

No. 96200-6

CASE NO. 76360-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

TERESA L. BANOWSKY,

Plaintiff/Appellant,

v.

GUY BACKSTROM, DC DBA BEAR CREEK CHIROPRACTIC.

Defendants/Respondents

OPENING BRIEF OF APPELLANT BANOWSKY

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I. INTRODUCTION

Teresa L. Banowsky (“Banowsky”), plaintiff and appellant, initiated a medical negligence lawsuit against Guy Backstrom, DC dba Bear Creek Chiropractic (collectively “Dr. Backstrom”), defendants and respondents, by a filing a complaint with the District Court alleging damages “in excess of \$100,000.” Despite CRLJ 14A(b), which states that “the district court shall order the entire case removed to superior court,” the District Court dismissed the complaint – after the statute of limitations on Banowsky’s claim had expired – for lack of subject matter jurisdiction, and denied Banowsky’s alternative requests to amend her petition to plead exactly “\$100,000” in damages, or to transfer her case to Superior Court using CRLJ 14A(b).

II. ASSIGNMENT OF ERROR

The District Court erred in dismissing the case (and the Superior Court erred in affirming the dismissal) instead of transferring the case from the District Court to the Superior Court in accordance with CRLJ 14A(b), when Banowsky’s original pleading alleged damages “exceeding \$100,000.”

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. The plain language of CRLJ 14A(b) mandates that the District Court “shall” transfer a case to Superior Court when “any party”

asserts a claim in an amount in excess of the jurisdiction of the district court or seeks a remedy beyond the jurisdiction of the district court. There is no language that qualifies or makes the rule subject to an amended pleading or applicable only to when the District Court initially has jurisdiction through a pleading that asserts a claim within the court's jurisdiction.

B. CRLJ 14A(b) was revised in 2004 to broaden the scope of the rule from "a defendant, third party defendant, or cross claimant" to "any party." However, an original proposed amendment to the rule referred only to "a plaintiff in an amended complaint, third party defendants, or cross claimant." This phrase was explicitly rejected by the Board of Judicial Administration, and "any party" was suggested and adopted. However, the Comment to revised CRLJ 14A(b) was not updated with the final amendment, and still only refers to a plaintiff in an amended petition, a designation that was explicitly rejected by the BJA, thus confusing the issue.

C. *Howlett* and the comment to CRLJ 14A(b) are distinguishable and inapplicable. The District Court and Superior Court relied on *Howlett* and the comment to CRLJ 14A(b) in dismissing Banowsky's case. However, *Howlett* was decided before CRLJ 14A(b) was amended, and the comment to CRLJ 14A(b) does not address every

scenario that can arise when a plaintiff asserts a claim for damages in excess of the district court's jurisdiction.

D. CRLJ 14A(b) must, as a practical matter, allow the District Court to exercise jurisdiction to act after the filing of a request for damages over \$100,000. *Howlett* holds that the District Court immediately loses jurisdiction over a claim where a plaintiff amends a complaint to allege damages in excess of the court's jurisdiction. If a court loses jurisdiction under *Howlett*, it simply cannot apply the rule for lack of subject matter jurisdiction without regard for the jurisdictional status of the case prior to losing jurisdiction.

E. Dismissing Banowsky's pro se case for pleading damages in excess of the District Court's jurisdictional limitations, when the District Court had jurisdiction over the first \$100,000 claimed, is contrary to public policy and the stated goals of the Washington courts. Washington courts have long sought to determine cases in controversy according to their merits rather than on procedure whenever possible, and the dismissal of the Plaintiff's case is contrary to that intention.

IV. STATEMENT OF THE CASE

1. Background Facts

In this case, Banowsky alleges that she sought medical care from Dr. Backstrom after experiencing a fall that occurred on or about February

25, 2013. CP at 105. She had sustained injuries to her right hip, pelvis, and thigh area from the fall, and the injuries were characterized by extensive bruising. *Id.*

Banowsky explicitly requested that Dr. Backstrom not perform the typical manipulation treatment he had previously employed on the injured area because the pain was so great. *Id.* Banowsky requested that Dr. Backstrom take an x-ray of the area, which he proceeded to do even though at the time, he did not have the supplies in his office to develop x-rays and, therefore, could not examine an x-ray prior to his subsequent treatment of Banowsky. *Id.*

Notwithstanding the fact that Banowsky obviously had an abnormal condition, that an x-ray analysis was not performed, and that Banowsky specifically requested not to receive manipulation on the injured areas, Dr. Backstrom proceeded to perform a lumbar spine manipulation on Banowsky. CP at 106.

