



National Conference of State Legislatures

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## **Severability, Saving, and Nonseverability Clauses as described in Legislative Drafting Manuals**

### **Alabama**

#### **Rule 22. Severability Clause**

Use a severability clause only when there is a possibility of partial invalidity and it is not clear that the intention of the Legislature is that the bill be severed. If used, it should be in a section as follows:

“Section. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains.”

### **Alaska**

#### CHAPTER 1.

#### **REPEALERS AND SPECIAL AND TEMPORARY SECTIONS**

##### (i) Saving clause

If a bill contains provisions that limit, modify, or destroy individual rights and privileges, it may be necessary to consider a saving clause to protect those who have acted in reliance upon the existing law. The means for providing this protection is the saving clause.

In order to eliminate the need for adding saving clauses to each and every bill, a general saving clause has been enacted as part of the Alaska Statutes.

AS 01.10.100(a) provides:

The repeal or amendment of a law does not release or extinguish any penalty, forfeiture, or liability incurred or right accruing or accrued under that law, unless the repealing or amending act so provides expressly. The law shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of the right, penalty, forfeiture, or liability.

The existence of this general saving clause makes it unnecessary for the bill drafter to include a saving clause unless a special circumstance leads the drafter to believe that the general saving clause is inadequate. If the purpose of the bill is to cut off all rights and remedies as of the effective date of the bill, the bill drafter must specifically exempt the bill from the application of the general saving clause in AS 01.10.100(a).

(j) Severability clause

A severability clause is a statement by the legislature that if a part of a law that is enacted is subsequently held to be unconstitutional, the unconstitutionality does not invalidate the rest of the law. There is a general severability clause in the Alaska Statutes. It reads as follows:

Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language: "If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby." (AS 01.10.030)

In view of this section, the bill drafter should not use a severability clause in a bill unless it is necessary to specify more details than are provided in AS 01.10.030 (e.g., "held invalid by the United States Supreme Court . . ."). If the sponsor insists on a general severability clause, use the following:

SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of it to any person or circumstance, is held invalid, the remainder of this Act and the application to other persons or circumstances are not affected.

Given AS 01.10.030, the drafter will need to include a nonseverability clause in a bill if the legislature intends that the provisions of the bill stand or fall together. An example of a nonseverability clause is:

\* **Sec. 20.** The uncodified law of the State of Alaska is amended by adding a new section to read:

PROVISIONS NOT SEVERABLE. Notwithstanding AS 01.10.030, the provisions of this Act are not severable.

## Arizona

### 4.22 NONSEVERABILITY AND SEVERABILITY CLAUSES

#### Nonseverability

On occasion the legislature wants an act either to stand or fall as one unit. To avoid a court interpretation that might allow an act to continue in force after a portion is invalidated the drafter should insert a nonseverability clause at or near the end of the bill similar to the following:

**Sec. \_\_. Nonseverability**

**If any portion of this act is finally adjudicated invalid, the entire act is void.**

Note: Section 1-252, A.R.S., does not apply if an act becomes invalid under a nonseverability clause. All former laws repealed by the invalid act are revived. An invalid statute that purports to repeal a prior statute is ineffective to do so. See *Selective Life Ins. Co. v. Equitable Life Assur. Soc. of U.S.*, 101 Ariz. 594, 422 P.2d 710 (1967).

## Severability

A severability clause is unnecessary for legal purposes because the courts have repeatedly ruled that regardless of the presence or absence of a severability clause they will sever invalid portions from an otherwise valid act whenever possible. See *Cohen v. State*, 121 Ariz. 6, 588 P.2d 299 (1978). However, severability provisions are occasionally used even though they add no legal effect to the bill. If requested, the drafter should use the following:

### Sec. \_\_. Severability

**If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.**

## Arkansas

### 6.1 APPLICABILITY.

#### (e) SEVERABILITY CLAUSE.

A severability clause provides that if a part of a law is declared invalid the remaining part stays in force. A general severability clause is not necessary, and should not be used. Arkansas Code § 1-2-117 states that the provisions of the Arkansas Code are severable, and Arkansas Code § 1-2-205 states:

“...The provisions of each and every act enacted by the General Assembly after July 24, 1973, are declared to be severable and, unless it is otherwise specifically provided in the particular act, the invalidity of any provision of that act shall not affect other provisions of the act which can be given effect without the invalid provision”.

#### (f) NON-SEVERABILITY CLAUSE.

If the author does not want the provisions to be severable or does not want specific provisions to be severable, add a section declaring the provision to not be severable. Bills having a statement of non-severability are rare.

#### **Example:**

SECTION 6. The provisions of this act are not severable, and if any provision of this act is declared invalid for any reason, then all provisions of this act shall also be invalid.

## Colorado

### VI. Special Clauses

#### A. Saving Clause - Grandfather Clause

Usually the provisions of a bill enacted into law become effective on the effective date of the new act. When a new act would affect existing rights, obligations, and procedures, a saving clause may be included to limit the application of the bill when enacted into law. The saving clause differs from the applicability clause (discussed below) in that the saving clause "saves" existing law while the applicability clause provides that new law will apply to certain events and transactions after a specified date.

A saving clause is usually not included in a bill since a general saving clause, concerning penalties and liabilities, is included in section 2-4-303, C.R.S.:

**2-4-303. Penalties and liabilities not released by repeal.** The repeal, revision, amendment, or consolidation of any statute or part of a statute or section or part of a section of any statute

shall not have the effect to release, extinguish, alter, modify, or change in whole or in part any penalty, forfeiture, or liability, either civil or criminal, which shall have been incurred under such statute, unless the repealing, revising, amending, or consolidating act so expressly provides, and such statute or part of a statute or section or part of a section of a statute so repealed, amended, or revised shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings, and prosecutions, criminal as well as civil, for the enforcement of such penalty, forfeiture, or liability, as well as for the purpose of sustaining any judgment, decree, or order which can or may be rendered, entered, or made in such actions, suits, proceedings, or prosecutions imposing, inflicting, or declaring such penalty, forfeiture, or liability.

If the general statutory saving clause quoted above is not adequate for purposes of a particular bill, a specific clause should be inserted. However, extreme care must be used in the drafting of a specific saving clause to be certain of its actual effect and operation.

### **1. Examples of Specific Saving Clauses**

The "Uniform Commercial Code" contains a specific saving clause as follows:

**4-10-101. Effective date.** (1) This title shall take effect at 12:01 a.m. on July 1, 1966. The provisions of this title apply to transactions entered into and events occurring after such date. (2) Transactions validly entered into prior to the effective date of this title and the rights, duties, and interests flowing from them remain valid thereafter and may be terminated, completed, consummated, or enforced as required or permitted by any statute or other law amended or repealed by the enactment of this title as though such repeal or amendment had not occurred.

