

## BILL ANALYSIS PILOT PROJECT - BACKGROUND MEMORANDUM

The Legislative Management delegated its responsibility under Section 11 of 2013 Senate Bill No. 2001 to the Legislative Procedure and Arrangements Committee. Section 11 provides:

**LEGISLATIVE INTENT.** It is the intent of the sixty-third legislative assembly that the legislative management consider implementing during the sixty-fourth legislative assembly a limited bill analysis report pilot project to provide bill analysis reports similar to analysis reports prepared in other states.

This provision was added to Senate Bill No. 2001 by the House Appropriations Committee during its consideration of the bill and was continued in the conference committee report. The minutes of the House Appropriations Committee include this description of the comments by the sponsor of the provision, Representative Blair Thoreson: "This is something that the state of Washington does. Florida does it. It gives a brief synopsis; I think it would be helpful for legislators . . . They track it at the beginning of the session as introduced and then update it through committee actions." The minutes of the conference committee include this description of Senator Ray Holmberg's comments: "Thirty years ago, we had analysis on yellow sheets, no more than one sheet. They were a recap of what you were talking about, they faded away 20-some years ago. This is similar to that except it utilizes technology rather than running off paper."

### INTRODUCTION - LEGISLATIVE COUNCIL BILL SUMMARIES

In the 1970s, the Legislative Council attorneys prepared bill summaries. Basically, the contract enroller and engrosser (an individual under contract with the Senate and House who, along with four enrolling and engrossing clerks, retyped bills to include amendments as reported by the standing committees and retyped bills as finally enacted), informed the Legislative Council staff in the late afternoon of the bills for which committee reports would be filed with the front desks that evening. Copies of the bills and amendments were provided to the attorneys, and the attorneys prepared a summary for every bill other than a bill being reported from an Appropriations Committee. The bill summaries were then typed by the Legislative Council clerical staff that evening, and delivered to the State Printer for copying the number needed for distribution to all legislators in the appropriate house. The State Printer delivered the copies to the front desks the following morning for distribution by the page and bill book clerks. The bill summaries were on yellow paper, so that they could be easily distinguished from the bills. Every bill analysis began with the statement: "Generally, this bill . . .". During the late 1970s, the Legislative Council implemented computerized bill drafting. One result of computerized bill drafting was that the Legislative Council staff assumed the responsibilities for enrolling and engrossing bills in place of the Legislative Assembly's enrolling and engrossing clerks.

The legislative internship program started in 1969 in which North Dakota State University graduate programs and the University of North Dakota Department of Political Science provided six interns and the University of North Dakota School of Law provided six interns. The interns' primary responsibility was research for committee chairmen and members of standing committees (other than the Appropriations Committees). As the program evolved during the 1970s and 1980s, the University of North Dakota provided a greater number of interns due to a lack of graduate students to fill their intern slots.

Because of workload demands on the Legislative Council attorneys and the gradual evolution of the internship program to include mostly law school interns, the responsibilities of the interns evolved from primarily research to primarily preparation of amendments and preparation of bill summaries due to the fact that the interns had first-hand knowledge of bills that would be reported from committees.

In the 1980s, legislative interns prepared rough drafts of bill summaries when bills were to be reported from committee. The bill summaries were delivered to the Legislative Council staff attorneys to review in the late afternoon or early evening. Due to the poor quality of the summaries--remember, the summaries were drafted by college students, most of whom had little experience other than as students--the attorneys essentially rewrote the summaries. Copies were made and distributed to legislators the next day. The Legislative Council staff time required to prepare the bill summaries extended from approximately 3:30 to 9:00 p.m. each day. Due to the "time-crunch" factor and the need for the attorneys also to prepare amendments for legislators, bill summaries gradually became little more than a rewrite of the bill titles.

During the 1991-92 interim, the Legislative Management Committee (now designated Legislative Procedure and Arrangements Committee) reviewed the bill summary program. Even though substantial time was spent in preparing the summaries, in reality, the summaries were little more than reiteration of the title of a bill, with some "fill," and as a result legislators received little value for the staff effort expended. The committee recommended discontinuation of this program because "a substantial amount of staff time goes into the preparation of bills

summaries . . . [and] . . . elimination of the bill summaries would help in reducing the very heavy workload in the evenings."