When Dr. Backstrom performed a manipulation on Banowsky, his actions caused Banowsky's hamstring to immediately detach from the bone, after which Banowsky instantly heard a loud "pop" and felt significantly more intense pain in the injured area as well as additional pain in her lower leg and toes. CP at 106-107.

Furthermore, Banowsky alleges that Dr. Backstrom was experiencing personal issues at the time of the treatment, where he expressed agitation, and which led to his inattention and use of too much force relating to the chiropractic manipulation. CP at 106.

Banowsky underwent subsequent surgery to re-attach the detached hamstring, but continued to experience severe pain as a result of Dr. Backstrom's actions up to and including the date on which she filed a Complaint against Dr. Backstrom. *Id.*

2. Procedural Facts

On February 25, 2016, Banowsky filed a *pro se* Complaint in the King County District Court. CP at 105. The Complaint requested relief “in an amount exceeding \$100,000....” CP at 107. On April 14, 2016, Banowsky's attorney entered an appearance in the case. CP at 101.

On May 6, 2016, Banowsky filed Motion to Transfer Case to Superior Court. CP at 66-67. On May 11, 2016, Dr. Backstrom filed an opposition to the Motion to Transfer Case to Superior Court. CP at 45-53. On May 13, 2016, Banowsky filed a reply to Opposition to the Motion to Transfer Case to Superior Court. CP at 29-35.

On May 16, 2016, the District Court heard the motion to transfer and denied the motion and dismissed the case. CP at 27-28, 134-136.

On June 15, 2016, Banowsky filed Notice of Appeal to Superior Court. CP at 1.

On October 14, 2016, Banowsky filed an Appeal Brief with Superior Court in accordance with the Superior Court's scheduling order. CP at 111-119. On November 14, 2016, Dr. Backstrom filed the Brief of Respondents with the Superior Court. CP at 146-168.

On December 14, 2016, the Superior Court heard the appeal and denied it, affirming the dismissal of the District Court case. CP at 170-172, RP at 17-19.

V. STANDARD OF REVIEW

Although CRLJ 14A(b) is a court rule, and not a legislative statute, the same rules of construction can be applied. *State v. Otton*, 185 Wn.2d 673, 681, 374 P.3d 1108, 1112 (2016) (The court interprets court rules the same way it interprets statutes, using the tools of statutory construction and the court begins with the plain language of the rule). The Court of Appeals reviews de novo the interpretation of a statute (and rule). *See Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The Court's fundamental objective in statutory (and rule) interpretation is to give effect to the legislature's intent. *See Nationscapital v. Dep't of Fin. Insts.*, 133 Wn. App. 723, 736-37, 137 P.3d 78, 85-86 (2006). If a statute's (or rule's) meaning is plain on its

face, then the Court must give effect to that plain meaning. *Id.* The Court discerns plain meaning not only from the provision in question but also from closely related statutes (and rules) and the underlying purposes. *See, id., citing Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 647, 62 P.3d 462 (2003). The Court should give effect to all statutory (and rule) language; the Court considers statutory (and rule) provisions in relation to each other, harmonizing them to ensure proper construction. *See, id., citing King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000). The Court avoids construing a statute (and rule) in a manner that results in unlikely, absurd, or strained consequences. *See, Glaubach v. Regence Blueshield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003).

