EXAMPLES OF UNINTENDED CONSEQUENCES IN MISSISSIPPI LAWS

(1) **Governor to submit a balanced budget**  (Pages 1-3 in copies)

Unlike in some of your states, the power of the Governor in Mississippi to control the state budget is relatively weak. The Legislature sets the budget through the appropriation bills that it enacts, and the Governor's only real power over the budget is to veto or threaten to veto an appropriation bill if he doesn't have sufficient influence to get his way in one house or the other. A joint legislative budget committee develops the proposed state budget in the fall before the upcoming regular session in January. The Governor has no direct input into that process, and the Legislature, when enacting appropriation bills, usually works off of the proposed budget of the joint committee. The Governor is required by statute to submit his balanced budget to the Legislature, but until recently, the Legislature just said "thank you very much, Governor, that's nice," then threw his budget away and proceeded to develop its own budget without paying any attention to the Governor's.

In 1990 the Governor submitted his balanced budget to the Legislature, as required by statute, but for the first time, he based his budget on a source of revenue that did not currently exist. He separately proposed that the Legislature enact a state lottery by general law, and then he used the projected revenue from the nonexistent lottery as part of the estimated funds available for the upcoming fiscal year, and based his budget on that total amount of funds. The Governor was not violating the law, but instead he was exploiting a loophole in the statute that required him to submit his balanced budget to the Legislature. The law did not say what amount or sources of funds the budget should be based on, so the Governor decided it was okay and within the law to base it on a source of revenue that would exist only if another general law were enacted.

Even though the Legislature did not pay much attention to the Governor's budget when developing its own budget, it did want the Governor's budget to be based on the same amount of estimated funds available for the upcoming fiscal year, so that the legislative and executive budgets could be accurately compared, if necessary. So, during the 1991 session, the Legislature amended the Governor's budget statute to close the loophole and require the Governor, when preparing his balanced budget, to use only those revenues that will be available under the general laws of the state as they exist when the balanced budget is prepared, and not include any proposed revenues that would become available only after the enactment of new legislation.

When writing language to direct someone to do something, I like to approach it from both angles, the positive and the negative -- first declaring what the person is required to do, and then following it up with what he is not allowed to do.

(2) **Baby drop-off law**  (Pages 4-7 in copies)

In 2001 the MS Legislature enacted a law known as the "Baby Drop-off Law," which required emergency medical services providers to take possession of a child who is 72 hours old or younger if the child's parent voluntarily delivers the child to the provider and does not express an intent to return for the child. The law provided an absolute affirmative defense to prosecution
of the parents of the child under the criminal statutes for abandonment, desertion, neglect or nonsupport of a child. Some other states enacted baby drop-off laws around the same time for the purpose of encouraging parents to leave their unwanted newborn with a hospital instead of abandoning their baby someplace where it would be less likely to survive. Without such a law, parents were afraid that they might be prosecuted under those criminal statutes even if they left their unwanted baby at a hospital, so they were more likely to just abandon the baby.

The law in MS seemed to be working pretty well until it was recently determined that in many cases the hospital or other provider was requiring the parent to give their name and other identifying information before it would accept the baby. Many of these parents want to remain anonymous, so this additional requirement being imposed on the parents by the hospitals was having the unanticipated effect of discouraging parents from bringing the baby to the hospital. It was causing a perverse effect where parents were not using a law that would help save the lives of unwanted babies, which was the intent and desired effect of the law. The 2001 law did not address whether or not a hospital could require any personal information from the parent as a condition of accepting a baby, and this omission was causing unintended consequences that were contrary to the intent and purpose of the law.

During the 2012 session the Legislature amended the Baby Drop-off Law to address this gap in the law that was weakening its effectiveness. The bill provided that the parent who surrenders the baby shall not be required to provide any information pertaining to his or her identity, and prohibited the emergency medical services provider from asking for that information. Also, if the provider already knows the identity of the parent, then the provider is required to keep the identity confidential.

[The bill also provided that a female who goes to a hospital and is then admitted for purposes of labor and delivery does not give up the legal protections or anonymity guaranteed under the law. If the mother clearly expresses a desire to voluntarily surrender custody of the newborn after birth, the emergency medical services provider may take possession of the child in the same manner as if the child was born outside the hospital and given to the provider there. If the mother expresses a desire to remain anonymous, identifying information may be obtained for purposes of securing payment of labor and delivery costs only, and the identity of the mother will not be placed on the birth certificate or disclosed to the Department of Human Services.]

