



THE LEGISLATIVE LAWYER

"To Better Serve Their Legislatures"

Volume XX,
Issue 3,
November 2006



NCSL

Available on the
Web at:

<http://www.ncsl.org/programs/legman/legalsrv/lssshome.htm>

To submit an article, please
contact the editor.

Jery Payne

E-mail:

jery.payne@state.co.us

Telephone:

(303) 866-2157

Mail:

State Capitol, Room 091
Denver, CO 80203

INSIDE THIS ISSUE:

On Loopholes 1

**The 2006 Annual Meeting in
Nashville..... 5**

**Professional Development
Seminar 6**

State News 9

ON LOOPHOLES

Jery Payne, Colorado

Loopholes everywhere as far as the eye can read!

Loopholes are the bane of drafters everywhere. Legislative lawyers work and work on a draft to perspicuously and elegantly define a crime. Drafters attend meetings with people who are out in the real world dealing with this statute. Drafters consider and research and think. And yet, within a couple of years the drafter will inevitably work on a "cleanup bill" to close all those nasty little loopholes that the drafter stupidly overlooked. This does not actually settle the issue. A few years later, there will be another cleanup bill. This seems to be the way of things. Are all drafters really that incompetent?

A popular online dictionary defines "loophole" as "[a] means of escape or evasion; a means or opportunity of evading a rule, law, etc." Then, it helpfully gives a usage example: "There are a number of loopholes in the tax laws whereby corporations can save money." (See <http://dictionary.reference.com/search?q=loophole>.) The difficulty with this definition is that it is not clear what type of evasion or escape actually qualifies as a loophole. Does it apply to the prescription or proscription of the rule, or does it apply to the punishment? A concrete example will, hopefully, help.

A hypothetical tax law states, "Ten percent of a person's income above ten thousand dollars shall be paid to the government as a tax. Failure to pay such tax is the crime of tax evasion and shall be punished by imprisonment of five years." According to the dictionary definition of loophole, there must be a means of escape or evasion. Is it in the first sentence that the person evades? It does not appear to be the second sentence because that merely imposes punishment. Evading the

second sentence is simply disobeying it. Consider the two ways that John Doe may respond to the first sentence. One, he may pay the tax. He would escape or evade punishment by paying, but this seems to be the purpose of the statute. Has he exploited a loophole? No. The statute's purpose was to change behavior and it did. Two, he may not pay the tax. But if he gets caught, he will be punished. Therefore, he has not evaded the law, he has simply disobeyed it.

The idea of a loophole seems to be in the notion that John does not pay the 10 percent and somehow manages to comply with the law. But this law appears to be ruthlessly discrete. Either he has paid 10 percent of his income or he has not. If he has, he has complied. If not, he has disobeyed and faces punishment.

Now, one may argue that the problem is that the dictionary definition is simply wrong. It lacks subtlety. What we need is a drafter. Perhaps a more promising definition of a loophole may be garnered from an actual tax law. Consider the federal law of tax avoidance:

26 USC '7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(Continued on page 3)

LISTSERV ETIQUETTE

The LSSS List Serve Task Force was asked to come up with ways to improve the LSSS listserv, including making it a better tool for our members. The Task Force believes that having some etiquette for using the listserv would be beneficial.

The purpose of the etiquette is to give members some advice about how best to use this information tool. The LSSS listserv is a forum for legislative legal services staff to exchange information and ideas. This is an excellent place to ask questions about topics you have noticed in your state or to ask other colleagues how their state or their staff handles an issue or problem you've noticed. It is also a great way to get some quick responses on whether other states have a law on a particular topic. Examples of e-mail discussions that have been posted on the listserv:

- punitive damages and "loser pay" laws;
- copyright of committee testimony;
- lobbying prohibitions on legislators;
- open meetings laws;
- public school employees' right of representation in disciplinary meetings;
- FMLA and legislative employees;
- legislative intent statements;
- how to define the term "internet";
- unauthorized practice of law by legislative staff;
- ethics questions; and
- how to evaluate the writing abilities of prospective drafters;

We ask that participants observe the following etiquette:

- Introduce yourself when you first join the group.
- Never hit the reply button unless you intend for everyone to read your message.
- Hit the reply button, rather than responding to an individual, if your response appears to be of general interest.
- If you would like others to respond to you directly please include your own personal email address.
- If you wish to e-mail an individual, compose a new message that contains only that person's address.
- Stick to intended topics of the listserv.
- Keep messages brief.
- If your answer to a question is no, please respond only to the requester and not to the entire listserv. Often the requester does want to be aware of "no" responses but everyone else does not.
- Use the same subject line as the original query.
- Do not use capital letters in your e-mail for emphasis as that is considered to be the same as shouting. Instead, use an asterisk before and after the word or phrase you want to emphasize.
- Please don't send virus alerts or other alerts that do not pertain to LSSS.
- Please don't send jokes.

If you are going to be out of the office and use an automated response, please check with your e-mail administrator as to how to modify that automatic response so that it does not go out to the rest of the listserv with every posting.

For all its added words, the essential characteristic seems to be the same as the dictionary definition, which is the idea of "evading" or "defeating" the tax.¹ But this statute is helpful on one point: The problem is not in evading punishment but evading the tax itself.

Returning to our original austere statute, there are, of course, ways for John to avoid paying as much as he might otherwise and yet still comply with it. The chief strategy is for John to change his income. Consider the following strategies:

- (1) John gives some of his income to his daughter.
- (2) John gives an asset to his daughter that generates income.
- (3) John cashes in his bonds and buys a house instead of renting.
- (4) John gives his daughter a monetary gift and then borrows it back from his daughter for investment purposes.
- (5) John decides to become a ski bum.

(1) John gives some of his income to his daughter.

John's daughter makes only \$5,000 a year. John loves his daughter and sends her money every month to augment her meager income. John asserts that he is not getting the use of the money, so why should he pay taxes on it? The simple answer is that John's assertion is false. He is getting the use of the money. He is buying happiness for his daughter. In other words, he is merely spending the money after it is earned. Once money is earned, it is income. Whatever happens after it is earned is irrelevant.

This analysis is a two-edged sword. It suggests to a clever lawyer how John may achieve the same results while actually complying with the statute.

(2) John gives an asset to his daughter.

Half of John's income comes from bonds as a result of investments. John realizes that once income is earned, he incurs the obligation to pay taxes on it. John decides that the solution is to give some of his bonds to his daughter and let her earn the income. Now, she earns the income on the bond. The total taxation paid by the two is less, and they have complied with the statute.

Does this work? As a matter of tax law it does, but some may think that what we have here is in fact a loophole. The two have evaded the tax while complying with the statute. If the darned statute was only better written, then John would be paying his fair share of taxes.

We shall see.

But at this point, a detour is in order. I wish to isolate the idea of loopholes from the issue of drafting. Observing the same behavior in its natural environment is useful to understanding. To this end, I am going to travel a bit astray and discuss the idea of "earning" in an arena where things are earned, there are rules based entirely on intuition, and no drafter can be blamed. I shall discuss the rules covering the earning of glory!

