

# 2023 Legislative Drafting Seminar – Drafting Issues and Solutions

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# Constitutional Considerations

## Separation of Powers

- The United States Constitution and the Constitution of North Dakota provide for three coequal branches of government:
  - Legislative branch
  - Executive branch
  - Judicial branch

# Constitutional Considerations

## Distribution of Powers

- The Legislative branch – Enacts laws
- The Executive branch – Administers the laws enacted
- The Judicial branch – Construes the laws

Because the branches derive their authority from the same constitution, there is an implied exclusion of each branch from the exercise of the functions of the other branches.

# Constitutional Considerations

## Broad Powers of the Legislative Branch

- The North Dakota Supreme Court, in *State ex rel. Johnson v. Baker*, 74 N.D. 244, 21 N.W.2d 355 (1945) said:
  - All governmental sovereign power is vested in the Legislative Assembly, except such as is granted to the other departments of government or expressly withheld from the Legislative Assembly by constitutional restrictions.
  - Constitutional provisions are in the nature of grants of powers to the executive and judiciary, but are limitations upon the power of the Legislative Assembly.

# Federal Constitutional Provisions

## Reservation Clause

- The 10<sup>th</sup> Amendment to the United States Constitution provides all powers not delegated to the United States nor prohibited to the states are reserved to the states.

# Federal Constitutional Provisions

## Supremacy Clause

- Article 6 of the United States Constitution provides the Constitution is the supreme law of the land and state law is expressly preempted when Congress declares in statute that it intends to preempt state law in a particular field.

# Additional Constitutional Considerations

The following memorandum prepared by the Legislative Council staff provides additional constitutional considerations for legislative drafters.

- [Constitutional Considerations for Legislative Drafters](#)

# Bill or Resolution?

- Determine whether to draft a bill or a resolution.



# Bills

- A bill is used to enact a law.
- If the intent is to compel or prohibit an action, a bill should be used instead of a resolution.
  - **Exception:** for matters dealing with the legislative branch, a resolution may be used to direct the conduct of the Legislative Council, the legislative branch, or the Secretary of State as provided by statute.

# Resolutions

- A resolution (other than one proposing a constitutional amendment) does not have the force of law. *State ex rel. Sanstead v. Freed*, 251 N.W.2d 898 (N.D. 1977).

# Resolutions

- A resolution may be used to:
  - Amend the state constitution.
    - Art. IV, § 16, Constitution of North Dakota; North Dakota Century Code (NDCC) § 1-02-09; *Sanstead*; legislative rules
  - Amend the Constitution of the United States.
    - Art. 5, United States Constitution; *Sanstead*; legislative rules
  - Establish a legislative investigating committee.
    - NDCC § 54-03.2-03

# Resolutions

- A resolution may be used to:
  - Authorize the Legislative Council to conduct a study.
    - NDCC § 54-35-02; legislative rules
  - Request the Legislative Council to provide assistance during the interim or during the legislative session.
    - NDCC § 54-35-11
  - Fix the compensation of officers and employees of the Legislative Assembly.
    - NDCC § 54-03-10

# Resolutions

- A resolution may be used to:
  - Commend a person or group recognized for an achievement that has brought national attention or recognition.
    - legislative rules
  - Extend condolences.
    - legislative rules
  - Require the Secretary of State to furnish copies of laws to the Legislative Assembly.
    - NDCC § 46-04-03

# Resolutions

- A resolution may be used to:
  - Require the Secretary of State to perform certain duties.
    - NDCC § 54-09-02
  - Terminate a state of disaster or emergency declared by the Governor.
    - NDCC §§ 37-17.1-05, 37-17.1-11
  - Approve certain hydroelectric transmission facilities crossing any portion of the state.
    - NDCC § 49-22-09.1

# Review Current Law

- Review existing provisions to determine whether the proposal is already in effect, whether existing provisions need to be amended or repealed, or whether new provisions need to be enacted.

# Review Current Law

- Review the Century Code to determine if codified provisions exist concerning the proposal by:
  - Using the general index.
  - Using title, chapter, and section listings.



# Review Current Law

- If an applicable Century Code section is found:
  - Review provisions referenced in the section.
  - Consider the language of the section if that is to be used as a guide for a new section.

# Check Source Notes

- Check the source notes to Century Code sections to determine whether other relevant sections were created or amended when the provision was created or amended.
- Review cross-reference notes, which may cite to sections that are related to the section involved.
- Review other notes that may identify special treatment of the section, e.g., different versions of that section may be in effect at different times.

# Review Session Laws

- Review Session Laws for relevant noncodified provisions.
  - Appropriations
  - Bonding authorizations
  - Building authorizations or land sale authorizations
  - Temporary provisions or provisions with delayed effective dates

# Review Previous Proposals

- Review previously introduced proposals that could provide a framework and reduce the amount of background research.
- Review similar laws or proposals from other states.

# Use Plain English

- **Use plain English** – make your draft understandable to the average person and eliminate legalese.
- Avoid legislative intent, purpose, or findings statements.

# Edit Horizontally

- **Check sequential numbering of clauses.** Check internal references to bill sections, code sections, and terms of art.
- **Read for coherence to check the substance.**
- **Check use of defined terms.** Is the appropriate term defined? Is a term defined for a chapter used consistently throughout the chapter?

# Edit Horizontally

- **Check for grammar.** Are the sentences too long? Are the verb tenses correct? Do the pronouns agree with their antecedents?
- **Read for consistency with the title.** Compare the Century Code section numbers listed in the title, identified in the clauses, and the text itself. Are sections in the title and in the body in the correct sequence? Does the bill do what the title says it does? Are there any special clauses that should be mentioned in the title?

# Style Considerations

- Avoid substance in definitions.
- Use singular in definitions and throughout the bill.
- Be consistent.
- Avoid lengthy, multiparagraph sections.
- Avoid hortatory language.
- Avoid redundant language.



# Style Considerations

- Use correct, legal names. Be consistent in the use of terminology.
- Avoid minicaptions.
- Review the definitions applicable to the Century Code.
- Ensure new material follows old material being overstruck.
- Be aware early effective dates require an emergency clause.

# Style Considerations

- Do not rely on the caption to give substance to the text of the section.
- Be careful creating unnumbered subsections that will be placed into existing sections.
- Check with the Code Revisor before creating new numbered provisions.

# Final Review

- Review the draft to ensure the content accomplishes the purpose of the bill.

# Questions

- Contact Legislative Council if you have questions.