(3) **Minimum standards for mental health holding facilities** (Pages 8-19 in copies)

In 2009 the MS Legislature amended the powers of the governing board of the Department of Mental Health to require the board to certify and establish minimum standards and required services for county mental health holding facilities -- those are facilities that are used for housing and providing medical treatment for persons who have been ordered to a mental health treatment center by a court. As required by the law, the board adopted operational standards for these holding facilities. One of the requirements in the standards was that the facilities had to have the person who is being held assessed by a psychiatrist or a psychiatric nurse practitioner within 72 hours of admission.
During the 2012 session, the chancery court clerk of the county where the House Public Health Committee chairman resides contacted the chairman and told him that it was impossible for his county and many other counties to comply with this requirement, because most of the 82 counties in MS do not have a psychiatrist available on short notice as the standards require. So, by allowing the agency to come up with the details of the 2009 law with no guidelines or limitations specified in the law, this resulted in the unintended consequences of a requirement on the counties that most of them could not comply with. Was this contrary to what the legislators intended? We really don't know, because it wasn't discussed when the 2009 law was enacted.

The chairman asked me to draft a bill for the 2012 session to address this problem for the counties that don't have access to a psychiatrist. I took the approach of setting some limits for the minimum standards that were required by the law, and stated that "those minimum standards shall not require that the initial assessment of those persons being housed in county facilities be performed by a psychiatrist, unless there is a psychiatrist available in the county at the time the assessment is to be performed." My language did not say who could perform the assessment. That would still be up to the board, but the board would now have some limitations in the law -- it would no longer be able to require that a psychiatrist must perform the assessment. In the committee, my language was removed and replaced with language that took a different approach. It stated who could perform the assessment, saying that "the minimum standard for the initial assessment of those persons being housed in county facilities is for the assessment to be performed by a physician, preferably a psychiatrist, or by a nurse practitioner, preferably a psychiatric nurse practitioner." The Legislature passed the bill with the revised language.

I think the revised language is okay, because it states who is to perform the assessment, which my language did not, but I wish they had still kept in my language saying that the board could not require the assessment to be performed by a psychiatrist. Some might think that is overkill, but I think that the revised language is still not quite precise enough to prevent the board from requiring the assessment to be performed by a psychiatrist. The intent of the revised language is that a psychiatrist would not be required to perform the assessment unless one is available, but it doesn't say that, as my original language did. I think it would have been better to keep my original language in, following the language that passed, to make it clear what the minimum standards cannot require.

As I mentioned earlier, when writing language in a bill to direct a person or entity to do something, I like to approach it from both angles, the positive and the negative. I will specify what they are required to do, and then follow the positive requirement with a negative prohibition, and specify what they are not allowed to do. In ordinary writing, this might appear to be overkill, but I have seen it happen many times that if the language is written with only the positive requirement, there will be someone who will say that "the language doesn't say that I can't do this, so I can do it." Their argument is that if the law doesn't specifically prohibit it, then they can do it. That's why I like to add the "overkill" language, the negative prohibition following the positive requirement, to make it clear what they cannot do under the law, and take away any argument that the law doesn't say they can't do it.

(4) Failure to update statutory reference (Pages 20-23 in copies)
This situation was caused by something that can happen to any drafter, but should not happen, because it is totally within the power of the drafter to prevent. [When it does happen, it can be very embarrassing because we know what to do to avoid it, and we should have done what would have avoided the problem.]

Back in 1985, the MS Legislature wanted to amend the statute that provided for their daily expense allowance during the legislative sessions and for attending to legislative duties between sessions. The daily amount was set in the statute, and it had to be changed through legislation whenever it was increased, so a bill was introduced to increase the amount. But the bill was going to do this in a way that hopefully would eliminate having to amend the statute in the future to make additional increases, by making it a floating amount that was tied to the amount provided for federal government employees. The bill made a reference to the federal statute, saying that their daily expense allowance would be equal to the maximum per diem compensation allowed to federal government employees under 5 USC Section 5702(a).

