

Legislative Drafting Seminar: Constitutional and Other Considerations for Legislative Drafters

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Preliminary Considerations

Before drafting proposed legislation, drafters should familiarize themselves with:

- Federal and state constitutional limits on legislation
- The three branches of government and the unlawful delegation of legislative powers
- Statutory rules of drafting and interpretation
- The proper use of bills and resolutions
- Current law and Session Laws
- Previous legislative proposals

United States Constitution

Numerous federal constitutional provisions apply to legislative drafting, including:

- The Supremacy Clause
- The Reservation Clause
- Full Faith and Credit
- Limitations on State Sovereignty

United States Constitution

Supremacy Clause

- Article 6 of the United States Constitution provides one of the most important limitations on state legislatures.
 - It 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.

United States Constitution

Reservation Clause

- The 10th Amendment to the United States Constitution is the reservation clause.
 - It provides all powers not delegated to the United States, nor prohibited to the states, are reserved to the states.

United States Constitution

Full Faith and Credit

- Article 4 of the United States Constitution requires each state to give full faith and credit to the laws and judicial proceedings of other states.
 - It requires the citizens of each state be afforded all privileges and immunities of citizens of other states.
 - It also provides for extradition proceedings between states upon the demand of a state's Governor and guarantees to every state a republican form of government.

United States Constitution

Express Limitations on State Sovereignty

- Section 8 of Article 1 of the United States Constitution lists the powers reserved to Congress
- Section 10 contains express limitations on state sovereignty, including a prohibition on states:
 - Coining money
 - Entering treaties
 - Impairing the obligations of contracts
 - Engaging in war
 - ...and numerous other items

United States and State Constitution

Separation of Powers

- Both the United States Constitution and the Constitution of North Dakota provide for the following three coequal branches of government:



LEGISLATIVE
BRANCH

EXECUTIVE
BRANCH

JUDICIAL
BRANCH

United States and State Constitution

Distribution of Powers



United States and State Constitution

Implied Exclusion

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

Constitution of North Dakota

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) explained:
 - 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.

Constitution of North Dakota

Unlawful Delegation of Legislative Powers

- Drafters should be wary of the unlawful delegation of legislative powers, which arises if the law attempts to give someone else, usually the executive branch, the authority to make policy decisions without adequate guidance.
- Legislative power cannot be delegated.

Constitution of North Dakota

Title and Single Subject Requirements

- Section 13 of Article IV of the Constitution of North Dakota provides:
 - No bill may embrace more than one subject, which must be expressed in the title; but a law violating this provision is invalid only to the extent the subject is not so expressed.

Constitution of North Dakota

Recent Caselaw – Single Subject Rule

- The title and single subject requirements of Section 13 of Article IV of the Constitution of North Dakota were analyzed by the North Dakota Supreme Court in *Board of Trustees of The North Dakota Public Employees Retirement System v. North Dakota Legislative Assembly*, 2023 ND 185, 996 N.W.2d 873, as clarified, (Oct. 12, 2023).

Constitution of North Dakota

Recent Caselaw – Single Subject Rule

- The court noted the title and single subject requirements can be violated in more than one way, including:
 - If a bill embraces two subjects, and both are fully expressed in the title;
 - If a bill embraces more than one subject and only one subject is expressed in the title; and
 - If a bill embraces one subject and that subject is not expressed in the title.

Constitution of North Dakota

Recent Caselaw – Single Subject Rule

- The court held the title and substance of the Office of Management and Budget's appropriations bill violated Section 13 because the bill embraced more than one subject.

Constitution of North Dakota

Recent Caselaw – Single Subject Rule

- The court reasoned the legislation was introduced as a general appropriations bill, and the changes to the title and substance of the bill were not germane to appropriating funds for state government operations.
- The court held, because the provisions were not germane, the bill embraced more than one subject in violation of Section 13, and the bill was therefore invalid in its entirety.

Constitution of North Dakota

Effective Dates

Are addressed in Section 13 of Article IV of the Constitution of North Dakota.

- The effective date for measures passed during a regular 80-day session is August 1, unless the measure is an appropriation measure or tax measure, in which case the effective date is July 1. (*also see North Dakota Century Code Section 1-02-42*)
 - A measure may become effective on a later date if noted in the measure.
 - A measure may become effective on an earlier date if the Legislative Assembly declares all or part of the measure to be an emergency measure and the measure passes by a vote of two-thirds of the members elected to each house.
 - An emergency measure takes effect upon the filing with the Secretary of State or on a date specified in the measure.

Constitution of North Dakota

Effective Dates

Reconvened and Special Sessions:

- For any measures passed during a reconvened session and filed between August 1 and January 1, the effective date is 90 days after filing.
- A law enacted during a special session of the Legislative Assembly takes effect on the date specified in the Act.
 - All bills passed during a special session **MUST** specify an effective date.
 - A special session bill may become effective immediately, without an emergency clause.