### **BILL ANALYSIS IN OTHER STATES**

Section 11 of Senate Bill No. 2011 refers to bill analysis reports similar to analysis reports prepared in other states. Information from the National Conference of State Legislatures (NCSL) indicates a variety of methods in preparing bill analysis or summary reports:

Arizona House - Analysis for every bill on a committee agenda, updated for committee action, updated as passed by House;

California Senate - Summary for every bill except budget bills, updated whenever bill amended;

Colorado House - Summary for every bill as introduced, updated on Internet but not on printed bill;

Florida House - Analysis for every bill on committee agenda or heard on floor, updated as bill is amended;

Illinois House - Synopsis on every bill and every amendment before being heard by committee;

Idaho - Statement of purpose and fiscal note for every bill as introduced;

Indiana - Summary for every bill as introduced, updated as amended;

Iowa - Senate, no bill summaries, House, drafter does initial summary for every bill, caucus staff updates as bill is amended;

Kansas - "Bill supplements" are prepared for every bill reported out of committee, updated as amended, no supplements for appropriation bills;

Louisiana House - Analysis on every House bill and every Senate amendment to House bill;

Massachusetts Senate - Summary on every bill debated on daily calendar;

Michigan Senate - Analysis for every bill when heard in committee, updated when bill is amended if time allows;

Mississippi House - Analyses for "selected" bills, as determined by Legislative Services Office attorneys or House membership;

Missouri - Analysis for every bill, updated when bill is amended;

Oregon - Bill drafter prepares summary, committee staff prepares summary in more detail, no summary for appropriation bills;

Nebraska - Summary for every bill, prepared by committee chairman and committee attorney, no update;

Nevada Assembly - Analysis for every bill as introduced "to the extent practicable", updated when bill is amended;

Pennsylvania - Analysis prepared by committee staff when bill is heard in committee, updated as changes are made;

Texas - Analysis required for every bill introduced, updated when bill reported from committee;

Utah - "Legislative review notes" are attached to bills to address whether any constitutional or statutory conflicts may exist;

Virginia House - Summary for every bill, revised when purpose of bill has been altered by amendment; and

Wisconsin Senate - Analysis for every bill prepared for introduction, no update.

As taken from the NCSL survey, bill analyses or summaries may be prepared at various stages of the legislative process--when bills are drafted, when bills are introduced, when bills are scheduled for hearing, when bills are reported out of committee, when bills pass to the other chamber, or when bills finally are passed. The staff preparing the bill analyses also ranges from the original drafter, committee staff, committee chairman, bill analysis agency staff, and caucus staff.

Special note should be made of the fact that some states refer to a "summary" and some states refer to an "analysis."

## BILL ANALYSIS CONTENTS

### Fiscal Analysis

Joint Rule 501 requires a fiscal note to be prepared by the appropriate state agency with respect to every measure, except an appropriation bill, having an effect of \$5,000 or more on the revenues, expenditures, or fiscal liability of the state. Joint Rule 502 requires a fiscal note to be prepared for every measure that mandates changes in the revenues, expenditures, or fiscal liability of counties, cities, or school districts. If no state agency has primary responsibility for maintaining the information for the preparation of a fiscal note under Joint Rule 502, a statement to that effect is to be attached to the measure. State agencies are required to complete the fiscal notes within five days after the receipt of the request to prepare a fiscal note. If the request is made for an amended bill, the agency is to return the fiscal note within one day of the request.

The Legislative Council staff's role in fiscal notes includes the reading of all versions of bills, requesting fiscal notes, following up with agencies to ensure fiscal notes are available timely, requesting agencies to correct fiscal notes if incomplete or incorrect information is noted, and preparing weekly reports summarizing the fiscal impact of bills on state revenues and expenditures. During the 2013 legislative session, 619 bills had fiscal notes.

A fiscal note, however, is not a fiscal analysis. As provided by Joint Rules 501 and 502, fiscal notes only describe an effect of \$5,000 or more on revenues, expenditures, or fiscal liability of the state or describe the statewide impact of a mandated change in revenues or expenditures of counties, cities, or school districts. Bills may have a fiscal effect other than on revenues and expenditures of public entities. Examples would include bills requiring employers to pay at least a minimum wage, increasing or reducing the requirements for occupational or professional licensure, increasing or reducing restrictions on disposal of radioactive waste, granting exclusive rights to an individual's DNA analysis, establishing siting or setback requirements for facilities, and bills prohibiting "puppy mills."