Those who are skeptical about whether there really are rules governing the earning of glory should consider the behavior of George S. Patton in World War I. Patton was selected to be a central command staff officer by the Commander of the Armies, John Joseph "Black Jack" Pershing. As leader of the American Expeditionary Force in World War I, Pershing was in charge of winning the war in Europe. The assistance and ability of his staff was immensely important to winning the campaign. For example, a mistake in logistics may mean the difference as to whether the army had enough ammunition to win the battle or enough rations to capitalize on a victory. As one such officer, Patton's efforts at organizing, equipping, and deploying the army was of supreme importance to the war effort. In the command post, Patton's failures and successes cost and saved many a soldier's life.

And yet, Patton was not happy. Patton was keenly aware that the rules of glory only paid a pittance to people who worked in the office. The highest wages in glory were paid on the field. Never mind that the office job was more important to the overall effort. Never mind that Patton was good at it. Never mind that the war was being won. Never mind because Patton was missing all the glory! One of the rules for earning glory in war is that one must actually fight the enemy. Therefore, Patton repeatedly requested a change of assignment that would place him on the front lines. When victory appeared to be just over the horizon, Pershing relented and granted Patton's petitions. Patton was transferred to a tank company and fought in the Battle of Saint-Mihiel, which was the last battle of the war. At the battle, he was shot in the rear² and earned a generous measure of the coveted glory. Indeed, he appeared to have been extremely proud of being shot.

(Continued on page 4)

1. Note that the terms "evade" and "defeat" are not meant literally. The tax is not searching for or in a contest with the citizen. Therefore the citizen cannot literally "evade" or "defeat" the statute. Statutes are not typically metaphorical. Laws do not typically read, "The state shall come down like a ton of bricks on a person who pulls a Richard Nixon." The metaphors envision a person standing on the courthouse steps smiling because he has not paid the tax that the authorities wanted him to pay, but he has won the court case. Therefore, he has defeated the tax and evaded its dictates.
2. "Rear" here is used in the anatomical sense not the tactical sense. Perhaps a "rear guard" would have helped.

Whenever he would get tipsy at a party, he would drop his pants and show his wound. But, not only did Patton appear to think that his service in the field earned him glory, so did the army. For such service, he earned a battlefield promotion to colonel and both the Distinguished Service Medal and the Distinguished Service Cross.

Indeed, the rules of glory seem to be something of a mirror image of the rules of infamy. For example, Patton's office dilemma seems to parallel two rules of criminal law relating to murder, which is not surprising since the infamy of murder and the glory of battle both consist in killing. Behind a desk, Patton was not the proximate cause of the enemies' death because the soldiers' acts broke the chain of causation. Behind a desk, Patton was merely an accomplice to the death of the enemy. Consider also the premeditation-versus-accident distinction, the act-versus-omission distinction, and the attempt-versus-completion distinction. The law assigns much more blame for a premeditated and successful act of killing than an impulsive, accidental or attempted killing. We also assign more glory to the soldier who kills intentionally rather than accidentally, to a soldier who kills by an act rather than by not stopping another soldier from killing, and to a soldier who successfully kills rather than one who attempts but fails. Thus, the rules of blame appear to coincide remarkably well with the rules of glory.

What would one think about a person who took credit for another's discovery or achievement? I think we can agree that the person would be considered unethical. For a time, there was a controversy about whether John F. Kennedy deserved the Pulitzer prize for writing "Profiles in Courage." In 1957, a newspaper columnist stated on the Mike Wallace Show that Theodore Sorensen and Arthur Schlesinger were ghost writers for Kennedy. Both Kennedy and Sorensen denied this claim, and Kennedy was so angry that he threatened to sue. Now, it is not really important to our discussion whether the allegations are true and I do not claim to know, but the very existence of the controversy affirms the rules for the proper crediting of glory. After all, no one, including Kennedy, argued "so what if he did not write it!" The unspoken assumption was that Kennedy did not deserve the glory if he did not actually write the book.

The rules of earning glory also seem to parallel the tax law. Strangely enough, the unwritten rules of crediting glory also appear to allow one to claim the earnings of an asset. This particular permutation is aptly illustrated by the case of Anton van Leeuwenhoek. Leeuwenhoek is known to this day as the father of microbiology. Before him, the existence of single-celled organisms was unknown. Leeuwenhoek discovered infusoria, bacteria, and spermatozoa, among other things.

The interesting thing is that Leeuwenhoek was an amateur biologist at best, which caused no small amount of heartburn to the Royal Society of London for the Improvement of Natural Knowledge. Leeuwenhoek was not a biologist, but he was a pioneering lens maker. He discovered a lens-making method

that was vastly superior to the known techniques. The Royal Society was dismayed, not because of envy, but because they believed Leeuwenhoek's lenses could be put to better use if they were employed by an actual biologist. To this end, they sent Dr. Molyneux to plead with the lens maker to share his microscopes with the Royal Society. Leeuwenhoek refused.

Eventually, Leeuwenhoek's credibility was questioned. Without access to his microscopes, no one could verify his incredible discoveries. Many in the Royal Society concluded that his writings were the product of a fruitful imagination. However, Leeuwenhoek's lenses eventually became available and his discoveries were eventually validated.

Like John Doe, Leeuwenhoek manipulated the facts so that he could earn glory from an asset. He was not terribly collegial about sharing his asset, but the fact remains that Leeuwenhoek was the actual person who made the discoveries, and thus, is the father of microbiology. In the same manner, since John Doe's daughter owns the asset, she is the actual person who earned the income. After all, John's wages are income generated from the asset of his labor over time. Therefore, it appears to me that John Doe and his daughter have merely rearranged their affairs to make compliance easier. Calling this rearrangement of affairs a loophole is not really reasonable.

(3) John cashes in his bonds and buys a house instead of renting.

For the unconvinced, consider another variation of the asset strategy. John realizes that he has to pay taxes on the earnings of his bonds. The logic that makes the previous tax strategy work also makes John have to pay taxes upon the earning of his bonds. John realizes that he could avoid considerable taxes with a different arrangement. John rents his house and uses the income from the bonds to pay rent. The bond income buys him a place to live. John realizes that if he were to sell the bonds and use the money to buy the house outright, he would receive the same benefit from the bonds, a place to live, with a lower tax burden. He will actually lower his income.

Therefore, John sells some bonds and buys the house. Now he has the same benefits but pays less in taxes. Is every person who owns a home exploiting a loophole?

In order to address this perceived loophole, tax professors have invented a concept they call "imputed income." Imputed income is a fancy term meaning "imaginary income." The basic idea is to assess a tax on the homeowner equal to the value of the home's rental value. After hearing my law professor explain this unusual idea, I raised my hand and asked him if he would allow one to take imputed or imaginary deductions. The law professor looked at me like I was crazy. But if one can be taxed

(Continued on page 7)

REPORT ON THE 2006 ANNUAL MEETING

Michael Chernick, Vermont

Just after the conclusion of a tortuous summer heat wave, the 2006 NCSL Annual Meeting convened in Nashville in mid August. Unlike other annual meetings that have been based at a center city convention center, this year's gathering was held at the Gaylord Opryland Resort and Convention Center located on Nashville's outskirts. The venue, perhaps the nation's geographically largest hotel under a single roof, features indoor rivers, islands, and endless hallways challenging even an expert in the science of orienteering. This well attended conference presented a diverse offering of educational and social activities. The annual meeting is made of intersecting conclaves that span both the entire organization and specialized groups within NCSL.