VI. ARGUMENT

A. **CRLJ 14A(b) mandates that the District Court transfer the case to Superior Court when a party claims damages in excess of the jurisdiction limit.**

CRLJ 14A(b) is unambiguous. When “any party” asserts a claim in an amount in excess of the district court’s jurisdiction, the court “shall” order the entire case removed to superior court. CRLJ 14A(b). The rule states:

(b) Claims in Excess of Jurisdiction - Generally. When **any party** in good faith asserts a claim in an amount in excess of the jurisdiction of the district court or seeks a remedy beyond the jurisdiction of the district court, the district court **shall** order the entire case removed to superior court.

CRLJ 14A(b) (emphasis added).

The rule's plain language applies to all parties, which includes a plaintiff. Also, the rule provides the court with no option and no discretion other than to transfer the case to superior court. The rule does not say "may order the case removed." The rule does not provide dismissal as an option. The only option is transferring the case to superior court.

B. CRLJ 14A(b) was revised in 2004 to broaden the scope of the rule from "a defendant, third party defendant, or cross claimant" to "any party."

CRLJ 14A(b) was amended and broadened in 2004 to include plaintiffs ("any party"):

~~When a defendant, third party defendant, or cross claimant~~ any party in good faith asserts a claim in an amount in excess of the jurisdiction of the district court or seeks a remedy beyond the jurisdiction of the district court, the district court shall order the entire case removed to superior court.

See WSR 04-15-028, Rules of Court, State Supreme Court, In the Matter of the Adoption of the Amendments to CRLJ 14A(b), Order No. 25700-A-792, Appendix A to this brief. That is, the rule was expanded to specifically include plaintiffs.

In an apparent explanation of the reason for the amendment, a part of the official comment to CRLJ 14A(b) states:

This rule change would allow a plaintiff the same right as other parties to transfer a case to superior court, **upon the filing of an amended complaint**, [and] will encourage plaintiffs to file cases initially in the district court. Plaintiffs can file in the district court knowing that if a basis for claiming damages in excess of the jurisdictional limit of the district court should arise after they have filed their complaint, then they will have the opportunity to transfer their case to the superior court.

However, the comment corresponds with an interim amendment that was offered to, and rejected by, the Board of Judicial Administration (chaired by Supreme Court Chief Justice Gerry Alexander) before the Board finally adopted the current version of the rule. *See Minutes of the Board of Judicial Administration meeting on January 24, 2003*, Olympia, Washington, Appendix B to this brief.

The initially proposed amendment to CRLJ 14A(b) provided:

When a ~~defendant~~ plaintiff in an amended complaint, third party defendant, or cross claimant in good faith asserts a claim in an amount in excess of the jurisdiction of the district court or seeks a remedy beyond the jurisdiction of the district court, the district court shall order the entire case removed to superior court.

Id. But the Board explicitly rejected this proposed version of the rule, and recommended adoption of the rule in its present state, which refers to “**all parties.**” Therefore, it is clear that the Board did not intend

the additional parties included in the amended rule to be limited to “plaintiffs in an amended complaint.” This appears to put the current rule and its associated comment in conflict, but a reasonable inference can be made that the comment was not updated to reflect the final amendment that was recommended by the Board and ultimately adopted by the Supreme Court, or that the comment is just one example of the many scenarios that could arise under the rule, including Banowsky’s situation.

Additionally, there is specific, post-rule revision, Division 1 case law that supports an interpretation that if a plaintiff asserts a claim in excess of the district court’s jurisdiction that the proper procedure is to transfer the case to superior court. *E.g., City of Seattle v. Sisley*, 164 Wn. App. 261, 265, 263 P.3d 610, 612 (2011) (“Finally, RCW 3.66.020 provides that district courts have no jurisdiction if a claim exceeds \$75,000: ‘If the value of the claim or the amount at issue does not exceed seventy-five thousand dollars, exclusive of interest, costs, and attorneys’ fees, the district court shall have jurisdiction.’ When a claim exceeds that value, it may be removed to superior court. (citing CR 14A(a) [sic])”.

In any event, the plain language of CRLJ 14A(b) indicates that a plaintiff in the position of Banowsky may avail herself of the rule and have her case transferred to the superior court.