### **3. General Saving Clauses**

Instead of any of the more specific saving clauses above, the following general saving clauses may suffice:

The remedies provided for in sections \_\_ and \_\_ are cumulative, and no action taken by the state constitutes an election by the state to pursue any remedy to the exclusion of any other remedy for which provision is made in this article.

This article is intended to be in addition and supplementary to other laws of this state, and shall not be construed to repeal any of the provisions of sections \_\_ and \_\_, C.R.S.

Such clauses are included in a C.R.S. section since they are part of the permanent law and should be located conveniently with the permanent law.

### **B. Severability Clause - Nonseverability Clause**

A severability clause provides that if any part of an act is held unconstitutional, the remainder shall not be affected. It is a type of saving clause in that it "saves" parts of an act if any other parts of the act are declared unconstitutional by court action.

Under article 4 of title 2, a general severability clause is provided that applies to all statutes:

**2-4-204. Severability of statutory provisions.** If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid, unless it appears to the court that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

It would seem that the above general severability clause would be adequate since it applies to all statutes. Nonetheless, the Colorado Supreme Court has given some weight to the inclusion of a severability clause in specific statutes (*In re Questions of the Governor*, 55 Colo. 17, 123 P. 660 (1912); *Mountain States Telephone and Telegraph Co. v. Animas Mosquito Control District*, 152 Colo. 73, 380 P.2d 560 (1963)). Thus, a severability clause is sometimes included, especially in long or controversial bills or when a member specifically requests its inclusion in a bill. However, a severability clause should not be used indiscriminately since it serves no particular purpose in most bills.

If the drafter determines that a severability clause is necessary, the example below, adapted from the severability clause in uniform laws, should be used:

**X-X-XXX. Severability.** If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

In some cases the General Assembly may request a "nonseverability" clause. This clause declares that the General Assembly would not have enacted the bill without *all* the provisions in it; therefore, if any provision is held to be invalid, the entire act is invalid. The following is an example of a "nonseverability" clause:

**29-8-139. Nonseverability.** If any provision of this article is held invalid, such invalidity shall invalidate this article in its entirety, and to this end the provisions of this article are declared to be nonseverable.

## Delaware

### RULE 19. SAVINGS CLAUSES AND EFFECTIVE DATES.

(a) An essential step in the preparation of legislation is to determine the effect that the enactment of the legislation will have on existing rights, liabilities, and proceedings. The function of a savings clause is to preserve a law that the legislation supersedes and which otherwise would apply with respect to described transactions and events that occur before the legislation takes effect to minimize disruption inherent in change from the old to the new law. Most savings clauses preserve the superseded law. However, the purpose of legislation may be better served by a clause that is tailored to meet the particular needs for continuation of the superseded law. If existing rights are preserved, it may be desirable to require that they be asserted within a relatively short, specified period after the legislation takes effect.

(b) A bill becomes effective upon its enactment into law unless otherwise specified. An effective-date section is necessary only when the bill or part of the bill will not go into effect immediately.

(c) An effective-date provision may phase in certain sections of a bill over time.

**Example:** This Act is effective upon its enactment into law, except Sections 3 and 4, which become effective 6 months after the date of enactment.

## Comment

Appropriate savings clauses and transitional provisions make it possible for legislation to take effect with minimum disruption of existing expectations and obligations. They must be drafted with great care.

If a short statute of limitations is included in the savings clause, consider including a statement that it does not revive claims for relief already barred, or preclude the barring of existing claims for relief sooner by another statute of limitations.

## Florida House

### MISCELLANEOUS PROVISIONS

**Severability clause** – Rarely, if ever, is a severability clause necessary. In 1969, the Florida Supreme Court stated that the absence of a severability clause in a statute does not prevent the court from exercising its inherent power to preserve the constitutionality of an act by the elimination of invalid clauses.

Conversely, it has been indicated that the presence of a severability clause will not prevent the court from throwing out the whole act if, in its opinion, to preserve a remainder would produce an unreasonable, unconstitutional, or absurd result.

When used, severability clauses are often observed to be quite lengthy and awkward. For those who insist on using a severability clause, the following short version would probably be as good as any:

Section \_\_\_. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

## Hawaii

Chapter 2, m.

**(3) Saving clause** - preserves certain rights, remedies, or privileges that would otherwise be destroyed by the general enactment. The saving clause is usually used to restrict repealing bills by continuing repealed acts in force as to existing powers, inchoate rights, penalties, and pending proceedings.

Example:

SECTION 11. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

## Illinois

### SAVING CLAUSE

#### REPEALERS

**(d) SAVING CLAUSE.** It is sometimes necessary to include a saving clause in connection with the repeal of a statute. An example follows:

(505 ILCS 950/13 rep.) Section 15. The Corncob Pipe Act is amended by repealing Section 13. The repeal of Section 13 does not apply to any action pending before the effective date of this amendatory Act of the 96th General Assembly.

Cross reference: Section 35-50, subsection (c), concerning applicability of a repealer.

#### EFFECTIVE DATE AND APPLICABILITY

**(c) REPEAL; SAVING CLAUSE.** When drafting legislation to repeal a statute, remember that a court might dismiss an action that is pending when the repeal takes effect unless a saving clause is included in the legislation. Always place the saving clause below the enacting clause, not in a preamble. See Public Act 89-2 and *Atkins v. Deere & Co.*, 177 Ill.2d 222 (1997).

### SEVERABILITY

#### NEW PROVISIONS

#### **SECTION 20-50. SEVERABILITY OR INSEVERABILITY.**

**(a) SEVERABILITY.** The general rule developed and applied by the courts is that if a portion of a statute is invalid or unconstitutional, then the remaining portions of the statute are valid and enforceable if they stand on their own. *City of Carbondale v. Van Natta*, 61 Ill.2d 483 (1975). If the remaining portions are completely dependent on the stricken portions, however, the remaining portions are also invalid. *Sperling v. County Officers Electoral Board*, 57 Ill.2d 81 (1975).

Section 1.31 of the Statute on Statutes, 5 ILCS 70/1.31, provides as follows:

Sec. 1.31. If any provision of an Act enacted after the effective date of this amendatory Act or application thereof to any person or circumstance is held invalid, such invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid application or provision, and to this end the provisions of each Act enacted after the effective date of this amendatory Act are severable, unless otherwise provided by the Act.

"The effective date of this amendatory Act" (Public Act 79-1178) adding Section 1.31 was July 1, 1976. Thus, Section 1.31 applies to Acts enacted after July 1, 1976.