For members of the Legal Services Staff Section (LSSS), the Nashville meeting included a number of seminars that focused on our professional work. Once again, Richard Ruda, Chief Counsel of the State and Local Legal Center in Washington, D.C., enlightened the audience with his always illuminating survey of recent U.S. Supreme Court decisions on federalism topics. Another veteran of the LSSS lecture circuit, Professor Alan Tarr, Director of the Center for State Constitutional Studies at Rutgers University, addressed a session entitled "The Effect of Direct Democracy on State Constitutions" that assessed the impact of popular vote initiatives and referendums on state constitutions. Other topical sessions of interest to legislative legal practitioners included: an examination of the U.S. Supreme Court's decision in the Texas congressional redistricting case; a presentation on Congress' increasing assertion of its preemption authority, an analysis of the ever present tensions that arise from separation of powers conflicts; an update on the role of DNA in the criminal investigative process, and a lively panel on digital copyright that displayed the intensity of the opposing parties' views. A year after the U.S. Supreme Court's controversial Kelo decision, a presentation on eminent domain featuring staff from NCSL and the Georgia House Speaker, who spoke on post-Kelo legislative activity in the Peach Tree State, attracted

the most intensive interest. All of the sessions were both informative and thought provoking.

At the annual LSSS staff luncheon, Bob Nelson (Wisconsin) was elected to succeed me as section chair, Diane Boyer-Vine (California) is our new staff section vice chair, and the executive committee now consists of returning members Michael Chernick (Vermont) Nancy Cyr (Nebraska), Debbie Haskins (Colorado), Doug Himes (Tennessee), Rich Merkel (Ohio), Jery Payne (Colorado), Robert Rothberg (New Jersey), Lisa Sandberg (Ohio) and new members Roger Norman (Arkansas) and Laura Hendrix (Kentucky).

On the broader stage, the 2006 NCSL Annual Meeting included presentations from a number of prominent speakers including: U.S. Homeland Security Secretary, Michael Chertoff, former U.S. Ambassador to China and U.S. senator from Tennessee James Sasser, pollster Frank Lunz, and historian and author Doris Kearns Goodwin who spoke on her recently released biography of Abraham Lincoln. The NCSL business meeting included a heartfelt debate on the burdens that the federal Real ID program will place on the states. For legislative staff, we bade farewell to Staff Section Chair and Virginia Senate Chief Clerk, Susan Schaar, and welcomed Wisconsin Legislative Reference Bureau Chief and LSSS member, Steve Miller, as her successor. Social events had a country music motif, not surprisingly, and included a concert at the state capitol.

Lastly, I wish to thank the legislative lawyers from across the country who made my year of service as LSSS Chair so enjoyable and professionally rewarding.

Michael Chernick is an attorney with the Vermont General Assembly and was the 2005-2006 chair of the Legal Services Staff Section.



FALL PROFESSIONAL DEVELOPMENT SEMINAR A BIG SUCCESS!

Robert Nelson, Wisconsin

The NCSL Legal Services Staff Section held its annual professional development seminar in Princeton, NJ this year. The number of attendees was a record, the weather was perfect, and the location was outstanding. Attendees came from all parts of the country, with a significant number from eastern states due to the close proximity of states in the region. The seminar was held at the historic Nassau Inn right on the edge of Princeton University. A walk across the street took one back to undergrad college, with ivy towers and quiet grassy squares.

This year, the seminar had two tracks, one for advanced legislative attorneys and drafters; the second for new drafters.

The seminar started with a impressive review of Washington state court decisions that reminded all of us that careful drafting is not always going to prevent a court from using legislative history in mysterious ways. The presenters showed how legislative history is used, and sometimes misused, by judges when attempting to ascertain the intent of the legislature.

Sessions in the introductory track provided drafters with insight into how to get the information needed to draft a bill, the opportunity to critique "bad drafts"; a session on statutory interpretation; and the time to discuss common issues that face new drafters.

The advanced track provided senior drafters the opportunity to fine tune their drafting skills in sessions on difficult drafting problems; drafting exercises; drafting in the age of international trade; statutory interpretation; and drafting complex legislation. For those legislative legal staff looking for topically based training, sessions on recent U.S. Supreme Court decisions that impact state and local governments; and legislative response to the Kelo decision were offered.

Plenary sessions focused on broader issues including ethics; legislative issues of concern to judges; and a discussion of cognitive linguistics for the drafter.

As is the custom with this seminar, one day was spent at the state capitol. Sessions were held in a committee room, the Welcome Center, and in the General Assembly Chamber. The state capitol in Trenton is really an amazing complex of buildings connected by tunnels. The historic state house is home to the Senate and Assembly chambers, conference rooms, the rotunda and Governor's Office reception room. The south addition in-

cludes offices for partisan staff for the Senate and Assembly. The State House Annex, constructed in the late 1920s, houses legislative committee rooms and offices. The state house is also connected by tunnel to the Welcome Center and gift shop.

One of the lasting impressions of the seminar came at the final sessions (a roundtable for the introductory track and another for the advanced track) on Friday where attendees had the opportunity to discuss pressing issues in their states and share ideas. These roundtables are an excellent time to learn what's happening in the state legislatures.

Another highlight was the reception held Friday evening at Prospect House on the Princeton University campus. The old mansion is right in the middle of campus, surrounded by gardens and trees. We sat out on the veranda and enjoyed each other's company after a busy day at the capitol.

The final event of the seminar was the Legal Services Staff Section Distinguished Scholar keynote speaker. Professor Richard Briffault from Columbia Law School spoke about campaign finance reform. His presentation was comprehensive and informative and everyone was impressed with his knowledge of the subject.

The professional development seminar is a great way to earn relevant continuing legal education credits, network with your peers, and share the experiences of being a legislative attorney.

Robert Nelson is the chair of the Legal Services Staff Section and a Senior Legislative Attorney of Wisconsin's Legislative Reference Bureau.



on imaginary income, why can one not be given the benefit of imaginary deductions?

(4) John gives his daughter a monetary gift and then borrows it back from his daughter for investment purposes.

For those convinced that it is unreasonable to call transferring an asset to transfer income a loophole, then one more strategy is worth considering. John wants to transfer the asset to his daughter and keep it at the same time. Therefore, he writes a check to his daughter. His daughter then endorses the check and hands it back to John as a loan. John then pays his daughter interest on the loan in perpetuity. John invests the money and then is able to deduct the interest he pays his daughter from the income the investment generates. The interest he pays to his daughter is the actual cost of investing his money, and therefore lowers his income. Sure, he has to eventually give his daughter back the principal, but he figures she will eventually get it as an inheritance anyway.

This is the type of transaction that a court will not allow. The typical court simply will not allow people to avoid taxes by pushing a check across the table twice. It is too naked, too direct, and too easy. Of course, there does not appear to be any concretely principled or compelling way to distinguish this from the other asset transfer strategies mentioned. And the courts have tried for nearly a century.

Courts have tied themselves in knots trying to solve this dilemma. After a few attempts, the courts came up with a distinction between the "form" and "substance" of the transaction. This is a specious distinction. The venerable judge Learned Hand wrote about the distinction, calling the issue, "a troublesome question that the courts had beclouded by recourse to such vague alternatives as 'form' and 'substance,' anodynes for the pains of reasoning." *Commissioner v. Sansome*, 60 F.2d 931, 933 (2d Cir. 1932). Feel the scorn.

