

PREVENTING AND AVOIDING LOOPHOLES AND UNINTENDED CONSEQUENCES IN LEGISLATION

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INTRODUCTION

During this session, we're going to look at identifying loopholes and preventing or avoiding unintended consequences in bill drafts and laws.

[MS example - Governor to submit a balanced budget -- Pages 1-3 in copies]

Loopholes, misinterpretations, and unintended consequences in the bills we draft and the laws that pass -- it seems like they always come up and we aren't able to prevent or avoid them, no matter how hard we try. No matter how much research we do, or how much we think about the various aspects of the issues involved and the best language to use, or how hard we try to make the bill airtight from beginning to end, it almost seems inevitable that after the Legislature has adjourned and gone home, we will get that call from a legislator. You know that call, the one where the legislator is upset and he tells you, "There are some people who are doing this/doing that under that bill we just passed....they can't do that -- that's not what we intended!!" Probably all of us here have experienced something like that, and it can be humbling and even embarrassing, especially if we thought the language in the bill was as good as it could be when it passed.

Sometimes the loopholes or unintended consequences will not be immediately obvious, and you won't find out about them right after the bill has passed, but they will become apparent over time, sometimes after several years. But rarely -- very, very rarely -- will a bill work out exactly the way it was envisioned by the drafters and by the legislators who enacted it.

So, what can we, as drafters, do to identify and prevent, or at least minimize, loopholes and unintended consequences when we are drafting bills? Is it inevitable that our bills will have loopholes and unintended consequences, or are there any steps we can take to minimize these unanticipated effects in the bills that we draft?

DEFINITIONS

Let's first look at what loopholes and unintended consequences are. We may think we know what they are, but let's look at some definitions and see what they tell us about them. Maybe if we can understand more about what they are, we will be better able to prevent or avoid them.

(1) **Loopholes** -- a loophole in a law is an ambiguity that can be used to circumvent or otherwise avoid the express or implied intent of the law. It is a technicality that allows a person or entity to avoid the scope of a law or restriction, to get around it in a way that was not intended by the legislators who put the law or restriction into place, without directly or technically breaking the law.

[One of my handouts is some cartoons I found about loopholes.]

Example of a loophole:

In the mid-1990s, Walmart was planning to open a store in Maryland, and a law in the county where it wanted to locate the store restricted the size of a retail store to 75,000 square feet. So, Walmart considered a plan that would get around this restriction by building two separate, smaller stores that were side by side, each store having less than 75,000 square feet. Walmart had found a loophole in the law and was trying to exploit it. But because of the controversy that arose about it, Walmart later withdrew that plan.

(2) **Unintended consequences** -- they are sometimes called "unanticipated consequences," "unforeseen consequences," or "unexpected consequences" or results. In the social sciences, unintended consequences are outcomes that are not the ones that were intended by a purposeful action, which is an action that involves motives and a choice between various alternatives.

So, basically, unintended consequences are this: You did something/took some action; you intended for that action to have a certain effect/expected certain results or a certain outcome...but something else happened -- an unanticipated, unexpected result.

You can see that loopholes and unintended consequences are related. In my view, loopholes are one type of unintended consequences, a sub-category of unintended consequences, which is the broader and more encompassing term.

TYPES OF UNINTENDED CONSEQUENCES

We usually associate the term "unintended consequences" with something negative, and more often than not, they are negative. But that is not necessarily the case -- unintended consequences can be good, or bad, or even neutral. They can be roughly grouped into three types:

(1) An **unexpected positive benefit**, which we might say is just luck, good fortune or a windfall.

(2) An **unexpected negative detriment** that occurs in addition to the intended and desired effect of the action or policy.

(3) A **perverse effect** that is contrary to what was originally intended, a counterintuitive result -- when an intended solution to a problem actually makes the problem worse.

In addition to these 3 types, I want to add a couple of other types of unintended consequences that I have seen, which overlap a bit with some aspects of the 3 types.

