	OK Scott Emerson
AR Phil Boudreaux	MA Kevin Blanchette	OR Joan H. Robinson
CA Michael Salerno	MI Roger Peters	PA Stacey Connors Mosca
CO Debbie Haskins	MN Karen Lenertz	RI Cay Massouda
CT Joyce Williams Jones	MS Ted Booth	SC David J. Cooper
DE Rich Dillard	MO Russ Hembree	SD Jacqueline Storm
FL Edith Elizabeth Pollitz	MT Greg Petesch	TN Joseph A. Barnes
GA Cynthia R. Thompson	NE Scott Harrison	TX Leonard Reese
HI Ken Takayama	NV Brenda Erdoes	UT Gay Taylor
ID Katherine Gerrity	NH Paul Lindstrom	VT Brian Leven
IL Heather Kirby	NJ Howard Rotblat	VA Mary Spain
IN George Angelone	NM Pam Ray	WV Mark McOwen
IA Rich Johnson	NY Paul Weifer	WI Steve Miller
KS Norm Furse	NC William R. Gilkeson	WY Karen Ashcraft Byrne
KY Ann Zimmer		

**National Conference of State Legislatures
7700 East First Place
Denver, Colorado 80230**