On the other hand, Learned Hand's own attempt does not appear to work either. He believed the distinction lay between transactions conducted for a business purpose and those conducted solely for the purposes of lowering one's taxes. See *Helvering v. Gregory*, 69 F.2d 809, 811 (2d Cir. 1934). Even though the IRS continues to cling to the form versus substance distinction, Hand's doctrine was adopted by the Supreme Court: "We hold ... that Section 163(a) of the 1954 Internal Revenue Code does not permit a deduction for interest paid or accrued in loan arrangements, like those now before us, that cannot with reason be said to have purpose, substance, or utility apart from their anticipated tax consequences." *Goldstein v. Commissioner*, 364 F.2d 734, 740 (2d Cir. 1966). In essence, the taxpayer is evading taxes if the transaction would not have taken place "but for" the tax law.

Unfortunately, this distinction fails to distinguish between this strategy and strategies (2) and (3) above, which would be fine except that those strategies are generally accepted under tax law. Indeed, it is childishly simple to avoid Hand's theory in the present example. John's daughter has merely to loan the money to a bank and have John take out the loan from the bank. Pushing the check across the table twice between two people is evasion,

but pushing it across the table thrice between three people is not. Ultimately, the distinction has little predictive value. In other words, it does not really work as a guide to behavior.

If you have ten thousand regulations, you destroy all respect for the law.

—Sir Winston Churchill

Is not the purpose of the law to change behavior? Is not the purpose of distinctions and tests to communicate to people how their behavior should and

should not change? The form-versus-substance test or the "but for" test seems to be nothing more than justifications for reaching certain decisions after the fact.

While this should cause any true believer in evasion to think twice, the following strategy is even more devastating to the prevailing theory of loopholes.

(5) John decides to become a ski bum.

John has a pretty good income from his bonds, and he works a job. Now, he values his wages at merely 5 percent more than the time and labor he gives in exchange for his wages. After the income tax is imposed, he decides that the after-tax return on his investment of time and labor is less than the value of his net wages. In other words, the tax makes working for wages not worth his while. Therefore, John quits his job, moves to a ski town, rents a cheap apartment, and buys a season ticket at the lift. He settles into the modest but contented life of a ski bum.

If it is really the case that the distinction between tax compliance and evasion is in whether the decision was made "but for" the tax law, our loveable ski bum has been evading taxes! The evasion is legal but is a loophole. Are you willing to impose the additional taxes on him? He does not have the income. In fact, it appears that this is another example of imaginary income. He does not actually have the income, but he has the means to earn the income. Why should the person who works hard every day have to pay more taxes than this lazy schlub?

Maybe the reason for all these loopholes is because the darned drafter made a mistake. Maybe the drafter should not have made the test "income." Maybe the drafter should have made the test the person's "means" to pay. That is, we should stop focusing on a person's actual earnings and start focusing on a person's means.

(Continued on page 8)

The extravagance of the loophole claim.

Maybe we should appoint an agency to test every person to see what their best aptitude is. This would be a method of determining a person's ultimate means. If John has the means to become a corporate chief executive officer, why should he not pay the taxes of a successful CEO? No, we would not force him to become a CEO. He could become a teacher instead. Sure, his taxes might exceed his wages, but that is not the government's problem. John should be more ambitious! He does not have to be CEO, he can become a stock broker or lawyer. But it is up to him to produce the money. We cannot tolerate loopholes.

Of course, I have been having a bit of rhetorical fun. No one thinks such absurd things, which is the ultimate point. The absurdity shows, however, the lengths one would have to go to get rid of tax loopholes, which as near as I can discern means, "tax avoidance strategies that we do not approve of upon further review." I have yet to study a law that does not admit gaming, and therefore, does not have those unexpected strange permutations that drive legislators and their drafters to drink.

One of the most important arts of legislating is to balance competing interests. The reality is that probably no legislator is willing to take the steps necessary to stop people from gaming the tax law, or for that matter, the criminal law or any other law. Legislators make these decisions based upon their understanding of how the law will eventually affect the population. Therefore, the legislator must choose between restrictive or permissive permutations.

In short, loophole issues cannot be divorced from policy considerations, which is my ultimate complaint about the term. The term "loophole" is rather an extravagant claim if it means that a drafter's error caused the law to not achieve all desired outcomes.

Even if we posit that the original drafter of the income tax law made a huge error and that the representative or senator intro-

ducing the legislation really wanted a "means" tax instead of an "income" tax, that does not mean that the bill would have passed. Just as it is highly unlikely that any legislator would vote to dramatically restrict people's freedom to marginally increase tax revenues, so one does not truly know whether a majority of the legislators would have voted in favor of a law if the law had been drafted differently. In essence, to claim that something is a "loophole" is to claim that one knows what each member was thinking when they voted for the bill. Indeed, the claim is even more far-reaching. To claim that something is a loophole is to claim to know what a majority of legislators would have thought had a bill that probably never existed been introduced. It is possible that someone has sufficient evidence to reasonably believe this, but I remain skeptical.

In addition, this, the drafter's error, understanding of the term loophole contains an implicit argument that the issue has already been settled. Blaming the drafter for those strange permutations that inevitably exist tends to lower the burden of proof when someone is suggesting that a policy should be changed. This seems to be one of the reasons the extravagant theory is so popular.

On the other hand, the term "loophole" is a great deal less extravagant if it means that the current law has some unexpected permutations that the speaker believes are too permissive and should be changed on public policy grounds. This is a more reasonable use of the term and would help drafters to sleep at night.

Jery Payne is the editor of The Legislative Lawyer and an attorney for the Colorado General Assembly.



STATE NEWS



WEST VIRGINIA Mark McOwen

The governor convened the 77th Legislature into a brief 1st extraordinary session of the year from June 13 - 14, during which 22 bills were passed. Among the bills were new provisions to protect children from abuse and neglect, particularly from sexual predators (HB101), and supplementary appropriations making substantial payments of surplus revenues toward reduction of pension fund liabilities and other purposes. Meanwhile, the Legislature's monthly interim study meetings continue and will conclude immediately prior to the next regular legislative session. Among the study topics this year are farmland protection programs; No Child Left Behind issues; public school dress codes; highway financing; all terrain vehicle safety; municipal police and firemen's pensions; the feasibility of the "money follows the person" concept for individuals moving from institutional settings to community-based services; clean-up of underground storage tank sites; fathers' custodial rights; dam safety; and broadband services.

November 7 brings the general election for all 100 House of Delegates seats and half (17) of the Senate seats. The 1st Regular Session of the new 78th Legislature will convene January 10, 2007, for 60 days. To monitor legislative activity, please visit the West Virginia Legislature's website at <http://www.legis.state.wv.us/>. For toll-free access, dial 1-877-56LEGIS.

WASHINGTON Jeffrey Mitchell

I have fallen into the habit of using the fall edition to briefly update readers not only on recent legislative happenings, but also on ballot initiatives Washington voters will be considering at the November election. To stay the course, the following briefly describes this fall's initiative lineup and several legal challenges that will be closely monitored by the legislature, and provides an update on a long-awaited state Supreme Court decision.