The first one is when the intended effect does not occur, but there is no unexpected negative detriment or perverse effect. Essentially, the legislation just misses the mark. It doesn't accomplish what was supposed to do, but nothing negative or counterintuitive occurs, either -- the unintended consequences are neutral. This can happen when a law is written with language that is too general or vague, is not precise enough, and provisions or aspects that should have been addressed are left out.

Maybe this was done intentionally for political compromise to get the bill passed -- as you know, we drafters are not always able to make the language more precise even if we know it is too vague, for reasons that are out of our control, because they are the decisions of the legislators.

The second one is when the bill works like it was supposed to, but the *political* consequences were not expected -- maybe there is a big public backlash or outrage with the legislation when the public finds out about it after it has passed, and the legislators did not anticipate/foresee the extent of the opposition to it.

[Our office is nonpartisan, like most of yours are, so we don't get too deep into the politics of a bill, and we don't give advice on the political ramifications of a bill. So, unless a legislator tells us that there may be political opposition to a bill or certain provision, and asks us to try to draft it in a way to minimize that opposition, we will assume that the legislator has already considered and evaluated the likely political consequences, and draft it the way they ask us to.

We *will* try to prevent or avoid the other types of unintended consequences even if not asked to do so, but it is not our place as nonpartisan attorneys to try to anticipate the political consequences of legislation and try to minimize it, unless we are asked to do so for a specific provision of the bill.]

Example of #1 - an unexpected positive benefit:

The GI Bill. Congress enacted the GI Bill to help the large number of soldiers returning after the end of WWII, and today it is regarded as one of the most successful and influential laws ever passed, but its great impact was actually accidental. The focus of the debate was primarily on the most controversial provision, which would guarantee veterans \$20/week in unemployment benefits. But two other "smaller" provisions in the bill generated little discussion: providing for free college education, and low-interest mortgage loans. President Roosevelt thought that only a few hundred thousand veterans would use these benefits, but he was wrong -- instead, millions of veterans took advantage of the benefits over the years to get a college education and buy new homes. These actions provided the unexpected positive benefit to America's economy and society by allowing for the expansion of the middle class, which greatly contributed to our country's post-war prosperity in the 1950s and 1960s.

Example of #2 - an unexpected detriment along with the intended effect:

Quotas on imports of certain products or materials. The U.S. government has imposed quotas on imports of steel in order to protect steel companies and steelworkers from lower-priced competition. These quotas do help the steel companies, but they also make less of the cheap steel available to automakers in the U.S. As a result, the automakers have to pay more for steel than their foreign competitors do. So, the U.S. has a policy that protects one domestic industry from foreign competition (the intended and desired effect), but that policy makes it harder for another American industry to compete with imports (the unexpected negative detriment).

Example of #3 - a perverse effect:

Price controls for limited supplies after disasters. In areas hard hit by hurricanes, like those of us on the Gulf Coast, people who are trying to rebuild afterward often face high prices for building supplies like plywood, because of the sharp increase in demand for those supplies. In response to those people who are upset about the high prices for plywood, legislators may enact price controls to keep the prices closer to the usual levels. An unintended consequence of this well-intended action is that suppliers of plywood from outside the region would have been willing to provide plywood quickly at the higher market price, but they are a lot less willing to do so at prices that were imposed by the government. This action results in the perverse effect of causing a shortage of a good where it is badly needed.

[MS example of perverse effect - baby drop-off law -- Pages 4-7 in copies]

THE LAW OF UNINTENDED CONSEQUENCES

Okay, we have now seen what unintended consequences are, and several different types of them. There is also a concept involving unintended consequences that you sometimes hear people refer to -- and that is, the *law* of unintended consequences. Well, what kind of law is the "law of unintended consequences?"

That law says that almost all human actions -- especially large-scale actions like those taken by governments -- have effects that are unforeseen, unanticipated, unintended or unexpected. These effects are often reactions or responses to the original actions, and they may be positive, negative or merely neutral, but they veer off from the intent of the original action. Nearly everything we do will have unintended consequences, with the likelihood being greater for big or large-scale actions -- that is the "law of unintended consequences."