This statute is merely declaratory of the rule of decision and will not operate to save an otherwise valid portion of a law that is so dependent on an invalid portion that the otherwise valid portion cannot be given effect. *Grennan v. Sheldon*, 401 Ill. 351 (1948).

Thus, both the decisions of the courts and the statute apply a rule of severability to all Acts enacted after July 1, 1976. There should never be any need for a bill to contain its own severability clause; it already has one both by court decisions and statute. In *People ex rel. Chicago Bar Association v. Illinois State Board of Elections*, 136 Ill.2d 513, 532 (1990), however, the Illinois Supreme Court indicated that it would give more weight to a specific severability clause than a general severability statute, such as Section 1.31 of the Statute on Statutes.

Therefore, if severability is at all a question, you may add the following specific Section to the bill:

Section 35. Severability. The provisions of this Act are severable under Section 1.31 of the Statute on Statutes.

If a fuller severability clause is requested, you may use the following:

Section 35. Severability. If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity of that provision or application does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application.

**(b) INSEVERABILITY.** There are times when the sponsor wants to ensure that a rule of severability is not applied. In other words, the sponsor intends that the Act should stand or fall in its entirety. If one provision is invalid, then all provisions, regardless of whether they could stand on their own, fall together.

The following is an example of an inseverability clause that applies to the whole Act:

Section 35. Inseverability. The provisions of this Act are mutually dependent and inseverable. If any provision is held invalid other than as applied to a particular person or circumstance, then this entire Act is invalid.

The following is an inseverability clause that applies only to certain amendments to an existing Act:

Section 35. Inseverability. The changes made to existing statutory law by this amendatory Act of the 96th General Assembly are mutually dependent and inseverable. If any change made to existing statutory law by this amendatory Act of the 96<sup>th</sup> General Assembly is held invalid other than as applied to a particular person or circumstance, then all changes made to existing statutory law by this amendatory Act of the 96th General Assembly are invalid in their entirety.

As noted in subsection (c) of Section 20-50 of this Manual, a court may find a statute unconstitutional for any of several reasons. The statute may violate the single-subject rule, it may violate the guarantee of due process, or it may be applied unconstitutionally to a particular person, entity, or set of circumstances.

You must determine whether the sponsor intends that the entire Act should fall regardless of the reason for the finding of unconstitutionality. For example, the sponsor may not intend that result if a part of the Act is found unconstitutional only as applied to a particular person, entity, or set of circumstances. If the sponsor does intend that the Act be inseverable if a part of it is found unconstitutional only as applied to a particular person, entity, or set of circumstances, then modify the language in the second sentence of the previous examples as follows:

If any provision or its application to any person or circumstance is held invalid, then .... If any change made to existing statutory law by this amendatory Act of the 96th General Assembly or its application to any person or circumstance is held invalid, then ....

## Indiana

### H. SPECIFIC TYPES OF CODE PROVISIONS

#### (16) Nonseverability Provisions

Under IC1-1-1-8(b) each part of every statute is severable unless a nonseverability provision is included in the statute. If a statute contains a nonseverability provision and if any part of that statute is declared invalid, the whole statute is void. Whether a nonseverability provision should be drafted as amendatory of the Indiana Code or not depends upon the situation. For example, a nonseverability provision must be inserted in the Code whenever it is necessary to indicate that one provision of the Code should be void if another is held invalid or unconstitutional. If the amendments made by a particular act to an existing Code section are to be void if the amendments made by another SECTION of that act to another existing Code section are held invalid, the nonseverability provision should be drafted as a Code provision. If, on the other hand, one noncode provision is to be void if another noncode SECTION of a bill is held invalid, the nonseverability provision should be drafted as a noncode provision.

#### Examples:

Sec. \_\_. For the purposes of IC1-1-1-8, if any part of this chapter [title, article, or section] is held invalid, the entire chapter [title, article, or section] is void.

Sec. \_\_. For the purposes of IC1-1-1-8, if section [chapter] \_\_ of this chapter [article] is held invalid, section [chapter] \_\_ is also void.

Sec. \_\_. For the purposes of IC1-1-1-8, if the amendments to section \_\_ of this chapter made by SEA [HEA] 23-2000, SECTION \_\_, are held invalid, the amendments to section \_\_ of this chapter made by SEA [HEA] 23-2000, SECTION \_\_, are void.

SECTION \_\_. For the purposes of IC1-1-1-8, if any part of this SECTION is held invalid, SECTION \_\_ of this act is also void.

## Kentucky

### Sec. 315. Severability or Separability Clause

A severability clause ordinarily is not necessary because both statute and common law make statute provisions severable. KRS 446.090 provides that if any part of a statute is held unconstitutional "the remaining parts shall remain in force, unless the statute provides otherwise, or unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable of being executed . . . ."

If a legislator insists upon such a clause, however, it should read as follows:

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

If the legislator wants the bill to be nonseverable, the bill drafter should include a nonseverability clause.

## Maine

### PART II: Chapter 1, Section 2.

#### (7) Housekeeping

**(f) Severability clause.** The Maine Revised Statutes, Title 1, section 71 provides that, if any provision or application of a law is invalid, the valid provisions or applications of that law are unaffected. Thus, the inclusion of a severability clause in a bill is unnecessary and may result in confusion since a court may attach significance to the presence of a severability clause in a law, given the absence of those clauses in other laws.

There are older laws still in existence that contain severability clauses. When amending or reenacting sections of the law that contain such clauses, it is the policy of the Office of the Revisor of Statutes to remove the severability language and to insert the following explanatory paragraph in the summary:

This bill does not reenact language on severability removed in section \_\_\_ from the Maine Revised Statutes, Title \_\_\_, section \_\_\_, because that language is unnecessary given the general rule of construction governing severability in Title 1, section 71, subsection 8 that applies to all of the statutes. It is the intent of the Legislature that the removal of the severability language from Title \_\_\_, section \_\_\_ has no substantive effect on the severability of this chapter or the applicability of that general rule of construction.

**(g) Nonseverability clause.** As discussed above, the Maine Revised Statutes, Title 1, section 71 contains a severability clause that applies to all of the Maine Revised Statutes. If the sponsor of a bill intends the bill to be considered an inseparable whole and does not want the bill sections to be severable, a nonseverability clause is necessary.

#### Example:

**Sec. 10. Nonseverability.** Notwithstanding the provisions of the Maine Revised Statutes, Title 1, section 71, if any provision of this Act or its application is held invalid, it is the intent of the Legislature that the entire Act is invalidated.