Whenever the legislators try to make any increase in their compensation, it is a controversial subject, even if it is only for their expense allowance. The press and their constituents will usually beat them up over it, so the less attention paid to legislative actions to increase their compensation, the better. The bill was introduced early in the session, and it quietly made it through the legislative process without any undue controversy. Mission accomplished, right? No, it was not quite over yet, and that was because of a crucial oversight by the drafter that caused some unintended consequences, which resulted in much more unwanted attention to this sensitive topic than the legislators had wanted.

Each session we have a lot of bills introduced that are exactly or essentially the same as they were during previous sessions -- we call those bills reintroductions, or "reintro." This bill was a reintro from previous sessions, and it was drafted accurately in the session in which it was originally introduced. Let me ask you -- when you prepare bills for reintroduction, do you always go back through the bill to make sure that all references in the bill, both internal and external, are up to date? You can probably guess what happened here. Since the session when the bill was first introduced, Congress had amended Section 5702, and the provision that was formerly in subsection (a) was now in subsection (c)! Whoops, we messed up -- the drafter had failed to check to see if the reference to Section 5702(a) in the bill was still accurate, and unfortunately for him and for the legislators, it was not.

The mistake was found almost immediately after it had been signed by the Governor, and luckily they were still in session so they had time to go back and correct the error. But they had to bring a lot more attention to the fact that they were increasing their expense allowance than they had wanted to. They first had to pass a resolution through both houses to allow the introduction of another bill to amend the first bill, and explain why they needed that resolution. Then they had to pass the second bill itself, which brought further attention to the issue. The drafter, who was a very experienced one, handled his mistake and the uncomfortable situation that he was in a lot better than I would have. The legislators were nice to him in person as they were dealing with correcting his error, but I'm sure that privately they were royally miffed at him.
As I said, this is one type of unintended consequence that can happen to any of us, but it shouldn't, because it is fully within our control to prevent. So, do what needs to be done to prevent this type of unintended consequences -- don't get lax with your reintros and always make sure that the references in them are up to date.

[In this case, the reference to the federal statute was very specific, including a reference to the particular subsection providing for the federal employees' per diem compensation. I have found that you can sometime create a problem by being too specific and detailed, and a drafting technique that I often use might have prevented the problem here. Early in my drafting career, I used to pride myself on being very specific with my references to other statutes -- I would use language in a bill saying that that "this procedure shall be done in accordance with Section 41-29-181(7)(b)(i) of the MS Code." But after a few years, I discovered that some of my very specific references were no longer correct, because the Legislature had amended the referenced section and the original paragraph (b) was now paragraph (c).

To prevent that problem, I am not usually that specific in my references now if I can avoid it. Instead, I may just refer to 41-29-181(7), leaving off the references to (b) and (i), and add a phrase describing what part of (7) I am referring to. That way if (b) is later changed to (c), my reference will still be correct if the reader of the statute can still tell what part of (7) I am referring to. It is possible that the embarrassing problem with the legislative expense allowance could have been avoided if the reference had been made to the entire section without referring to a particular subsection.

But sometimes you cannot refer to provisions in a section this way, and you have to be very specific in your reference, down to the subparagraph, because the meaning would not be clear enough by referring only to the section or subsection.]

(5) Distribution of ending cash balance in General Fund  (Pages 24-29 in copies)

In 2008 the Legislature enacted a bill to provide a formula for distributing any ending cash balance in the State General Fund among several funds in the State Treasury in a certain order of priority. The lead-in language to the list of funds into which the cash balance would be distributed said "...the distribution of those funds shall be made by the Director of the Department of Finance and Administration in the following order:” However, the language used for the amounts to be distributed to several of the funds said "not to exceed" a certain amount or percentage. That language was used because the full amount or percentage may not be available when the director gets down to the next fund in the list, but the intent was that if the full amount or percentage was available, then the director should distribute the full amount or percentage to that one fund, before distributing any money to the next fund in the list. Yes, that was the intent, but it didn't actually say that in detail.