Initiative Measure No. 920 would repeal the Washington state estate tax. The initiative is the latest installment regarding a controversy that emerged almost two years ago, when the state

Supreme Court invalidated Washington's previous estate tax. In February 2005, the Court held that Washington's previous estate tax was a "pick up" tax based on the federal estate tax credit for state estate taxes, which was completely phased out beginning in 2005, and state law did not impose an independently operating Washington estate tax. Several months later, the Legislature expressly created a stand-alone estate tax. Initiative Measure No. 920 would repeal the tax.

Initiative Measure No. 933 would require state and local governments to compensate property owners if government regulations damage the use or value of private property. The initiative would also forbid regulations that prohibit existing legal uses of private property, and would provide certain exceptions and payments. The compensation requirement would be triggered by any ordinance, regulation, or rule enacted on or after January 1, 1996, that restricted any use legally permitted before this date.

Initiative Measure No. 937 would require electric utilities with 25,000 or more customers to meet certain targets for energy conservation and use of renewable energy resources. Utilities subject to the initiative would have to use renewable resources to serve at least 3 percent of their load by 2012 through 2015; 9 percent of load by 2016 through 2019; and 15 percent of load by 2020 and thereafter. Utilities not meeting these energy conservation or renewable energy resource requirements would be subject to penalties. Beginning in 2012, utilities would have to report to the state regarding their progress in implementing the requirements of the initiative.

A state superior court judge ruled that a portion of an omnibus revenue bill from 2005 violated the state's spending limit law. The law limits expenditures out of the state's general fund. The limit is increased each year to reflect population growth and inflation. The limit can also be adjusted to reflect certain transfers to and from the general fund. Expenditures in excess of the limit must be ratified by the voters. The lawsuit alleged, and the superior court judge agreed, that the legislature artificially lifted the expenditure limit by manipulating transfers to and from the general fund. Oral arguments before the Washington state Supreme Court are scheduled for late November.

(Continued on page 10)

In 2001, Washington voters approved Initiative Measure No. 747 that limits annual property tax increases for the state, cities, and counties to 1 percent per year. In June of this year, a state superior court judge ruled that the initiative was unconstitutionally enacted. Washington's constitution requires legislation to fully reflect existing law to be amended. The superior court stated that the purpose of this requirement is to disclose the effect of new legislation on existing laws. Initiative Measure No. 747 contained several provisions of law that were judicially invalidated after the initiative was originally filed, but before the voters approved the initiative. Therefore, the court ruled that voters were misled because some of the language within the initiative did not reflect existing law. Oral arguments before the state Supreme Court will most likely take place in January or February.

In July, the state Supreme Court, in a 5-4 decision, upheld Washington's 1998 Defense of Marriage Act (DOMA) that defines marriage as between a man and a woman. The case, which had been argued before the Court 16 months earlier, had challenged DOMA under the state's constitutional provisions addressing privileges and immunities, due process, privacy and equality of rights.

TENNESSEE

Emily Urban

The 105th Tennessee General Assembly will convene an organizational session on January 9, 2007.

Among the studies to be performed prior to or during this session are the following: Public Ch. 887 calls for the appointment of a special joint committee to study open government laws (first organizational meeting scheduled for October 16, 2006); Public Ch. 899 calls for the appointment of a special joint committee to study the Water Quality Control Act; Public Ch. 956 calls for the appointment of a special joint committee to study not-to-compete covenants involving physicians and other health care professionals; SJR 745 calls for the appointment of a special joint committee to study the "Tennessee Voter Confidence Act of 2006" (issue of voter-verified paper ballots); and SR 151 calls for the appointment of a special committee to study the licensure of public school teachers.

In addition, HJR 1026 requires the convening of an Education Summit, composed of more than 50 members including 10 members of the General Assembly; the governor; several department heads; various local government officials; selected school superintendents, K-12 educators, parents of K-12 students, and officials, educators, and students in institutions of higher education; and selected members of chambers of commerce and business roundtables. The summit will be convened by the governor and will make recommendations to create an educational system in Tennessee that will provide an adequate education and allow

for equal educational opportunities for all students regardless of socioeconomic status at all levels from pre-kindergarten through post-high school degree programs.

NORTH CAROLINA

William R. Gilkeson

The 2006 session of the NC General Assembly made major changes to the state's ethics and campaign finance laws. This was done in the wake of—perhaps more precisely "in the middle of"—news stories and investigations involving events and people connected with four-term House Speaker Jim Black.

The stories and investigations concern:

- Campaign fundraising practices involving Black and his fellow optometrists. The beneficiary of some of those practices was Rep. Michael Decker, a Republican who in 2003 changed his party registration to Democratic, tying the partisan composition of the House and making it easier for Black, a Democrat, to continue as speaker, serving jointly with a Republican ally.
- Lobbying and ethical practices surrounding the passage in 2005 of the North Carolina lottery and Black's first appointment to the new Lottery Commission. His first appointment was Kevin Geddings, who was revealed to have been receiving payments from Scientific Games, a potential lottery contractor, while he was active on behalf of the lottery bill before its passage. Another person in the pay of Scientific Games was Meredith Norris, who received those payments while she was Black's unpaid political director. On the theory that she did monitoring work for the company rather than advocacy, she did not register as a lobbyist on Scientific Games' behalf.

Newspaper stories connected dots that drew a picture of Black using underhanded methods to retain the speakership in 2003 and of Black being too close to unsavory maneuvering to benefit lottery vendors. The speaker said the picture was untrue. He denied knowingly doing anything wrong. He urged the legislature to take far-reaching steps to address the issues that had been raised. Before adjournment at the end of July, here is what the General Assembly did:

- Prohibited personal gifts to legislators by lobbyists or those they represent.
- Created a statutory Ethics Commission with authority to rule on cases involving the executive branch, and give advisory rulings on cases involving the legislative and judicial branches. Previously the Ethics Commission had been created by executive order and had governed the executive branch only.

(Continued on page 11)

- Expanded the definition and regulation of "lobbying" to include both legislative and executive lobbying.
- Prohibited the personal use by candidates of their campaign funds. North Carolina has had no restrictions on use of campaign funds.
- Prohibited lobbyists from making or delivering contributions at any time to candidates for the legislature or executive offices, and prohibited lobbyists serving as such candidates' campaign directors.
- Prohibited the practice of making contributions by the use of checks with the payee line left blank.
- Tightened the restrictions on campaign activities by organizations that have tax exemptions as political organizations under Section 527 of the IRS Code but couch their campaign-related ads in terms that prevent their subjection to full-blown campaign finance regulation.

Those were proposals that had been discussed by reformers for years but had not been thought anywhere close to ready for passage.

After the General Assembly adjourned, rumors of prosecutorial action began to come true. Representative Decker, the Republican-turned-Democrat, pleaded guilty to a federal charge that he had done so in exchange for a promise of \$50,000 in campaign contributions. (Speaker Black, who had admitted sending optometrist contributions Decker's way, nonetheless said there was no bribery involved.) Meredith Norris, the speaker's former unpaid political director, pleaded no contest to state charges of failing to register as a lobbyist for the lottery company. Scott Edwards, the head of the optometrists' political committee, was indicted on a state charge of campaign reporting perjury. Kevin Geddings, Speaker Black's appointee to the Lottery Commission, was charged with federal crimes, the essence of which was concealing his relationship with a lottery company in the way he filled out ethics forms and otherwise, and so denying the state his honest services in public office. Although Geddings pleaded not guilty, he was convicted of five felony counts in early October.