## Maryland

### Chapter 10. Special Sections

#### Severability Clause and Nonseverability Clause

Article 1 – Rules of Interpretation, § 23 of the Annotated Code states that provisions of statutes enacted after July 1, 1973, are severable unless the statute specifically provides that they are not. However, the following clause may be used to reinforce this rule:

#### Example

...; making the provisions of this Act severable; ...

SECTION 2. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

Conversely, the General Assembly expressly may state its intent that the entire Act be void if any provision is found to be invalid.

## Example

...; declaring that the provisions of this Act are not severable; ...

SECTION 2. AND BE IT FURTHER ENACTED, That, notwithstanding the provisions of Article 1, § 23 of the Annotated Code of Maryland, the provisions of this Act are not severable, and if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, no other provision or application of this Act may be given effect.

**Note:** If a severability provision does not apply to all provisions of a bill, the severability language should be included in the codified text of the bill rather than a special section and should specifically indicate which portions of the bill are severable. (See, e.g., § 3-413 of the Courts and Judicial Proceedings Article.)

## Minnesota

4.7 Miscellaneous Special Provisions

### (b) Severability or Nonseverability Clause

Minnesota Statutes, section 645.20, makes the provisions of all laws severable. If you don't want the provisions of your bill to be severable, specify that they are not.

You may, for some special reason, wish to explicitly provide that the provisions of your act are nonseverable. An example of a nonseverability provision would be:

Sec. ... [NONSEVERABILITY.]

If any provision of this act is found to be invalid because it is in conflict with a provision of the constitution of the state of Minnesota or the constitution of the United States or for any other reason, all the provisions of this act are without effect.

## Montana

### 4-22. Severability Section

If a statute is found to be unconstitutional or invalid in part, the court must decide if the invalid portion is severable from the valid portion and looks to legislative intent. The Montana Supreme Court has held that inclusion of a severability clause in a bill creates a presumption that the valid portions of a bill would have been enacted without the invalid portions (*Bacus v. Lake County*, 138 M 69, 354 P2d 1056, 1083 (1960), and *Sheehy v. Public Employees Retirement Division.*, 262 M 129, 864 P2d 762 (1993)) and thus only the invalid portions are voidable. See, however, *White v. State*, 233 M 81, 759 P2d 971 (1988), and Judge Rapkoch's dissent in *Sheehy*.

The Montana Supreme Court has also held, in apparent contradiction to Judge Rapkoch's dissent in *Sheehy*, that there is a presumption that the Legislature intended all severable portions of an act to be upheld, regardless of whether an express severability clause appears in the act. *Gullickson v. Mitchell*, 113 M 359, 375, 126 P2d 1106 (1942). Therefore, there is probably no reason to include a severability clause in every bill, but one may be included if the

drafter has particularized concerns. Severability clauses are not codified but are published in the Annotations.

**example**

NEW SECTION. **Section 16. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

**4-23. Nonseverability Section**

In the rare instance that the sponsor intends that the entire act should fail if one of the provisions is declared unconstitutional, a nonseverability clause may be added.

**example**

NEW SECTION. **Section 16. Nonseverability.** It is the intent of the legislature that each part of [this act] is essentially dependent upon every other part, and if one part is held unconstitutional or invalid, all other parts are invalid.

**Nebraska**

THE PARTS OF A BILL

SEVERABILITY

A requester may ask that a severability clause be included in the bill. This clause provides that if any section or part of a section of the act is found to be unconstitutional, the other sections or parts will remain valid. The severability clause is standard language:

Sec. \_\_\_\_\_. If any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.

The bill drafter does not need to write the entire section but need only write “Sec. \_\_\_\_\_. Severability” on the title page to insure its inclusion in the bill. The presence of a severability clause is always reflected in the title. A requester may ask that an inseverability clause be included in the bill. This clause provides that if any section or part of a section of the act is found to be unconstitutional, the entire act is invalid. The inseverability clause is not standard language. It may read as follows:

Sec. \_\_\_\_\_. This act is a complete act and its provisions inseverable. If any provision is declared unconstitutional, the entire act is invalid.

The bill drafter should write the entire section (as there is no “fetch” for the technicians to use for this type of clause), include it at the end of the substantive provisions and the operative date, if any, and write “Sec. \_\_\_\_\_. Inseverability” on the title page to insure its inclusion in the bill. The presence of an inseverability clause is always reflected in the title.

**New Mexico**

CHAPTER 3 - BILLS

**. Saving Clause**

A saving clause is designed to preserve certain rights, duties or privileges that might otherwise be destroyed by a general enactment containing an amendment to or repeal of existing

provisions of law. Saving clauses are not used very often in New Mexico law because Article 2, Section 19 and Article 4, Sections 33 and 34 of the constitution cover the problem most of the time. If a saving clause is needed, the following language is suggested:

**Example:**

Section 13. SAVING CLAUSE.--The Radiation Act does not apply to pending litigation.

**Cumulative, Additional or Supplemental Remedies**

A type of saving clause is used to save existing law from implied repeal. An example is when the requester wants to provide for cumulative remedies. The section heading is usually written more specifically, e.g., "REMEDIES CUMULATIVE.--", instead of under the rubric "SAVING CLAUSE.--". The section is compiled, same as a saving clause section.

**. Severability**

No definite statement can be made as to the necessity of a severability clause. Therefore, if the act is severable, with parts that are constitutionally questionable, and it is desired that the remainder stand, a severability section may be advisable. The requester, though, should be warned that the section may not offer the protection he desires. This is a stock phrase that has survived the test of time, and it is suggested that the drafter not try to rewrite it:

**Example:**

Section 10. SEVERABILITY.--If any part or application of the Rabid Rabbit Eradication Act is held invalid, the remainder or its application to other situations or persons shall not be affected.

There are times when the drafter wants to state that parts of a bill are **not** severable. A request for a nonseverable bill is rare, but, if necessary, the following section is recommended.

**Example:**

Section 10. ACT NOT SEVERABLE.--If any part or application of this act is held invalid, the remainder or its application to other situations or persons shall likewise be invalid. The provisions of this act are not severable.

## North Dakota

### Part 2 - Bills

#### SPECIAL CLAUSES

##### Savings or Constitutionality Clause

A clause intended to protect the validity of certain portions of an Act is usually termed a savings, severability, or constitutionality clause. **Do not use these clauses.** This type of clause is not necessary in North Dakota because the courts will generally hold all portions of an Act which stand alone to be constitutional even though some other portion of the Act may be unconstitutional. See *State ex rel. Link v. Olson*, 286 N.W.2d 262 (N.D. 1979); *Baird v. Burke County*, 205 N.W. 17 (N.D. 1925). Additionally, North Dakota Century Code Section 1-02-20 is a statutory savings clause.