One of the sources I used for this presentation said it this way:

When Congress addresses significant social issues with complicated legislation, the results, more often than not, will be dramatically different from what was originally intended. A general rule of thumb for determining how likely a bill is to veer off course is to ask how ambitious the legislation is: the more far-reaching it is, the more likely it is to produce unintended consequences. One reason for this is that big, complicated laws are often the product of partisan brokering and compromise that makes their "intent" ambiguous and open to interpretation. That gives enormous power to the government bureaucrats who are charged with enforcing the law, and to the courts that are inevitably called upon to settle the conflicts. The gap that opens between the lofty goals of the bill and the often haphazard implementation of the bill is the breeding ground for unforeseen results.

When someone brings up the law of unintended consequences in a discussion, it is often used, like Murphy's Law, as a humorous warning against the arrogant, overconfident belief that humans can fully control the world around them, a warning that an intervention in a complex system tends to create unanticipated and often undesirable outcomes.

The concept of the law of unintended consequences is nothing new -- it actually has been around for a long time, dating back to at least Adam Smith with his observation that people working for their own self-interest results in a positive unintended consequence that benefits the public interest. But the concept was named and probably best defined in the 1930s by American sociologist Robert K. Merton. The law applies in physical sciences as well as social sciences, such as experiments in science and medicine, but it is even more pronounced in the social sciences because they are dealing with even less predictable forces -- human beings.

It may be impossible to fully anticipate how any change to a society may ultimately affect it, in many ways, until those effects are already occurring. The law of unintended consequences is a law that is often observed best in hindsight. [Another source that I used said it this way: The real-world implications of actions you take may be far different from what seems logical and obvious. The problem seems obvious, and the solution seems sure-fire. But the solution has created another problem. It's impossible to foresee all the consequences of being clever.]

CAUSES OF UNINTENDED CONSEQUENCES

What are the causes or reasons for unintended consequences? Why do they occur? Some of the reasons are as follows:

- Individuals are complex beings, even in the smallest systems, like family units.
- Society as a whole is vastly more complex.
- The mechanisms of society are convoluted and extraordinarily challenging.
- Failure to appreciate the complexity of the issues.
- Perverse incentives that cause changes in behavior that are opposite of what was intended.
- Human stupidity, overconfidence and self-deception.
- Failure to account for human nature or other cognitive or emotional biases.

Those are some general causes or reasons, but I think the following is a good, concise analysis of the cause of unintended consequences, and it is right on point about those that we encounter in our work with the Legislature:

The law of unintended consequences is what happens when a simple system tries to regulate, manipulate or influence a complex system (such as governments, societies, or large companies). The political system is relatively simple, because it operates with limited information, short time horizons, low feedback, and poor and misaligned incentives. By contrast, society is a complex, evolving, high-feedback, incentive-driven system. When a simple system tries to regulate a complex system, you often get unintended consequences.

[Unintended consequences are not restricted to government regulation of society, but can also happen when government tries to regulate other complex systems such as the ecosystem. For example, a fire prevention policy that reduces forest diversity results in increasing mass fires; dam building that destroys wetlands results in making floods more likely.]

Robert K. Merton, the sociologist who popularized the concept of the law of unintended consequences, identified 5 possible causes or sources of unintended consequences:

(1) **Ignorance** -- ignorance of the possible far reaching effects of the law. It is impossible to anticipate everything, and to have all the information you need to know about a matter, and this leads to incomplete analysis.

(2) **Error** -- incorrect analysis of the problem, or following habits that worked in the past but may not apply to the current situation.

(3) **Immediate interest**, or **self interest**, which may override long-term interests. Someone desperately wants to see a change, wants the intended result of an action so much, that he purposefully chooses to ignore any unintended consequences, and doesn't evaluate the ultimate effects of making that change. That is *willful* ignorance, which is quite different from true ignorance that is the first cause I mentioned.