### Legal Analysis

A legal analysis would involve a description of current law and a description of how the bill changes current law. Included in such a description should be whether the change raises constitutional issues. Currently, the Legislative Council staff attorneys review with a legislator who requests a bill draft whether there may be constitutional issues with respect to the proposal. If the legislator wants to proceed, the bill drafter prepares the draft to the extent possible to reduce probability of constitutional challenge. The personal, individual review ends with the legislator. Under confidentiality requirements, the legislator determines whether to share that information with anyone else.

### Constitutional Issues

A legal staff review of bills and proposed state constitutional amendments considered during the 2013 and 2011 legislative sessions identified several measures which may raise constitutional issues, whether under the North Dakota Constitution or the Constitution of the United States. Each enactment of the Legislative Assembly is presumed to be constitutional. Under Article VI, Section 4, of the Constitution of North Dakota, it takes four of five Supreme Court justices to declare a state law unconstitutional. Cases can be brought in state or federal courts challenging the constitutionality of state legislation. Examples are: *Husebye v. Jaeger*, 534 N.W.2d 811 (ND 1995) (North Dakota Century Code Section 16.1-01-09(7), which shortened the constitutionally prescribed period for submission of petitions unconstitutionally hampered, restricted, and impaired the referral powers reserved to the people in Article III, of the Constitution of North Dakota); *State v. Hanson*, 558 N.W.2d 611 (ND 1996) (Section 29-01-32, which required the defendant to disclose certain materials conflicts with a procedural rule adopted by the North Dakota Supreme Court and thus violated Article VI, Section 3, of the Constitution of North Dakota); *Dickie v. Farmers Union Oil Co.*, 611 N.W.2d 168 (ND 2000) (Section 28-01.3-08, which barred claims for damages caused by defective products after 10 years from date of purchase, irrespective of whether the injury is incurred within or beyond the period, created an unconstitutional classification in violation of Article I, Section 21, of the Constitution of North Dakota); *Guzman v. Western State Bank*, 516 F.2d 125 (8<sup>th</sup> Cir. 1975) (Chapter 32-08, North Dakota's attachment law, failed to accommodate debtor's and creditor's conflicting interests and thus violated due process required under the United States Constitution).

The legal staff review does not include bills that provide for Budget Section, or any other legislative committee, approval of actions of executive agencies or officials. Such bills have become a common occurrence--e.g., the 2013 Legislative Assembly enacted eight bills that provide for 10 new Budget Section approval requirements and two bills that provide for two approval requirements by other legislative committees (in 2011 four bills provided for six new Budget Section approval requirements). The North Dakota Attorney General has issued opinions pointing out the violation of the constitutional separation of powers doctrine by provisions that grant the Budget Section the power to approve or reject actions by executive agencies. One of the most recent opinions was Attorney General

opinion 2007-L-08, in which Attorney General Wayne Stenehjem said the provision of 2007 House Bill No. 1015, which granted the Budget Section power to approve or reject the choice of the Emergency Commission for construction or remodeling of the State Penitentiary would usurp an executive branch function and would likely be found unconstitutional by a court as violating the separation of powers doctrine.

### Legislative Intent

Section 1-02-39 provides that if a statute is ambiguous, the court, in determining the intention of the legislation, may consider among other matters, the legislative history of the statute. There are statutory attempts to control what a court may use in determining legislative intent. Section 1-02-11 (1943) declares no source note may be deemed a declaration by the Legislative Assembly as to the effect of any section to which the source note or revisor's note relates. The question is whether any such declaration for a bill analysis would, in practice, limit a court. See, *Kershaw v. Burleigh County*, 47 N.W.2d 132 (N.D. 1951), in which the North Dakota Supreme Court said where the legislature, in declaring what the 1943 Revised Code should contain, made provision for historical and source annotation; it was a clear indication that the prior history of the statutes incorporated in the codification might be consulted as an aid in their interpretation. In effect, the court relied on a source note to aid in the interpretation of two conflicting statutes, notwithstanding Section 1-02-11.