## Oregon

### 5. SEVERABILITY CLAUSES.

A severability clause provides in effect that if any part of a bill is held unconstitutional, the remainder shall not be affected. The inclusion of a severability clause in a bill is not needed; a

severability provision is made applicable by ORS 174.040 to all Acts passed in Oregon. Further, the courts in Oregon generally have followed this principle. *Standard Lumber Co. v. Pierce*, 112 Or. 314 (1924); *Wadsworth v. Brigham*, 125 Or. 428 (1928); *Gilbertson v. Culinary Alliance*, 204 Or. 326 (1955); *State v. Hunter*, 208 Or. 282 (1956); *Foltz v. State Farm Mutual Auto Insurance Co.*, 326 Or. 294 (1998); however, see 33 Op. Att’y Gen. 311 (1967).

On the other hand, it may be the legislative intent that an entire Act be declared invalid if any part of it is held unconstitutional. In such an instance, a nonseverability clause should be included. *City University v. State, Educational Policy and Planning*, 320 Or. 422 (1994).

The following are examples of the two types:

**SECTION \_\_\_\_\_. It is the intent of the Legislative Assembly that each part of this (year) Act be considered as essentially and inseparably connected with and dependent upon every other part. The Legislative Assembly does not intend that any part of this (year) Act be the law if any other part is held unconstitutional.**

**OR**

**SECTION \_\_\_\_\_. If this (year) Act is declared unconstitutional, it is the intent of the Legislative Assembly that all sections amended or repealed by this (year) Act shall remain in effect the same as if this (year) Act had not been enacted.**

## **South Dakota**

### **THE COMPONENTS OF A BILL**

#### **SEVERABILITY CLAUSE**

Although severability clauses are frequently encountered in the laws of other states, do not include a severability clause in any South Dakota bill. Severability is a long-established doctrine of the Supreme Court of the state of South Dakota, sometimes called "the doctrine of separability." The Court is required to uphold any part of a legislative measure that will stand on its own without the part that is unconstitutional. See *State ex rel Mills v. Wilder* (1950), 73 SD 330, 42 N.W. 2d 891, and *Nelson et al v. City of Miller* (1968), 83 S.D. 611, 163 N.W. 2d 533.

Occasionally uniform or model Acts contain a severability clause and for reasons of uniformity the severability clause may be retained.

On the other hand, it may be desirable to indicate that the parts of the bill are not intended to be severable. In such a case, a section should be inserted to reverse the presumption of severability:

Section 7. The provisions of this Act are essentially and inseparably connected and interdependent.

## **Texas**

**SEC. 3.12. SAVING AND TRANSITION PROVISIONS. (a) Introduction.** Saving and transition provisions help to minimize the disruption and inequities that often attend the taking effect of legislation.

A saving provision “saves” from the application of a law certain conduct or legal relationships that occurred before or existed on the effective date of the law. One example is the “grandfather clause,” which is discussed in Subsection (h) of this section. Another type, commonly used when a criminal statute is amended or repealed, provides for the continued application of the former law to conduct occurring before the effective date of the repeal or amendment. Section 311.031, Government Code, is a general saving clause applicable to those codes to which the Code Construction Act applies.<sup>1</sup>

Transition provisions provide for the orderly implementation of legislation, helping to avoid the shock that can result from an abrupt change in the law. The most common transition provision is the effective date section, which provides for orderly implementation of a statute by delaying its effective date or by providing staggered effective dates for various provisions.

Section 3.14 specifically addresses delayed and staggered effective dates. A legislator making a drafting request is usually much more concerned about the substance of the requested bill than about saving or transition problems, and it is the drafter’s responsibility to attempt to foresee any problems of this type that might arise and to ensure that they are dealt with appropriately. Foreseeing these problems requires a combination of legal and practical analysis, imagination, and common sense. The task begins with the question: What are the undesirable consequences that might occur if this law were enacted with no saving or transition provisions? If the proposed law is covered by the Code Construction Act, the drafter must consider whether the general saving provisions of that act take care of the problems adequately. If that act does not apply or does not adequately resolve the problem, the drafter must fashion whatever provisions are necessary, consistent with the objectives and desires of the legislative client.

This section deals with some areas of law in which transition problems often arise. The sample transition and saving provisions that are included are merely illustrative and should not be blindly adopted. However, the discussion and examples should give the beginning drafter some understanding of saving and transition problems and an idea of how to approach them.

**(b) Separate sections for transition and effective date provisions.** Although effective date provisions are in fact a type of transition provision, this manual treats them as separate from transition provisions because it is necessary to draft them in separate sections of a bill. The automated statute update program, used to automatically update the statutes to incorporate changes enacted during each regular or special session, works most effectively when transition language is stored in the database separately from effective date provisions. Part of the reason for storing the two kinds of provisions differently is that transition provisions usually have continuing effect for some temporary period while effective dates immediately become executed law.

It is acceptable, if needed, to have more than one section in a bill contain transition language, as long as none of the transition sections contain effective date language.

**(c) Insurance.** A bill that affects the coverage of insurance policies, such as a bill providing for mandatory coverage of a particular condition, requires a transition and saving provision that

preserves the law under which the policy was governed before the effective date of the bill. Insurance policies are a contract between the insurer and the insured; as a result, the legislature is limited by Section 16, Article I, Texas Constitution (no impairment of obligation of contract), in the extent to which it may enact laws that affect insurance contracts.

This model transition provision clearly preserves the prior applicable law, whatever the law may be, to govern contracts executed before the new statutory requirements apply. A typical transition provision (in this example, for a bill with an effective date of September 1, 2011) will read:

SECTION 2. Section 1202.053, Insurance Code, as added by this Act, applies only to an insurance policy that is delivered, issued for delivery, or renewed on or after January 1, 2012. A policy delivered, issued for delivery, or renewed before January 1, 2012, is governed by the law as it existed immediately before the effective date of this Act,<sup>1</sup> and that law is continued in effect for that purpose.

This transition provision accomplishes two goals:

(1) it allows the commissioner of insurance the time between September 1 and January 1 to adopt rules and approve policies under a statute that is in effect but does not yet apply to policies; and (2) it identifies clearly and preserves the prior law to govern policies issued either before September 1 or during the interim between September 1 and January 1.