We often see this one when there is heavy political pressure for the Legislature to pass something, and they do so regardless of the consequences.

(4) **Basic values** -- one's basic values may require or prohibit certain actions even if the long-term result might be unfavorable. A person's value system may fail to make them look past their own system when taking an action to evaluate what unintended consequences may result.

[For example, Merton said that the Protestant ethic of hard work and asceticism "paradoxically leads to its own decline through the accumulation of wealth and possessions."]

(5) **Self-defeating prophecy** or **self-defeating prediction** -- instances when the public prediction of a social development proves false precisely because the prediction changes the course of history. Fear of some consequence drives people to find solutions before the problem occurs.

[For example, the warnings earlier in the 20th century that population growth would lead to mass starvation helped spur scientific breakthroughs in agricultural productivity that have since made it unlikely that the gloomy prophecy will come true.]

CAUSES OF UNINTENDED CONSEQUENCES - DRAFTER'S PERSPECTIVE

The top 2 causes -- ignorance and error -- are the most frequent causes of unintended consequences, and for our purposes of the unintended consequences of laws, those are the ones we will be focusing on, with maybe some attention to the 3rd cause -- immediate interest.

So far, I have discussed what some academics and writers say about the causes of unintended consequences, but what about from our own perspective, the drafters of the legislation?

From my own perspective as a drafter, the 2 main reasons that we have ignorance and error in drafting bills, leading to unintended consequences, are these:

(1) We are not able to get enough information that we need within the time frame that we have to draft the bills; and

(2) We are not able to get enough accurate input from those who will be affected by the bill and/or those who will be implementing the bill, which contributes to the lack of information that we need to perfect the bill.

But even if we were somehow able to get enough information and enough input, would that be the sure-fire way to prevent or avoid unintended consequences in our bills? Unfortunately, no. That's because the nature of the legislative process involves factors that are beyond the control of the drafters, which lead to unintended consequences.

All of us here probably know that it is often not within our control what language is included or omitted from a bill, and how specific or general that language is worded. Sometimes the legislators may ask us to leave out specific language, or use vague or ambiguous language, in order to gain support, or at least not lose support for the measure. Other times we are told to intentionally leave some language vague or ambiguous, so that different interests can try to get their own favorable interpretations from the administering agency or the courts. The different interests sometimes would prefer to fight for their interpretations in those other forums, so they may try to persuade the legislators not to be too specific or precise in the language in the bill so that they can do that.

Another reason that legislators will punt to the administering agency to flesh out the details is that they *could* get more information to make the bill more precise, but they don't want to spend the time needed to get it. So, it is easier and expedient to just pass the bill with a general framework and then authorize the agency to adopt rules and regulations to implement the law. Again, this is a factor in the legislative process that is often out of our control as drafters.

But regardless of why the language of the bill is left vague or incomplete, whether it was due to pressure from special interests or because of expediency, the administering agency may take actions that result in unexpected consequences. Sometimes the agency interprets the intentionally vague law in a way that legislators don't like, or their constituents are upset with, and then the legislators say "that's not what we intended!", but it was actually never discussed when passing the bill. So, what was *really* intended?

[MS example - minimum standards for holding facilities -- Pages 8-19 in copies]

RELIANCE ON THE LEGISLATIVE PROCESS TO PROVIDE NEEDED INFO

At this same seminar in 2007, Duane Gall from Colorado gave a presentation on the topic of unintended consequences, and he asked the question about whether we should be able to count on the other parties in the legislative process to help identify loopholes, vagueness and errors in bills so that the language can be tightened down before the bills pass.

Duane had drafted some language within a short time frame that he thought would work for the sponsor of the language. He made a reference to a specific provision of existing law, but he didn't find out until after the session was over that that reference was not what he thought it was. The result was that his language was more far reaching than he or the sponsor intended.