Additional Constitutional Considerations

For further elaboration on constitutional considerations for legislative drafters, please see the following memorandum prepared by the Legislative Council staff:

[*Constitutional Considerations for Legislative Drafters*](#)

Statutory Rules of Drafting and Interpretation

North Dakota Century Code

- Drafters should be aware of provisions in the Century Code relating to drafting and interpretation.

Statutory Rules of Drafting and Interpretation

North Dakota Century Code

- Notable provisions include:
 - Chapters 1-01 and 1-02, relating to drafting and interpretation of bills.
 - The general definitions in Chapter 1-02, which apply to the entire Century Code unless otherwise separately defined in the relevant title, chapter, or section.
 - Section 1-02-12, which states the caption is not the law and may not be used to determine legislative intent.
 - Section 1-02-38, which lists the five items presumed in the enactment of every statute.
 - Section 1-02-42, which interprets the effective date provisions in Section 13 of Article IV of the Constitution of North Dakota.

Proper Use of Bills and Resolutions

Bill or Resolution?

- Once a drafter has familiarized themselves with the relevant constitutional and statutory provisions, a drafter must decide if a bill or resolution is the appropriate vehicle for their draft.

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:

- Propose an amendment to the Constitution of North Dakota
 - Art. IV, § 16, Constitution of North Dakota; North Dakota Century Code Section 1-02-09; *Sanstead*; legislative rules
- Propose an amendment to the United States Constitution
 - Art. 5, United States Constitution; *Sanstead*; legislative rules
- Establish a legislative investigating committee
 - Section 54-03.2-03

Resolutions

A resolution may be used to:

- Authorize the Legislative Council to conduct a study
 - Section 54-35-02; legislative rules
- Request the Legislative Council to provide assistance during the interim or during the legislative session
 - Section 54-35-11
- Fix the compensation of officers and employees of the Legislative Assembly
 - Section 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
 - Section 46-04-03

Resolutions

A resolution may be used to:

- Require the Secretary of State to perform certain duties
 - Section 54-09-02
- Terminate a state of disaster or emergency declared by the Governor
 - Sections 37-17.1-05 and 37-17.1-11
- Approve certain hydroelectric transmission facilities crossing any portion of the state
 - Section 49-22-09.1

Research and Investigation

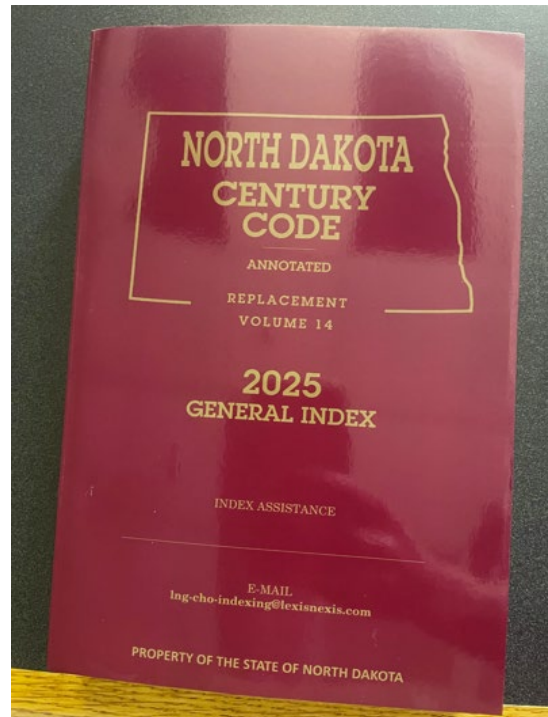
When drafting a bill, a drafter should first:

- Review existing provisions of law to determine:
 - Whether the proposal is already in effect.
 - Whether existing provisions need to be amended or repealed.
 - Whether new provisions need to be enacted.

Review Current Law

A drafter may search for existing provisions of Century Code, or provisions that need to be amended by:

Using
the General
Index



Using title,
chapter,
and
section
listings

Title 1 - General Provisions	
Chapter 1-01 - General Principles and Definitions	
Section	Section Name
1-01-01	This act - How referred to
1-01-011	Adoption of North Dakota Revised Code of 1943
1-01-012	Adoption of code not repeal of laws passed in 1944 Special Session
1-01-02	Origin of law
1-01-03	Expression of law
1-01-04	Common law divided
1-01-05	Evidence of common law
1-01-06	Code excludes common law
1-01-07	Classification of civil rights
1-01-08	Rights of property and person - How waived
1-01-09	Word defined by statute always has same meaning
1-01-10	Quorum
1-01-11	Authority of deputies
1-01-12	Variation from prescribed form

Review Current Law

If an applicable Century Code section is found:

- Review provisions referenced in the section.
- Consider whether the language of the section is appropriate to use as a guide for a new section.

Review 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, for instance, different versions of that section may be in effect at different times.

Review Session Laws

Review Session Laws for relevant noncodified provisions, such as:

- 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.

Review Final Draft

Always review your final draft to ensure the content accomplishes the purpose of the bill.

Questions

Please contact the Legislative Council if you have questions.

701-328-2916

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