**(d) Occupational licensing.** If a new occupational licensing act prescribes substantial educational or similar requirements for obtaining a license, the legislature occasionally will choose to include a “grandfather clause” (see Subsection (h) of this section) exempting from all or some of the requirements those persons who already have substantial experience in the occupation. For example:

SECTION 14. EXEMPTION. A person who has engaged in the practice of cake decorating in this state for at least three years preceding the effective date of this Act is entitled to obtain a license under Section 2754.101, Occupations Code, as added by this Act, without fulfilling the educational requirements prescribed by Section 2754.103, Occupations Code, as added by this Act, if the person has the other qualifications required by Section 2754.102, Occupations Code, as added by this

Act, and if, before January 1, 2012, the person:

1: It is common in transition and applicability sections to refer to “the effective date of this Act.” A drafter must be careful in using that phrase in bills that have provisions that take effect at different times (see Section 3.14(h) of this manual), as the potential for ambiguity (which “effective date” is meant?) exists. An alternative is to use, in a transition or applicability section, the specific effective date of the bill or provision. The danger this approach poses is that an amendment to the bill might change the effective date without addressing the date in the transition or applicability section.

(1) submits an application as required by Section 2754.104, Occupations Code, as added by this Act;  
(2) passes the examination required by Section 2754.105, Occupations Code, as added by this Act; and  
(3) pays the required license fee.

The effective date prescribed for a new licensing law can also serve a transition purpose. See Section 3.14(k).

**(e) Criminal law.** In criminal law, the three circumstances presenting the most significant possibility for trouble are: (1) repealing an offense; (2) changing the elements of an existing offense; and (3) changing the punishment for an existing offense.

### ***Repealing an Offense***

Under Texas law, repeal of a criminal law without a saving clause effectively prevents conviction of a person after the effective date of the repeal for an offense committed while the law was still in effect.<sup>1</sup> An appropriate saving clause to prevent this from occurring is as follows:

SECTION 3. The repeal by this Act of Subchapter G, Chapter 161, Health and Safety Code, does not apply to an offense committed under that subchapter before the effective date of the repeal. An offense committed before the effective date of the repeal is governed by that subchapter as it existed on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of the repeal if any element of the offense occurred before that date.

Section 311.031, Government Code, is a general saving clause for legislation to which the Code Construction Act applies, including the Penal Code. For reasons stated at the conclusion of this subsection, however, drafters are cautioned against routinely relying on this general clause for criminal law purposes.

### ***Changing the Elements of an Offense***

The amendment of a criminal statute to change the elements of an existing offense is often equivalent to the repeal of the former version of the statute. Assume that the section of the Penal Code prohibiting unauthorized use of a vehicle were amended as follows:

Sec. 31.07. UNAUTHORIZED USE OF VEHICLE. (a) A person commits an offense if he intentionally or knowingly operates another's boat, airplane, or bicycle [motorpropelled vehicle] without the effective consent of the owner.

(b) An offense under this section is a state jail felony.

<sup>1</sup>See *Wall v. State*, 18 Tex. 683 (1857); *Greer v. State*, 22 Tex. 588 (1858); *Sheppard v. State*, 1 [Tex.] App. 522 (1877); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 20 L. Ed. 153 (1871); and *United States v. Chambers*, 291 U.S. 217 (1934).

Before the effective date of the amendment, unauthorized use of a snowmobile constituted an offense under this section because a snowmobile is a "motor-propelled vehicle." Deleting that phrase from the statute is equivalent, as to snowmobiles, to repeal of a statute prohibiting the unauthorized use of those vehicles. If the former law were not appropriately "saved," a person who took a joyride in a snowmobile before the effective date of the amendment could not be prosecuted afterwards.

The usual saving clause for an amendment changing the elements of an offense is:

SECTION 9. The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose.

For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

Note that under the preceding clause an offense in the process of being committed at the instant the amendment takes effect will be prosecuted under the former law if any element of the crime occurred before the effective date; assigning such an offense for punishment under

the new law could well be held to violate the constitutional prohibition against ex post facto laws.<sup>1</sup>

### ***Changing the Punishment for an Offense***

A bill changing only the punishment for an offense generally presents few problems and can be handled with the same saving clause as the one previously suggested for a change in the elements of the offense. If the change in punishment is clearly an *increase*, that clause will almost always be appropriate.

If the change in punishment is clearly a *reduction*, additional factors should be considered.

If the reduced punishment is to apply only prospectively, the type of clause suggested for a change in the elements of an offense is appropriate. Since the constitutional prohibition against retroactive laws does not bar the retroactive reduction of punishment for offenses in which a conviction has not yet been obtained,<sup>2</sup> this option must be considered. The general saving clause in Section 311.031, Government Code, provides for retrospective reduction in punishment. Subsection (b) of that section states:

If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

### ***Is a Change in Punishment an Increase or Reduction?***

A word of caution should be offered here: not all changes in punishment are easily classified as either an increase or a reduction. Suppose, for example, that a punishment

<sup>1</sup> See Section 16, Article I, Texas Constitution, and Section 10, Article I, U.S. Constitution.

<sup>2</sup> See *Holt v. The State*, 2 Tex. 363 (1847); *Millican v. State*, 167 S.W.2d 188 (Tex. Crim. App. 1942); *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648 (1798); and *Rooney v. North Dakota*, 196 U.S. 319, 25 S. Ct. 264 (1905).

by a fine of “not more than \$200” is amended to read “not less than \$50 and not more than \$150 [\$200].”

The lowering of the maximum fine can be seen as a reduction in punishment, but the establishment of a minimum fine could be considered an increase. It would be shaky at best to attempt to require retroactive application of this change in punishment. In such a case as this, the drafter has two safe options. One is to simply treat the change as an ordinary enhancement of punishment and retain the former punishment for all offenses committed before the effective date of the change. On the other hand, an affected defendant could be permitted to elect, before the assessment of punishment, to be punished under the new law, as was provided for in the following saving provision in the 1973 act that enacted the current Penal Code:

(c) In a criminal action pending on or commenced on or after the effective date of this Act, for an offense committed before the effective date, the defendant, if adjudged guilty, shall be assessed punishment under this Act if he so elects by written motion filed with the trial court before the sentencing hearing begins.<sup>1</sup>

(If a clause such as this is used, it must be coupled with a general saving clause preserving the punishment prescribed by the former law for those defendants who do not elect to be punished under the new law.)

Drafters should note that the standard punishments established by Chapter 12 of the Penal Code are so designed that the punishment for each grade of offense is clearly greater than the punishment for the next lower grade. There can therefore be no question about whether changing the punishment for an offense from one of these standard punishments to another is an increase or reduction.

### ***Reliance on the Code Construction Act for Criminal Law Purposes***

Routine reliance on Section 311.031, Government Code, for bills amending or repealing criminal statutes is not advised. Section 311.031 fails to address the question of when an offense actually occurs; the sample clauses used earlier in this subsection assign an offense for treatment under the former law if any element of the offense occurred before the effective date of amendment or repeal. Section 311.031(b), which provides for retroactive application of a reduction in punishment, has three other shortcomings: (1) it distinguishes between cases on the basis of whether the punishment has been “already imposed” without defining what is meant by the imposition of punishment (*presumably* punishment is imposed at the time of sentencing); (2) it fails to recognize the fact that, as earlier explained, some changes in punishment defy classification as either a reduction or an enhancement; and (3) in many instances, a legislative client will not desire the retroactive reduction in punishment Section 311.031 calls for.