As of mid-October, no sitting legislator had been indicted, but rumors of potential prosecution continued as the days ticked off until election day. All members of the House and Senate serve two-year terms and are up for election in November. Republicans, hampered by scandals and bad news on the Washington front, sought to take advantage of the troubles of Democrat Jim Black in their efforts to break the Democrats' slim majorities in both houses. Black himself, representing what has been a reliably Democratic district on the fringe of Charlotte, found himself in what appeared to be a tight race for re-election to his own seat.

NEBRASKA Scott Harrison

The Nebraska state constitution permits initiatives, but restricts the resubmission of the same measure during a three-year period. That portion of the constitution reads as follows: "The same measure, either in form or in essential substance, shall not be submitted to the people by initiative petition, affirmatively or negatively, more often than once in three years."

The Nebraska Supreme Court recently had an opportunity to interpret the resubmission clause in *State ex rel. Lemon v. Gale*, 272 Neb. 295 (2006). In 2004, three initiatives were submitted to the voters dealing with casino gaming. One dealt with taxation of casino gaming, one amended the state constitution to authorize laws regulating casino gaming, and one enacted a statute permitting casino gaming. The tax initiative passed, the other two did not. This year, additional initiative petitions dealing with gaming have been presented to the secretary of state. These petitions have sufficient signatures to comply with the constitutional requirements according to the sponsor. One would enact a statute that would earmark the tax proceeds from gaming, and one would amend the state constitution to authorize three casinos. The secretary of state refused to place these proposals on the ballot based upon his interpretation of the resubmission clause, and a sponsor filed suit seeking a writ of mandamus. The district court ordered the secretary of state to place the tax initiative on the ballot, but not the initiative authorizing three casinos. The district court determined that the standard to use was whether the initiatives were "substantially the same" as the prior initiatives.

An appeal and a cross-appeal to the Nebraska Supreme Court followed. The court disagreed with the district court's standard and stated that the standard to be applied when judging whether an initiative is the same as a previously submitted initiative is as follows: "we interpret the phrase 'essential substance' in the Nebraska Constitution to require a broader, conceptual analysis and comparison of the fundamental theme and purpose of each initiative measure to determine if they are the 'same' for purposes of the resubmission clause." The court found that both the tax initiative and three casinos initiative violated the resubmission clause and that neither should appear on the 2006 ballot. The sponsor additionally raised free speech and right to political association issues with the resubmission clause. The court was not persuaded by the sponsor's arguments on these issues.

The Nebraska Supreme Court has heard oral arguments in another case dealing with an initiative that would enact a statute permitting the use of video keno machines. Keno is a permitted form of gaming in the state. The secretary of state placed this initiative on the ballot and an opponent has filed suit to have it removed. The district court agreed with the secretary of state, and the opponent appealed. The opponent believes the video keno initiative violates the resubmission clause because of the

(Continued on page 12)

similarities between video keno and slot machines. Slot machines would have been authorized by one of the 2004 initiatives. The secretary of state reasoned that since keno was already permitted, the initiative was authorizing an additional manner of playing a permitted game, not expanding to a new type of gaming as the 2004 initiative would have done.

MINNESOTA Karen Lenertz

In May 2006, the Minnesota Legislature gave final approval to financing plans for a baseball stadium for the Minnesota Twins and a football stadium for the University of Minnesota Golden Gophers.

The Twins stadium legislation (Laws of Minnesota 2006, chapter 257) was the result of a 10-year lobbying effort on the part of the franchise to secure a new baseball-only stadium. Since 1982, the Twins have played in the Hubert H. Humphrey Metrodome, also home to the Minnesota Vikings and the Gophers. The new stadium will cost approximately \$522 million and will be paid for by the proceeds from a .15 percent sales tax in Hennepin County, the site of the new ballpark, and a \$130 million contribution from the team. The 42,000 seat open-air ballpark will be located in the Minneapolis warehouse district next to the Target Center, home of the Minnesota Timberwolves basketball team. The stadium is scheduled to open in April 2010.

The new football stadium for the Minnesota Gophers will bring college football back to campus for the first time since 1982, when the Gophers began playing their games in downtown Minneapolis in the Metrodome. The law authorizing the new stadium (Laws of Minnesota 2006, chapter 247) provides for a \$248 million facility, with the state contributing approximately 55 percent of the funds. The remainder of the cost is to be financed by pledges, gifts, sponsorships, and other nonstate general fund revenues. Included in the legislation is a land swap that will transfer 2,840 acres from the university to the state for future use as a nature preserve. The stadium is scheduled to be open for the 2009 season.

MARYLAND Sherry Little

The Office of Policy Analysis, Department of Legislative Services, maintains a very active publication program for members of the General Assembly and the public. Publications of interest that are directly related to legislative activity during the annual 90-day regular sessions include The 90 Day Report, the Effect of the Legislative Program on the Financial Condition of the State, and the Major Issues Review. The 90 Day Report, prepared since 1981, is available to each legislator within the week following sine die and thereafter on the General Assembly's website and, through Library and Information Services, in hard

copy at no charge. Although there is a traditional bill signing ceremony the day after sine die, The 90 Day Report primarily reflects legislative action on passed legislation since bills, if not presented during a specified timeframe during the session, may be presented to the governor up to 20 days after adjournment. The governor has up to 30 days after presentment to veto legislation. (Notably, when a new General Assembly is sworn in, bills from the previous session are not returned and are not subject to any further legislative action.)

The 90 Day Report is divided into 13 parts, each dealing with a major policy area such as budget and state aid, taxes, state government, crimes, transportation, education, and health. Each part contains a discussion of the majority of bills passed in that policy area, including comparisons with previous sessions and current law, background information, and a discussion of significant bills that did not pass. There is also a list of major issues from the session. Information related to the operating budget, the capital budget, and aid to local government is also included.

Since 1969, the annual Effect of the Legislative Program on the Financial Condition of the State has been issued after the governor has taken final action on all bills. This report lists enacted legislation that affects state and local finances, summarizes state revenues and appropriations, and discusses the major fiscal issues of the session. Members may receive copies on request.

The Major Issues Review summarizes legislative activity over the General Assembly's four-year term. In Maryland, all seats of the legislature are up for election every four years. The Review, first published for the 1987-1990 term, is available about eight to ten weeks following the close of the term's last session. Distribution and availability is the same as for The 90 Day Report. The Review includes a discussion of all major issues over the term, significant bills that did not pass, and gubernatorial vetoes of major legislation.

Like The 90 Day Report, the Review is also divided into the 13 parts, each dealing with a major policy area. There is also a list of major individual issues spanning the term. For the 2003 to 2006 period, these included Access to Health Care/Senior Prescription Drug Program, Healthy Air, Charter Schools, Early Voting/Elections Procedures/Voting Machines, Legalization of Slot Machines for Commercial Use, Higher Education Affordability—Tuition Increases and Freezes, Medical Malpractice, and Young Drivers—Additional Restrictions.