C. *Howlett* and the comment to CRLJ 14A(b) are distinguishable and inapplicable.

The District Court and Superior Court appear to rely heavily on *Howlett v. Weslo, Inc.*, 90 Wn. App. 365, 951 P.2d 831 (1998) and the comment to the CRLJ 14A, essentially finding that before CR 14A(b) [sic] can apply, the district court must already have jurisdiction over the case and a subsequent claim asserts a claim for damages over \$100,000. *E.g.*, CP at 134-136, RP at 17-19. But both *Howlett* and the comment to CR 14A are distinguishable.

Howlett, a Division 3 case, held that when a plaintiff amended the complaint to assert a claim alleging the damages exceeding the district court's jurisdictional limit, there was no authority for the district court to transfer jurisdiction over the case to the superior court. *Howlett v. Weslo, Inc.*, 90 Wn. App. 365, 367, 951 P.2d 831, 833 (1998).

First, *Howlett* was decided before CRLJ 14A(b) was amended and broadened in 2004 to include plaintiffs in general ("any party"). Accordingly, the plaintiff in *Howlett* did not (and could not) argue that the district court has a specified power to transfer the case under CR 14A(b). *See, Howlett* at 367 ("Nor does she argue the district court has a specified power to transfer the case. Instead, she argues the district court has the inherent or implied power to transfer the case to the superior court because

RCW 3.66.010 vests the district courts with ‘all the necessary powers, which are possessed by the courts of record in this state.’”).

Second, and in support of dismissal in *Howlett*, the *Howlett* court cited *Crosby v. Spokane County*, 87 Wn. App. 247, 253, 941 P.2d 687 (1997) and *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189, 193 (1994). Neither *Crosby* nor *Marley* addressed facts or issues that are similar to this case.

In *Crosby*, the plaintiff failed to perfect her appeal. *Crosby* at 253 (“The court in this case did not err. Under *Griffith* and *Sterling*, the court lacked jurisdiction because Mr. Crosby failed to file the affidavit or verification required by RCW 7.16.050 within 90 days after filing the writ application. A court lacking jurisdiction of any matter may do nothing other than enter an order of dismissal.”). *Crosby* is distinguishable where the plaintiff failed to perfect her appeal and there was no option other than to dismiss. In Banowsky’s situation, the district court had jurisdiction up to \$100,000 and a revised CRLJ 14A(b) provided a mechanism to transfer the case to the superior court.¹

¹ Additionally, it should be noted that *Crosby* was reversed in 1999, when the Supreme Court held that the jurisdictional requirement had been satisfied by substantial compliance with the affidavit/verification requirement. *See Crosby v. Spokane County*, 137 Wn.2d 296, 301-303, 971 P.2d 32 (1999) (“Our approach is consistent with sound public policy...[citation omitted] that the merits of controversies be reached...[citation omitted] and the purpose of the civil rules is to place substance over form to the end that cases be resolved on the merits.”) It is undisputed that Banowsky substantially complied with the filing of her complaint in the District Court.

In *Marley*, the issue was whether the Department’s order (an adjudication) was void. *Marley* at 539 (“[A] void judgment exists whenever the issuing court lacks personal jurisdiction over the party or subject matter jurisdiction over the claim”). *Marley* is distinguishable because an order (an adjudication, a judgment) was actually entered deciding the case and the order was void for lack of jurisdiction. In Banowsky’s case, the District Court did not enter a judgment for over \$100,000 (the district court would lack jurisdiction to do so). In Crosby, the plaintiff failed to perfect her appeal. In *Marley*, the issue was whether the Department’s order (an adjudication) was void.

The comment to CRLJ 14A(b) addresses when a plaintiff amends her complaint (*e.g. Howlett*), and appears to specifically address the inequitable situation such as the one at issue in *Howlett*, where the plaintiff amended her complaint to assert a claim in excess of the jurisdictional limit, leading to dismissal. But the comment does not suggest that CRLJ 14A(b) be so limited to exclude the fact pattern in this case. In fact, as discussed above, the fact that the Board of Judicial Administration explicitly rejected wording that would limit the application of the rule to “plaintiffs in amended complaints” indicates that the rule should not be read to limit its application in such a manner.