**(f) Taxation.** Common changes in tax laws raising transition issues include repealing a tax, changing the rate of a tax, and adding or deleting exemptions. These types of changes often require a saving provision to ensure that a tax liability that accrued under the former version of the law remains enforceable. The general saving provisions in Section 311.031, Government Code, are often sufficient for this purpose, and since most taxes are imposed under the Tax Code, which is subject to the Code Construction Act, specific saving

Section 6(c), Chapter 399 (S.B. 34), Acts of the 63rd Legislature, Regular Session, 1973. The requirement that the defendant affirmatively choose to be punished under the new law is to avoid a later objection to the imposition of punishment under an ex post facto law.

provisions are often unnecessary. When a specific saving provision is needed, one such as the following is often used:

SECTION 8. APPLICABILITY OF FORMER LAW. The change in law made by this Act does not affect tax liability accruing before the effective date of this Act. That liability continues in effect as if this Act had not been enacted, and the former law is continued in effect for the collection of taxes due and for civil and criminal enforcement of the liability for those taxes.

Since taxes are generally computed and reported on a periodic basis (monthly, quarterly, or annually), implementing a change on the first day of a reporting period is usually less confusing to the payers and collectors of the tax. If a change is to take effect during a reporting period, it may be desirable to include specific transition language providing for administration of the tax during that particular reporting period or to merely provide that the official who administers the tax shall provide for the transition by rule or directive.

**(g) Family law.** The existence of continuing jurisdiction in family law cases presents a trap for the unwary drafter. The trial court in these cases usually retains jurisdiction over what would be final judgments in other kinds of cases. Much confusion can result if the drafter fails to address the question of whether a new law should apply to an old case that, after the effective date of a change in the law, comes back to the trial court on a motion to clarify or amend a previous order for enforcement purposes.

The simplest solution is to exempt from any change in the law litigation instituted before the effective date of the change. This may not be what the client desires, however, and is not always the fairest solution. Although a retroactive change in law affecting private rights is barred by the constitution, the legislature is not prohibited from changing the procedure by which those rights are enforced.<sup>1</sup>

The question of whether to apply a procedural change to pending litigation is not necessarily a simple yes or no proposition, as it is possible to adopt a middle ground that allows the courts to decide, on a case-by-case basis with appropriate guidelines, whether to apply a new procedural rule to pending litigation. For example, the transition clause of a 1983 act dealing with the filing in adoption cases of a report on a child’s health, social, educational, and genetic history provided:

A court having, on the effective date of this Act, jurisdiction of a suit affecting the parent-child relationship in which an adoption is sought may waive the requirement under Section 16.032 [now 162.008], Family Code, that a copy of the summary report must be filed, if the court finds that the making or filing of the report is not feasible or would cause an injustice.<sup>2</sup>

**(h) The “grandfather clause.”** “Grandfather clause” has come to refer to a provision in a licensing statute that automatically grants a license or similar prerogative to those established in an occupation or business before its regulation.<sup>3</sup>

<sup>1</sup>See *Harrison v. Cox*, 524 S.W.2d 387 (Tex. Civ. App.—Fort Worth 1975, writ ref’d n.r.e.).

<sup>2</sup>Section 8, Chapter 342 (H.B. 1174), Acts of the 68th Legislature, Regular Session, 1983.

<sup>3</sup>The name “grandfather clause” is derived from post-Civil War constitutional provisions in certain southern states. Those provisions imposed stringent property or literacy tests for voting in order to deny the franchise to the newly freed slaves. Most white citizens were exempted from the requirements by a “grandfather clause,” applicable to descendants of persons eligible to vote before 1867.

Normally, these clauses function by exempting an applicant from a licensing examination on the justification that “those already practicing their profession were lawfully and satisfactorily performing their services on the date the regulatory act became effective . . . .”<sup>1</sup>

Like the regulatory statutes of which they are a part, grandfather clauses are subject to the constitutional considerations of equal protection and due process. Texas courts have found that a clause meets the requirements of equal protection if it is “neither capricious or arbitrary” in its policy.<sup>2</sup> Similarly, due process has been held to require “both specificity and fairness” in a law.<sup>3</sup>

These somewhat nebulous constitutional directives can be better understood by reference to statutory examples of two basic types of grandfather clauses. The first type includes clauses in

which mandatory certification is meant to prevail. Those clauses flatly require certification of applicants meeting the grandfather stipulations and make no allowances for the regulatory authority to determine suitability of a questionable applicant. (For an example of this type of clause, see Section 1053.158, Occupations Code.) The second type includes somewhat modified clauses that allow for discretion on the part of the board, yet retain the constitutionally necessary specificity. (See Section 605.254, Occupations Code, for an example of a modified clause.)

Even apart from constitutional issues, the need for specificity cannot be overemphasized when drafting a grandfather clause. Legal problems arising from these clauses can nearly always be traced to ambiguous language or the omission of certain elements necessary to determine eligibility. The following “grandfather’s laundry list” is compiled from a review of case law and other sources:

- If a certification clause is meant to be mandatory, avoid using “may” (as in, “the board *may* issue a license to an applicant”). This has been held to imply a grant of discretion. Instead, say “the board *shall* issue a license to an applicant who . . .” or “an applicant who possesses these qualifications *is entitled to* a license.”<sup>4</sup>
- State time limits, if any, under which applicants may file for grandfather exemptions and include this deadline information in the clause itself.<sup>5</sup>
- Be explicit about the type or length of service required for exemption and consider all eventualities. Must the service be continuous? Must it occur immediately before the act’s effective date? Must it take place in the state?<sup>6</sup>
- Specify any applicable residence requirements. Does the grandfather clause apply to state residents only? Must applicants be residing in the state at the time of enactment?<sup>7</sup>

**(i) The illusory saving clause.** To conclude this section, a final caution is offered: Beware the illusory saving clause. This clause provides more or less as follows:

<sup>1</sup>See *Bloom v. Texas State Board of Examiners of Psychologists*, 492 S.W.2d 460 (Tex. 1973).

<sup>2</sup>See *Hurt v. Cooper*, 113 S.W.2d 929 (Tex. Civ. App.—Dallas 1938, no writ).

<sup>3</sup>See *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

<sup>4</sup>*Bloom, supra*.

<sup>5</sup>See Op. Tex. Att’y Gen. Nos. V-595 (1948), V-1486 (1952).