The third fund in order of priority on the list is the State General Fund itself, and the statute said that "an amount not exceeding 1% of the General Fund appropriations for the fiscal year" was to remain in the General Fund. The Legislature set aside that amount for funding deficit appropriations during the next session. The fourth fund in order of priority on the list is the state's Reserve Fund, commonly known as the "rainy day" fund. The Governor wanted to build up the amount in that fund and he was looking for a way to do it.
In 2010 the Governor told the director that he did not want him to leave the full 1% in the State General Fund, which would leave much less money available for the rainy day fund. Since the Governor wanted more money in the rainy day fund, he told the director to leave only a small amount in the General Fund, and put a lot more money in the rainy day fund. The director previously worked as a budget staffer for the Legislature, but as director, he served at the will and pleasure of the Governor, so the director did what his boss told him to do. I'm sure that he and the Governor knew what the intent of the Legislature was for the distribution of funds under that law. The director and the Governor were not violating the law, but instead they were exploiting a loophole in the law, and said that the language "an amount not exceeding 1% of the General Fund appropriations" gave them the discretionary authority to determine the amount that remained in the General Fund, as long as it did not exceed 1%. In other word, the 1% was a cap on their discretion, not a requirement to leave the full 1% in the General Fund if there was enough money to do so.

The Legislature came back in 2011 and closed that loophole to make it clear that if the full amount or percentage was available for distribution to any fund on the list, then that full amount or percentage must be distributed to that fund before any money could be distributed to the next fund on the list. It took a lot more language than should have been necessary to make the director and the Governor do what the Legislature had originally intended (and what the director and the Governor had done in 2008 and 2009). As I said previously, the director and Governor were not technically violating the law, because the language was not precise enough and it allowed them to interpret it favorably to what they wanted to do, but they were violating the intent of the law.

(6) **Removing the PLADs from Medicaid coverage** (Page 30-38 in copies)

Before 2004 the Medicaid program covered a group known as the PLADs, which stands for "Poverty Level Aged and Disabled." These were persons who were 65 or older or who were disabled, and whose income did not exceed 135% of the federal poverty level. Most of them were what we call "dually eligible," which means that they were eligible for both Medicare and full Medicaid benefits. The primary reason that Mississippi and several other states covered the PLADs under Medicaid was to allow them to receive prescription drug coverage, because Medicare did not provide for prescription drugs until Medicare Part D, the Medicare prescription drug program, was enacted. The dually eligible would be automatically enrolled in and receive drug coverage through Medicare Part D, effective January 1, 2006. Because of this, the federal government would not allow states to continue providing prescription drug coverage for the PLADs under their Medicaid programs after December 31, 2005, unless they were covered with 100% state funds -- after that date, federal matching funds would no longer be provided to the states for this coverage.

The Director of the Division of Medicaid and the Governor told the Legislature about this upcoming situation and recommended that the Legislature amend the Medicaid law during the 2004 session to delete eligibility for the PLADs, a year ahead of the federal cut-off date. There were a number of legislators who didn't fully accept the Governor's assertion that the PLADs would be just fine after being taken off Medicaid, but they knew that the state couldn't afford to
continue covering them using 100% state funds, so they reluctantly agreed with the Governor's recommendation as part of a comprehensive Medicaid technical amendments bill.

It didn't take long for the unintended consequences from this legislative action to appear, and these were the unintended political consequences that I mentioned earlier. There were about 23,000 PLADs covered under Medicaid, but not all of them were dually eligible -- about 5,000 were only eligible for Medicaid, which meant that they lost their Medicaid coverage and they wouldn't be getting prescription drugs or anything else from Medicare. The Governor's office was quickly inundated with calls from people who were outraged at what had been done. The Governor, who was a Republican, did not anticipate that there would be so many of his supporters who were upset about this action. The PLADs wouldn't seem to be a Republican constituency, but these elderly or disabled people were the parents and grandparents of a number of Republicans who came down hard on the Governor and blamed him for it. The Chairman of the House Public Health Committee, who had reluctantly agreed to remove the PLADs from coverage in a conference report at the end of the session, led a group of protesters to the door of the Governor's office, demanding a meeting with the Governor. The Governor soon knew that he had not anticipated the extent of the political consequences of this action.

A lawsuit was brought against the Division of Medicaid to reinstate coverage of the PLADs until December 31, 2005, and the lawsuit was settled to do just that. During the 2005 session, the Legislature amended the Medicaid law to reinstate the PLADs as provided in the settlement.