Whether or not the limitation of the comment should be read into the rule can be determined by following canons of statutory construction. Although CRLJ 14A(b) is a court rule, and not a legislative statute, the same rules of construction can be applied. *State v. Otton*, 185 Wn.2d 673, 681, 374 P.3d 1108, 1112 (2016) (The court interprets court rules the same way it interprets statutes, using the tools of statutory construction and the court begins with the plain language of the rule). By virtue of separation of powers, courts are empowered to make their own procedural rules, and can even overrule court rules enacted into law by a legislature. *Marine Power & Equip. Co. v. State*, 102 Wn.2d 457, 461, 687 P.2d 202, 204-05 (1984) (“It is within the power of this court to dictate, under the constitutional separation of powers, its own court rules, even if they contradict rules established by the Legislature”). In fact, Superior Court Civil Rule CR 81 states that procedural statutes - other than certain enumerated proceedings - are superseded by the civil and criminal rules for superior court. *See, also* Civil Rules for Courts of Limited Jurisdiction Rule 81(b), which states, “(b) Conflicting Statutes and Rules. Subject to the provisions of section (a) of this rule, these rules supersede all procedural statutes and other rules that may be in conflict.”

It has long been the rule to interpret statutes (and rules) as they are plainly written, unless a literal reading would contravene legislative intent

by leading to a strained or absurd result. *Marine Power & Equip. Co. v. State*, 102 Wn.2d 457, 461, 687 P.2d 202, 204-05 (1984).

Looking to scholarly writings on statutory construction, legal scholars have written and opined extensively on how Washington courts interpret statutes. For example, Philip A. Talmadge, in *A New Approach to Statutory Interpretation in Washington*, 25 Seattle U. Law Review 179, 190, 211 (2001) (Appendix C), writes “Washington courts have long indicated that they will not construe a plain and unambiguous statute, that is, they will not resort to canons of construction or legislative history to analyze the meaning of a statute. This is often described as the plain meaning rule.” Under the plain meaning rule, courts must give statutes their full effect, *even if the result is unjust, arbitrary, or inconvenient. Id.*, citing *Board of Trade v. Hayden*, 4 Wash. 263, 280, 30 P. 87, 91 (1892), (emphasis added). Likewise, Professor Wang writes, “[a]s a corollary to the rule permitting examination of legislative history in the case of ambiguity, Washington courts have found it inappropriate to consider the legislative history of an unambiguous statute.” Wang, Arthur C., 7 *Univ. of Puget Sound Law Review* 571 at 576 (1984) (Appendix D).

Even if one believes that applying the exact language of Rule CRLJ 14(A)(b) rather than more narrowly according to the comment (*i.e.* only to plaintiffs in amended complaints) would lead to a case where the

words go beyond what was probably the intention, the long history of jurisprudence in Washington requires that the interpretation, based on the exact language of the rule, controls any other interpretation. “Where, as here, the language of the statute is plain and not ambiguous, a departure from its clear meaning is not warranted.” *McCarver v. Manson Park and Recreation Dist.*, 92 Wn. 2d 370, 378, 597 P.2d 1362, 1366 (1979), citing *Roza Irrigation Dist. v. State*, 80 Wn.2d 633, 497 P.2d 166 (1972).

In *Roza Irrigation Dist.*, the Supreme Court of Washington, *en banc*, found that interpretation of a statute was necessary because there were at least two meanings of the term “municipal corporation.” However, the Court first stated, “Of course the basic rule is that, where the language of a statute is clear and unambiguous, there is no room for judicial interpretation.” *Id.* at 635, citing *King County v. Seattle*, 70 Wn.2d 988, 425 P.2d 887 (1967).

Accordingly, CRLJ 14A(b) should be applied to the present case, according to its plain language, and Banowsky’s case should be transferred from the District Court to the Superior Court.