<sup>6</sup>*Bloom, supra*.

<sup>7</sup>See the annotations at 4 ALR2d 688.

SECTION 3. This Act applies to all litigation instituted on or after the effective date of this Act.

Such a provision is generally harmless—it merely states what would be the case in any event, given the general presumption that a law applies only prospectively. What the provision fails to do is save former law. The drafter of the preceding clause probably *meant* to say, but didn’t, that the former law continues to apply to litigation instituted before the effective date of the act.

**SEC. 3.13. SEVERABILITY AND NONSEVERABILITY CLAUSES. (a) Severability in general.** When part of a statute is held to be invalid, the remainder of the statute is not affected by the

invalidity if the court determines that the remainder of the statute is “severable” from the invalid part. A determination of severability requires an affirmative answer to two questions: (1) Is the remainder of the statute capable of being given effect after the invalid part is removed? (2) Would the legislature have enacted the remainder of the statute if the invalid part had not been included in the first place?

**(b) Severability clauses.** To encourage a finding of severability, drafters sometimes include in a bill a “severability clause” that reads substantially as follows:

If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

The efficacy of the severability clause historically has been a matter for debate. Review of case law indicates that presence of the clause does not guarantee a finding of severability, while absence of the clause does not preclude such a finding. Probably the best that can be said for the clause is that it provides a clear statement of legislative intent that, in a close case, may influence a court to find that a statute is severable.

The question of whether to include a severability clause in a particular bill has largely been made moot in Texas by enactment of Sections 311.032 and 312.013, Government Code, which provide that all statutes are severable unless they declare that they are not.

Drafters are advised *not* to include a severability clause in a bill unless the requestor, after being advised of these general severability statutes, nonetheless insists on insertion of the clause.

**(c) Nonseverability clauses.** Nonseverability clauses come in two types: a “general” nonseverability clause, which declares that *none* of the provisions of an act are severable, and a “special” nonseverability clause, which declares that *specific* provisions of an act are not severable from one another.

The **general** nonseverability clause, if given effect according to its terms, would destroy a whole act because of a constitutional flaw in one minor provision. It should be used only when it is specifically requested.

A **special** nonseverability clause may be useful if the legislature wants to make clear that even though two provisions of an act could be given effect by themselves, both provisions are meant to be treated as a “package” and rise or fall together against a constitutional challenge.

Language such as the following may be used for the purpose:

SECTION 3. NONSEVERABILITY. Section 1969.101, Occupations Code, as added by this Act, prohibiting the manufacture of bicycles without a license, and Section 1969.151, Occupations Code, as added by this Act, imposing a tax on the manufacture of bicycles, are not severable, and neither section would have been enacted without the other. If either provision is held invalid, both provisions are invalid.

## Washington

### **PART II FORMAL AND TECHNICAL REQUISITES**

#### (10) SUGGESTIONS FOR COMMONLY USED CLAUSES

(v) **Savings clauses.** The general rule is that repealing acts terminate all rights dependent upon the repealed statute and all proceedings based upon it. *Lau v. Nelson*, 89 Wn.2d 772 (1978). An amendatory act constitutes a repeal of the amended act to the extent the two acts are inconsistent. To preserve existing rights and obligations, a savings clause should be used, especially if the statute could be applied retroactively. *Seattle-King County Council of Camp Fire v. Dept. of Revenue*, 105 Wn.2d 55 (1985). Note that RCW 10.01.040 presumes a savings clause in the case of the express or implied repeal of a criminal offense, penalty, or forfeiture.

Examples:

(i) This act does not affect any existing right acquired or liability or obligation incurred under the sections amended or repealed in this act or under any rule or order adopted under those sections, nor does it affect any proceeding instituted under those sections.

(ii) (Sections \_\_ through \_\_ of this act/this chapter) do/does not terminate or modify any civil or criminal liability that exists on the effective date of this section/act.

(iii) (Sections \_\_ through \_\_ of this act/this chapter/this section) are/is cumulative and nonexclusive and do/does not affect any other remedy.

(iv) This act does not repeal, amend, or modify any law providing for water supply for any city or town but is an additional and concurrent method providing for this purpose.

(v) **NEW SECTION. Sec. 99.** The following acts or parts of acts are each repealed:

(1) RCW 3.20.130 (Venue, criminal actions--Justice of the peace districts) and 1951 c 156 s 16; and

(2) RCW 3.20.131 (Venue in criminal actions) and 1953 c 206 s 4.

**NEW SECTION. Sec. 100.** The repeals in section 99 of this act do not affect any existing right acquired or liability or obligation incurred under the statutes repealed or under any rule or order adopted under those statutes nor do they affect any proceeding instituted under them.

**(w) Severability clauses.**

**(i) State version.**

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

"An act of the legislature is not unconstitutional in its entirety because one or more of its provisions are unconstitutional unless the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purpose." *State v. Anderson*, 81 Wn.2d 234, 236 (1972). A severability clause is viewed by the court as a persuasive indication of legislative intent offering ". . . to the courts the necessary assurance that the remaining provisions would have been enacted without the portions which are contrary to the Constitution." *Id.* at 236.

**(ii) Federal version.**

(A) If the drafter anticipates the receipt of federal funds under the act, the use of a "federal severability" clause may be desirable:

If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, the conflicting part of this act is inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and this finding does not affect the operation of the remainder of this act in its application to the agencies concerned. Rules adopted under this act must meet federal requirements that are a necessary condition to the receipt of federal funds by the state.

Other examples are RCW [43.88.220](#), 74.29.055, and 74.42.630.

Substantially similar language was held valid against a challenge that it unlawfully delegates legislative power to the federal government. The court held that the delegation was proper and that there was no attempt to adopt or incorporate future changes in federal statutes or regulations. *Yelle v. Bishop*, 55 Wn.2d 286, 303 (1959). See discussions of incorporation and delegation in subsection (11)(f) and (h) of this part.

(B) If federal unemployment tax credits are involved, the drafter may want to consider the following clause:

If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state or the eligibility of employers in this state for federal unemployment tax credits, the

conflicting part of this act is inoperative solely to the extent of the conflict, and such finding or determination does not affect the operation of the remainder of this act. Rules adopted under this act must meet federal requirements that are a necessary condition to the receipt of federal funds by the state or the granting of federal unemployment tax credits to employers in this state.

(iii) The invalidity of one portion of a legislative act has the effect of invalidating the remaining portions, despite the legislature's inclusion of a severability clause, if the purpose of the entire act would be overcome by severing the invalid portion. See *Dep't of Fisheries v. DeWatto Fish Co.*, 34 Wn. App. 135 (1983).