The Legislative Handbook Series, another upcoming publication that is also prepared for each term, initially will be distributed in hard copy and, for the first time, on a CD to newly elected legislators during this November's New Legislators Orientation, in preparation for the January convening of the 2007 General Assembly. The Handbook Series, first prepared beginning in 1970, this year will contain eight volumes: Maryland Legislator's

(Continued on page 13)

Handbook; Government Services in Maryland; Maryland's Revenue Structure; Maryland's Budget Process; Maryland State Personnel, Pensions, and Procurement; Maryland Local Government; Business Regulation in Maryland; and Maryland's Criminal and Juvenile Justice Process. These volumes will be available on the General Assembly's website and, through Library and Information Services, in hard copy for no charge. Additionally before the 2007 session, legislators will receive the annual Issue Papers, a compilation of staff reports that covers current issues, arranged by major topic, that are likely to be considered during the next regular session. Staff who prepared the reports is identified so that members may contact this staff for more information.

LOUISIANA Clifford Williams

I ended the article in the previous issue by stating that contentions over the budget would be concerned with how to allocate the unanticipated revenue surplus. Those same concerns have returned. There are reports indicating that when the books are closed for the fiscal year that recently ended, the state could see a surplus of up to \$800 million. The actual amount of the surplus must be declared by the Revenue Estimating Conference, which has yet to meet. However, this has not stopped the Republican Delegation's and some Democratic members' call for a special session to determine how to spend the surplus. In an attempt to head the governor off, the coalition of Republicans and Democrats are looking to utilize a never-used provision of the state constitution which authorizes the legislature to convene upon written petition of a majority of the elected members of each house. As of this writing, the petition has been drafted, but ballots have not been sent to the members.

For many members of the House and Senate, the next regular session will be their last. They are term-limited and will be serving their last year in their respective houses. Many of the term-limited House members are expected to seek election to the Senate; however, the same cannot be said for Senate members. In anticipation of the possible effects of the exodus of more than half of its members, the speaker of the House appointed a special committee on term limits. The draft goals of the special committee, which have not been formally adopted by the committee, include: investigate the effects term limits has had on the 13 states which already have lived through the change; develop and share the knowledge base on which to run the House of Representatives; investigate how to improve the institutions that are the House of Representatives and the legislature by mentoring the individual and collective behavior of the members; re-create the House of Representatives as a more independent partner in the legislature and with the governor; and establish the foundation for a House of Representatives with an accepted, planned partisan organization. As of this writing, the Senate had not announced the establishment of a similar committee.

INDIANA George Angelone

The Indiana General Assembly is in recess until November 21, 2006. The General Assembly will meet one day (hopefully) to adopt rules and elect officers and then recess until January.

Organization Day may have more drama than in some past years. The Senate will need to elect a different president pro tempore; depending on the outcome of the elections, the House may elect a different speaker; and there will be a different executive director of the Legislative Services Agency.

The Republicans have a substantial majority in the Senate. There is no indication in the press that the majority in the Senate will switch parties. However, the current president pro tempore of the Senate lost a primary race and will not be returning next session. Six current members of the Senate have publicly stated that they are seeking the post. The political blogs suggest others may also be considering a run.

The race for the position of speaker of the House of Representatives will depend on the outcome of the general election. Enough seats are being actively contested that control of the chamber could possibly switch from a Republican majority to a Democratic majority. The House of Representatives has not in living memory had a speaker of a different party than the majority party.

Phil "Satch" Sachtleben announced last June that he was resigning as executive director of the Legislative Services Agency. He will be returning to Ball State University as Associate Vice President of Governmental Affairs. Satch has served as executive director for nine years. The Personnel Subcommittee of the Indiana Legislative Council is engaged in a search for a new executive director and should complete its work before the end of October.

ILLINOIS Rosalind A. Sargent

The 94th Illinois General Assembly, which is nearing the end of its two-year term, is gearing up for the annual Fall Veto Session. This session will find the General Assembly uprooted and carrying out the tasks at hand in unfamiliar surroundings due to the extensive remodeling currently taking place within both the Senate and House chambers. The six-day Veto Session is scheduled to begin on November 14, 2006 and, with a week-long break the week of Thanksgiving, is set to adjourn on November 30th. The prominent issue going in to this year's Veto Session concerns the extension of a decade-old electricity rate freeze proposed by House Bill 5766. The bill amends the Electric Service Cus-

(Continued on page 14)

tomers Choice and Rate Relief Law of 1997 in the Public Utilities Act and prohibits the Illinois Commerce Commission from taking certain actions prior to 2010 with respect to (i) initiating, authorizing, or ordering any change by way of increase or (ii) in approving an application for a merger, imposing a condition requiring any filing for an increase, decrease, or change in or other review of an electric utility's rates or enforcing such a condition. The amendatory 2010 date extends the freeze for an additional three years. A requested early-October special session, which was requested for the specific purpose of addressing pending electricity rate hikes and the proposed extension of the freeze, did not come to fruition; however, the House Electric Utility Oversight Committee did convene and vote to extend the freeze. The extension must now be approved by the full General Assembly. Though some constituents feel that the issue may lose momentum following the November 7th election, debate of the bill, which could switch to a new vehicle bill number for the sake of legislative efficiency, is set to take place during November's scheduled session. Talk of the extension seems to have temporarily overshadowed a former Veto Session "hot topic" frontrunner going into this fall's session — Governor Blagojevich's plan to lease or sell the State lottery, which, depending on election results, could still emerge as a key issue during the limited session.

IDAHO

Katharine Gerrity

The 58th Idaho Legislature met in special session on August 25, 2006, to consider legislation proposed by the governor aimed at cutting property taxes. At the conclusion of the one-day session, the Property Tax Relief Act of 2006 was adopted. The Act reduces property taxes by \$260 million through the elimination of the public schools maintenance and operation levy on real property, raises the state sales tax to 6 percent, appropriates general funds to public schools to replace the maintenance and operation levy, places \$100 million into the Public Education Stabilization Fund, and places an advisory question on the November ballot to ask Idaho voters if they agree with the property tax relief. The session was only the sixth special session for Idaho since 1980.

Nine interim committees and task forces have been meeting throughout the summer and fall to review various specific topics of special interest to the state. The Energy, Environment and Technology Interim Committee was formed to undertake and complete a study of environment, energy and technology-related issues from both the statewide perspective and the national perspective and was authorized to retain a consultant to assist it in making recommendations for updating the State Energy Plan.

The Community Colleges Interim Committee was charged with completing a thorough assessment of the role and mission of postsecondary professional-technical and academic education in Idaho. The committee has conducted statewide meetings involving representatives of both public and private partnerships, educational institutions including professional-technical education,

the Office of the State Board of Education, members of the business community, legislative members and other interested people and organizations.

The Mental Health and Substance Abuse Interim Committee was formed to complete a study of the current mental health and substance abuse treatment delivery systems in Idaho and to review alternative ways to provide services. Committee members have received input from various agencies, including the Department of Corrections, Department of Juvenile Corrections and representatives from the judicial branch.

The primary focus of the Natural Resources Interim Committee has again involved water, particularly stabilization of the water distribution system in the state. The committee also continues to monitor the progress of a number of state and federal legal cases involving water issues.

As the Legislature prepares for its upcoming session that begins on January 8, 2007, it also is preparing for temporary relocation to accommodate Idaho's major Capitol restoration. In addition to the Legislature, the offices of the governor, secretary of state, treasurer and attorney general will also be temporarily moved to other sites. Restoration of the Capitol and construction of two new atrium wings is slated to begin in April 2007, with the intent of completing the project in 30 months.