Here's what he said in his 2007 presentation: "When you *are* so specific -- when you give a clear and unmistakable cross reference, even if it is wrong -- is there a point at which you're absolved from blame? Aren't you allowed to rely on all players in the process to do their homework? If not the sponsor, then certainly one of the lobbyists should have caught that before the bill was actually signed."

"What is the responsibility of advocates on all sides to read and understand legislation as it may pertain to them? Here it seems that the people involved either read this language in a way that suited their own needs and biases, without examining their own unspoken assumptions, or perhaps they consciously decided not to try and nail down exactly how this provision would apply because they thought they could win on the interpretation issues in court -- after the bill had safely passed -- and they didn't want to educate their opponents in the meantime."

I agree with what Duane said -- because I know that most of the time what I draft may not include some things that should be addressed, or may have some errors in the language, because I didn't have enough information or time to try to make it as airtight as possible. [We drafters usually don't have the luxury to spend several weeks on drafting one bill.] Since I know that many of my bills probably have some gaps or errors in them, I am comforted in knowing that I usually don't have to be 100% correct on everything from the beginning. That is because many other people will have the opportunity to read the bill and provide input for correction before the bill gets to the end, and I actually count on them doing that, like Duane did. So I am irritated, as he was, if the other players in the process don't point out the gaps or errors until it is too late to do something about it, or even worse, they don't point them out at all.

Here's a thought to keep in mind -- when you think something is likely to be controversial and would have opposition from certain groups, and those groups are surprisingly/unexpectedly quiet, perhaps you should look at the language even more closely. Maybe they already see a loophole or gap in the language in their favor, but they aren't going to mention it before the bill is passed, and then will try to use it to their benefit after it becomes law.

RELATIVE LIKELIHOOD OF AVOIDING UNINTENDED CONSEQUENCES

Here are some of my observations on the types of situations where we may be more likely and less likely to be able to prevent or avoid unintended consequences:

Direct effects vs. Indirect effects

I think it is probably easier for us drafters to prevent or avoid unintended consequences in making sure that the legislation accomplishes its direct effects, which is the purpose that the Legislature is trying to accomplish, the stated goal of the legislation, by making sure that most of the loopholes are closed, and that the language is specific and not loose, vague or ambiguous.

However, it is a lot harder and probably is impossible to prevent or avoid all unintended consequences from the indirect effects, which are the changes in behavior and actions that occur in response to the legislation that cannot be anticipated or cannot be controlled even if they are anticipated. As we've already seen, individuals are complex, society is much more complex, and it is difficult to predict what they are going to do.

Short term vs. Long term and Simple vs. Comprehensive

In addition, I think it is probably easier to close loopholes and make things work essentially as they should for the short term and for relatively simple issues.

But it is much harder to anticipate how something is going to work out for the long term and when the issues are broader, more comprehensive -- again, because people and society are complex, not always predictable in how they will respond to legislation.

It's like a forecasting error, particularly the forecasting error caused by unforeseen events/factors that aren't used in the forecasting model, which will make the model less accurate or reliable. The more events/factors that the model has to take into account, and the longer in the future the period of the forecast is, the more likely there will be errors/inaccuracies, which will increase and compound as more time passes.

HOW CAN WE PREVENT OR AVOID UNINTENDED CONSEQUENCES?

Okay, so now I am back to the question that I asked when we started:

Is it inevitable that our bills will have loopholes and unintended consequences, or are there any steps we can take to minimize these unanticipated effects in the bills that we draft? Is there anything we, as drafters, can do to identify and prevent, or at least minimize, loopholes and unintended consequences when we are drafting bills?

We have learned that the most frequent causes of unintended consequences are ignorance and error -- so what actions can we take to eliminate or reduce those? Those that are caused by immediate interest are, for the most part, out of the control of the drafters.

Some of the recommendations for how to avoid unintended consequences from the sources I used are:

- Have more involvement of the people who will be affected in the design of legislation.
- Include triggers to have targeted review of programs created in legislation.
- Set time limits for sunset legislation.
- Articulate the purpose and desired outcome, and confirm that the mechanics of the legislation work to positively promote the end goal.