## BILL ANALYSIS PREPARATION

### Washington State Legislature

The proponent of a bill analysis pilot project referred to Washington State Legislature bill analyses as the type of analysis desired. The Washington State Legislature consists of a Senate of 49 members and a House of Representatives of 98 members. The Legislature meets for 105 days in odd-numbered years--the budget year--and for 60 days in even-numbered years. Special sessions are common--in 2013 the Washington Legislature met for 105 days, January to April; in special session 30 days, May to June; in special session 18 days, June; and in special session 3 days, November. Legislative standing committees continue to meet during the "interim" between legislative sessions to conduct followup of new legislation, to conduct two-day study sessions, and to anticipate work for the next session. Central bill drafting services are provided by the Office of Code Revisor. Separate agencies provide committee staff services for the House of Representatives and the Senate.

The Director of the Washington State Legislative Office of Program Research (OPR) was contacted with respect to bill analyses in the Washington Legislature. The OPR, a nonpartisan staff agency, provides year-round staff support to the 19 standing committees of the House of Representatives. The OPR is authorized 69 full-time equivalent (FTE) positions, which includes 55 policy (attorney and master's degree-holding analysts) and fiscal staff members and 14 administrative staff members. The OPR has seven permanent legislative assistants and hires several temporary legislative assistants during legislative sessions. Legislative assistants would be the equivalent of committee clerks in North Dakota. The "classic" committee staff structure is one attorney and one policy analyst who perform drafting and research work and one legislative/administrative assistant who performs administrative services, such as taking minutes and handling information technology and audio recording requirements. Staffing for a particular committee varies depending on the committee or workload, e.g., the House Judiciary Committee has 3 attorneys and 1 legislative assistant, and the House Appropriations Committee has 15 staff (2 staff coordinators, 10 fiscal analysts, and 3 attorneys), 3 legislative assistants, and 1 computer analyst.

A bill analysis consists of these parts: Brief Description, Sponsors, Brief Summary of Bill, Hearing Date, Staff, Background, Summary of Bill, whether an appropriation is made, whether a fiscal note has been requested, and Effective Date. A bill analysis is prepared only for the first hearing of a bill.

The OPR staff for a committee prepares the bill analysis for a bill that is scheduled to be heard by the committee. Not every bill referred to committee is scheduled for a hearing, and those bills do not have bill analyses prepared. The OPR staff presents the bill analysis at the first hearing on the bill. As a bill proceeds through the process, the bill analysis is not revised, but its original substance becomes part of the "bill report" that is prepared at each stage of the legislative process.

A bill report includes the bill analysis and, in addition: Title, Brief History (Committee Activity), Majority Report, Minority Report (if any), Staff Summary of Public Testimony, Persons Testifying (identified as in support, with concerns, or opposed), and Persons Signed In To Testify But Not Testifying. If the bill was amended, the bill becomes a Substitute Bill. No new bill analysis is prepared, but the bill report then contains these parts: Summary of Substitute Bill, Substitute Bill Compared to Original Bill, and Effective Date of Substitute Bill. The OPR staff edits the bill report as the bill moves through the legislative process in the House.

A House Bill that has passed the House does not have a bill analysis prepared in the Senate, but the Senate Committee Services staff will prepare a Senate bill report. The first Senate bill report essentially is the House bill report with a notation of the date passed and final vote in the House.

A similar process is followed in the Washington Senate. The Senate equivalent to the OPR is Senate Committee Services, a nonpartisan staff agency. Senate Committee Services staffs the 14 Senate standing committees with 59 staff--25 attorneys, 20 research or fiscal analysts or budget coordinators, and 14 administrative assistants. As in the House, staffing for a particular committee varies depending on the committee or workload, e.g., the Senate Transportation Committee has 2 attorneys, 3 fiscal analysts, 1 budget coordinator, and 1 committee assistant, and the Senate Ways and Means (Appropriations) Committee has 16 staff members.

[Appendix A](#) contains the Bill Analysis and the text of 2013 House Bill 1429. The Washington State House of Representatives Government Accountability and Oversight Committee consists of nine members, and the OPR provides two attorneys and a legislative assistant as committee staff. When House Bill 1429 was scheduled for hearing, the committee staff prepared the Bill Analysis. This Bill Analysis is an example of an analysis of a short, two-section bill "authorizing students under the age of 21 to taste wine in viticulture and enology programs". The quoted language is taken from the title of the bill. The information provided by the Bill Analysis outside the parameters of the bill's language is in the "Background" on the first page of the Bill Analysis.