FLORIDA

Edith Elizabeth Pollitz

Rumors surface now and then of the possibility of a special session, but nothing is set in stone. After the November election, the legislature meets in an organizational session, and the most likely scenario for a special session (ostensibly to deal with the ongoing problems relating to hurricane insurance coverage) would be in conjunction with organization in late November.

DELAWARE

Rich Dillard

The 144th General Assembly will convene on January 9, 2007. Soon thereafter, the Delaware Legislature will have a new Bill Drafting Manual. The current version was last updated in 1993.

A 75-page revamp of the Workers' Compensation Chapter was introduced in the Senate three weeks prior to the end of the normal legislative session, released from committee, but not acted upon by the Senate. The governor has repeatedly threatened to call a Special Session to deal with the issue, but it appears to be on hold until January.

(Continued on page 15)

COLORADO

Debbie Haskins

Colorado voters face 14 measures on the November ballot, including seven measures initiated by the people and seven that are referred measures. Nine of the proposals would amend the state constitution. Initiated measures on the ballot include a significant rewrite of the petitions process for placing measures on the ballot, a constitutional measure to limit school district spending requirements, term limits for Supreme Court judges and Court of Appeals judges, a broad-sweeping ban on gifts to legislators and legislative staff, an increase in the minimum wage, a constitutional provision on defining marriage as being only between one man and one woman, and a provision to make the possession of one ounce or less of marijuana legal for persons 21 years of age or older. In addition, the General Assembly referred a bill allowing for the creation of domestic partnerships by same-sex couples and a different version of the school district spending requirements. At the next report, we will update you on what happened.

Our latest vetoes case, General Assembly v. Owens, was concluded this summer when the Colorado Supreme Court affirmed the lower court decision that the Governor's line item vetoes of the definitional head notes do not affect the enactment's other purposes and were an appropriate exercise of the governor's item veto power. The Supreme Court did rule in favor of the General Assembly in affirming that the governor cannot veto an appropriations clause in a substantive bill unless he vetoes the entire bill.

We are busy planning for the next session and getting ready to provide new member orientation to the upcoming newly elected legislators.

ALASKA

Jack Chenoweth

The focus during the second regular session of the 24th Alaska Legislature that ended May 9, and during each of two following 30-day special sessions, was a package of bills submitted by the Murkowski Administration to advance the construction of a natural gas pipeline at a cost of an estimated \$25 billion. The pipeline would connect the state's extensive North Slope natural gas reserves to the domestic North American pipeline transportation system at a point in Alberta. The administration's legislation included a combination of proposed state oil and gas severance tax reforms, a series of amendments to the state's Stranded Gas Development Act, and a proposal to establish a public corporation so that the state could participate with other interested parties in the planning, financing, construction, and operation of that project. Only the measure reforming the oil and gas severance tax gained final passage.

In the course of the combined regular and special sessions, legislators approved 115 bills and 32 resolutions. Among other measures that were approved were those to impose limitations on the use of eminent domain; change the standard of proof applicable in proceedings relating to the placement of a child and to terminate parental rights; establish crimes against unborn children; bar the confiscation of firearms by public officials during declared disaster emergencies; amend laws penalizing the possession, manufacture, and delivery of marijuana and extend and increase the penalties for offenses involving methamphetamines; clarify when the use of deadly or nondeadly force is justified in defense of self, property, and others; direct health care insurers offering health care plans to cover colorectal cancer screening and related lab tests under the plan coverage; require school districts to develop, adopt, and enforce policies on harassment, intimidation, and bullying of students; amend penalties for contempt of court and to authorize detention and identification of witnesses to certain serious crimes; and increase the number of superior court judges and the salaries payable to all state court justices and judges. The Legislature also authorized state participation in the Interstate Insurance Product Regulation Compact and made extensive changes to the state's Health Care Decisions Act involving use of health care directives and do not resuscitate orders. Finally, the Legislature approved a fiscal year 2007 state operating budget appropriating \$5.3 billion and a state capital budget of more than \$3 billion from the state general fund, federal funds, and other sources.

Incumbent Alaska Governor Frank Murkowski was not renominated at the August 22 Republican primary. The November general election will see a contest among former (1994 - 2002) two-term Governor Tony Knowles, a Democrat; former two-term Wasilla City Mayor and former chair of the Alaska Oil and Gas Conservation Commission Sarah Palin, a Republican; and former two-term State Representative Andrew Halcro, an Independent. At that primary election, voters also approved two initiatives, one tightening the state's laws relating to campaign contribution limits, regulation of lobbying, and legislators' financial interest disclosure, and a second levying state taxes on cruise ships and regulating activities of those vessels as they operate in the state's marine waters.



LSSS CORRESPONDENTS

Dedicated correspondents supply us with state news for *The Legislative Lawyer*. The Legal Services Staff Section thanks you.

State News Editor: Edith Elizabeth Pollitz pollitz.edith@leg.state.fl.us

Regional Correspondents

Great Lakes	John Rowings	rowings@iga.state.in.us
Mid-Atlantic	Rich Dillard	richard.dillard@state.de.us
New England	Brian Leven	bleven@leg.state.vt.us
Mid-West	Scott Harrison	sharrison@unicam.state.ne.us
South Central	Norm Furse	normf@rs01.wpo.state.ks.us
West	Jeffrey Mitchell	Mitchell-je@leg.wa.gov

State Correspondents

AK Pam Finley	MA Louis Rizoli	OH Rich Merkel
AL Karen Smith	MD Sherry Little	OK Scott Emerson
AZ Don Thayer	ME Peggy Reinsch	OR Cindy L. Hunt
CO Debbie Haskins	MN Karen Lenertz	PA Stacey Mosca
CT Bradford Towson	MO Russ Hembree	RI Cay Massouda
DE Rich Dillard	MS Ted Booth	SD Jacqueline Storm
FL Edith Elizabeth Pollitz	MT Greg Petesch	TN Emily Urban
HI Ken Takayama	NC William R. Gilkeson	TX Mark Brown
IA Rich Johnson	ND Jay Buringrud	UT Gay Taylor
ID Katharine Gerrity	NE Scott Harrison	VA Mary Spain
IL Rosalind A. Sargent	NH Paul Lindstrom	VT Brian Leven
IN George Angelone	NJ Howard Rotblat	WA Jeffrey Mitchell
KS Norm Furse	NM Pam Ray	WI Cathlene Hanaman
KY Ann Zimmer	NV Brenda Erdoes	WV Mark McOwen
LA Clifford Williams	NY J. M. Wice	WY Dave Gruver

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

Chair:

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

Vice-chair:

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

Secretary:

Lisa Sandberg lsandberg@lsc.state.oh.us

Directors:

Robert Rothberg Rrothberg@njleg.org

Debbie Haskins debbie.haskins@state.co.us

Doug Himes doug.himes@legislature.state.tn.us

Roger Norman roger@arkleg.state.ar.us

Laura H. Hendrix Laura.Hendrix@lrc.ky.gov

Newsletter Editor:

Jery Payne jery.payne@state.co.us

NCSL liaison to LSSS:

Kae Warnock kae.warnock@ncsl.org



**National Conference of State Legislatures
7700 East First Place**