Here are some suggestions from my own experience that I think will be helpful in preventing or avoiding loopholes and unintended consequences in the bills that we draft:

(1) Get as much information on the topic and the issues involved as possible within the time that you have. Even complete knowledge about a topic, if that could even be possible, won't guarantee that your forecasting will be completely accurate. But "knowledge is power" and I think it is always better to have the most information that you can get.

(2) After you have made your best effort on a draft, then try to pick it apart as if you were an opponent of the concepts in the bill. Try to mentally put yourself in the place of someone who does not want to follow the law proposed in the bill. That person will be looking for any way to get themselves out from under the provisions of the bill, looking for any loophole in it, looking for any way that the bill can be interpreted so that they will not have to do what the bill says and comply with the intent of the bill. Then, after looking at it from the eyes of an opponent, make whatever changes are necessary to the language of the bill so that it will be crystal clear what the persons who are subject to the bill are required to do and what they are not allowed to do. Use both positive and negative language, as I've previously mentioned.

(3) Discuss the bill with your colleagues in your office, ask for suggestions to improve your language, and ask them to play the devil's advocate as you did for yourself, to try to find flaws with your bill draft so that you can tighten down the language. Even if you have already done this for yourself, it's a fact that it can be quite difficult to edit and analyze your own work -- this is because you know the topic and you know what you are trying to say about it, but the people who will have to follow the law or implement it do not. So it is good to have some fresh eyes look at your draft, to help you get the perspective of someone who doesn't know as much about the topic as you do. They can let you know whether your language is good enough to properly convey what you want to say to those who are not as knowledgeable about the topic.

(4) If the bill sponsor has allowed you to talk about it with others, let the agency that will be involved in implementing the proposed law review your bill draft. Also, talk about the concepts of your bill with the agency initially, before drafting, for advice about what topics and language should be included. However, you cannot do this if you don't want to "tip off" the agency in advance, giving them time to find a way to oppose it. But if you have a good working relationship with the agency and are sure that it's okay to let the agency know about it in advance, it can be really beneficial for you if the agency will help you clean it up, tighten it down and make it work. This is also beneficial to the agency, even if they oppose it, because it's in the agency's interest for the bill to be workable if it ultimately passes. You have to be sure that you can trust the agency to be open and honest with you, because they may try to put in their own agenda and think that you won't know better about what they are doing.

(5) Again, if the bill sponsor has allowed you to talk about it with others, let the interested parties, interest groups, organizations and associations review your bill draft and provide input initially, like what you do with the agency. You have the same problem here as you do when with discussing it with the agency, because these people will have their own agendas. You have to be careful -- they may say, and it may appear, that they are being objective in their language, but they may try to put in provisions that they are advocating for, which may not be what the sponsor/committee wants, and may be counter to the public interest. You should not fully rely on the interest groups for the language, unless you have to because of your total lack of knowledge about it, because they are advocates for their own positions/agenda and are under no obligation to be neutral, unbiased resources. But keeping that in mind when you get

them involved, it can be very helpful to get their input because they will likely know more about the subject matter and issues than you do.

(6) Research the experience of other states on the same issues -- look at reports, news articles and publication articles to see how similar bills have worked in other states. But as noted in the previous suggestion, if the information is from an interest group, keep in mind that it may be, and probably will be, biased in favor of their own agenda.

(7) Related to the previous suggestion, contact your counterparts from other states and ask them about their experience in dealing with those issues, and problems that arose after they enacted a law. We drafters and nonpartisan legislative staff generally want to help each other out, because we know that we are a select (and relatively small) group of specialized lawyers, and we understand what the others are going through, and we won't be trying to push any agenda. You are likely to get objective, unbiased information right from the source -- the drafters.

[MS example - failure to update statutory reference -- Pages 20-23 in copies]

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