[Appendix B](#) contains the Bill Analysis of 2013 House Bill 2030. The Washington State House of Representatives Public Safety Committee consists of 11 members, and the OPR provides 1 attorney, 1 research analyst, and 1 legislative assistant as committee staff. House Bill 2030 was an 80-page comprehensive amendment of driving under the influence laws, described in the title of the bill as "relating to driving while under the influence of intoxicating liquor or drugs". This Bill Analysis is an example of an analysis in which the Background--four pages--is as extensive as the Summary of Bill--four pages.

### **North Dakota Legislative Interns**

Currently, interns assigned to standing committees are law students. The proponent of a pilot project suggested that bill analyses could be prepared by the legislative interns assigned to standing committees.

Law students have a tendency to "issue spot" and focus research on a specific issue they identify, as per their training as law students. As illustrated by the bill analyses in the attached appendices, comprehensive knowledge of subject matter is required, as well as general information on the subject area involved. In the past, when asked to analyze a bill, interns have reiterated the testimony on the bill as the analysis. Because of their status as students, interns may be unduly influenced by testimony, as well as by committee members, as to the contents of any analysis.

### **North Dakota Legislative Council Staff**

The Legislative Council staff is authorized for 37 FTE positions, including 18 positions in the Administrative Services Division providing administrative support for bill drafting, including proofing, editing, and business processing and technology support.

The Legislative Council Legal Services Division consists of eight attorneys, and the Fiscal Services Division is authorized nine fiscal positions. During a legislative session, the Legal Services Division drafts the majority of the bills, resolutions, and amendments, other than appropriation bills and amendments to appropriation bills and some of the bills referred to appropriations, and engrosses and enrolls all measures. With respect to the 2013 legislative session, 1,197 bills and resolutions and 2,425 amendments were drafted by the Legislative Council staff. Under the current bill and amendment drafting system, every amendment requires the redrafting of a bill or resolution. As a result, the Legislative Council staff prepared 3,622 drafts of bills and resolutions. Included in these totals are 601 drafts of appropriation bills (47 appropriation bills and 554 amendments to appropriation bills).

Based on the figures for the 2013 legislative session, the seven attorneys involved in drafting bills and resolutions prepared the majority of the 3,021 nonappropriation bills and resolutions versions. Some are done by interns, and the fiscal staff also amends bills other than appropriation bills. The current legal staff workload is manageable in part because of the attorneys' legislative-related experience and use of technology.

The Legislative Council fiscal staff assist the Appropriations Committees, in addition to their work in preparing fiscal analysis and drafting amendments for appropriation bills and other bills. Presumably any bill analysis

project would not include appropriation bills because the fiscal staff prepares statements of purpose of amendments when those bills are amended.

The current workload of the Legislative Council staff prior to and through a legislative session is heavy. All staff are required to work overtime. Nonexempt employees (administrative support) are paid overtime, other employees are not. A total of 1,109 hours of overtime was paid to support staff for the 2013 legislative session.

### **FEASIBILITY OF A PILOT PROGRAM**

A true bill analysis should be done by an independent, nonpartisan staff, not subject to influence by any individual, legislator, caucus, or party. The Legislative Council attorneys already are requested to not use certain "buzzwords" in a bill or amendment, are requested to revise language so as to obfuscate the impact of the bill or amendment, and are requested to not change any wording in predrafted bills prepared by certain special interest groups. Similar pressure would be expected during the preparation of a bill analysis.

A true bill analysis may identify issues not appreciated by some legislators. For example, the background of a bill may identify the effect of a bill on local sign ordinances, which were at issue in a legislator's campaign. In many instances, extreme care would be required so as to not inadvertently refer to a benefit (implementing the Affordable Care Act), or a cost (imposing a new local government mandate), in a manner that distresses opponents or supporters of the bill.

Independence of the staff would be necessary because of the potential reverberations for an analysis to which some members would object or for which some would claim "death by bill analysis." Another question would be whether the legislative process would need to be delayed to wait while a bill analysis is prepared, whether before the hearing on a bill, after the bill is reported from committee and before second reading, or before final passage, so as to reflect floor amendments or conference committee reports.

An effective bill analysis would necessarily have to be prepared by committee staff. The time requirements for bill analysis preparation also would necessitate staff whose primary or sole responsibility would be bill analysis preparation and additional support staff resources for processing, proofreading, editing, etc.

ATTACH:2