But if the comment to CRLJ 14A(b) is considered, a history of the adoption of the comment should also be considered. According to the minutes of a Board for Judicial Administration (BJA) meeting discussed *supra*, an amendment to CRLJ 14A(b), as originally proposed, specifically

referred to “a plaintiff in an amended complaint...” (Emphasis added). However, the BJA rejected that proposed amendment and instead, decided to change “*a plaintiff in an amended complaint*, third party defendants, or cross claimant” to “*any party*” in the proposed rule, thus broadening the scope of the parties that could avail themselves of the rule. (Emphasis added). *Minutes of the Board of Judicial Administration meeting on January 24, 2003*, Olympia, Washington, Appendix B (at 2) to this brief. The rule, as amended with reference to “any party,” was ultimately adopted by the Supreme Court. *See* WSR 04-15-028, Rules of Court, State Supreme Court, In the Matter of the Adoption of the Amendments to CRLJ 14A(b), Order No. 25700-A-792, Appendix A to this brief.

Whether the commentary is considered with the plain language of the rule or not, the Supreme Court of Washington intended that a mechanism be put in place to transfer a case from District Court to Superior Court when damages are claimed in an amount in excess of the jurisdiction limit of the District Court. This was done to avoid an injustice to the claiming party. Applying the plain language of the rule to the present fact pattern does not produce an absurd result, as it would simply allow a case to be transferred to preserve the plaintiff’s right. In fact, it would be more absurd to read the rule with the comment and hold that a

plaintiff should lose her cause of action for claiming as little as one cent over the jurisdictional limit.

D. CRLJ 14A(b) must, as a practical matter, allow the District Court to act after the filing of a request for damages over \$100,000.

A logical fallacy is inherent in two primary arguments made by Dr. Backstrom. On one hand, he claims that CRLJ 14A(b) only applies to a claim over which the district court already has jurisdiction if it is later determined the amount in controversy exceeds the court's jurisdictional limits. On the other hand, Dr. Backstrom relies on *Howlett* which holds that the District Court immediately loses subject matter jurisdiction over a case when a plaintiff amends her complaint to allege damages in excess of the court's jurisdiction limits.

But if the court has lost jurisdiction, it cannot apply the rule, whether or not there was some color of jurisdiction prior to it being lost. Therefore, a plaintiff who is asserting damages in excess of \$100,000 in an amended complaint is in exactly the same position, vis-à-vis the court's jurisdiction, as a plaintiff who is asserting damages in excess of \$100,000 in an original complaint.

Hence, interpreting CRLJ 14A(b) in the manner proposed by Dr. Backstrom produces an untenable result, unlike interpreting the rule according to its plain language.

E. Dismissing Banowsky’s case for pleading damages in excess of the District Court’s jurisdictional limitations, when the District Court had jurisdiction over the first \$100,000 claimed, is contrary to public policy and the stated goals of the Washington courts.

Washington courts have long sought to determine cases in controversy according to their merits rather than on procedure whenever possible, and the dismissal of the Plaintiff’s case is contrary to that intention. For example, CRLJ 1 states in part: “[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”

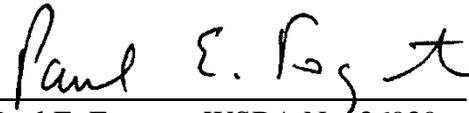
In this case, the District Court had jurisdiction over the first \$100,000 claimed by Banowsky. Dismissing Banowsky’s pro se district court case for pleading damages in excess of the court’s jurisdictional limitations (even if she had pleaded one cent over \$100,000), when the District Court would have jurisdiction over the first \$100,000 (within the Court’s jurisdiction), is an unjust result and must be contrary to public policy and the stated goals of the Washington courts. Also, Dr. Backstrom was on notice of the case within the statute of limitations (the case was filed within the statute of limitations and he was properly served within 90 days after filing), and he suffers absolutely no prejudice if the case is transferred to the superior court. Banowsky substantially complied with the filing requirements in the District Court. Respectfully, the dismissal,

especially in light of the express language of CRLJ 14A(b), leads to an absurd and unjust result, contrary to CRLJ 1.

VII. CONCLUSION

Banowsky respectfully requests that this Court reverse the rulings of the District Court and the Superior Court, and determine that her case can be transferred from District Court to Superior Court pursuant to CRLJ 14A(b).

Respectfully submitted this 16th day of August, 2017.



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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2017, I caused to be served a true and correct copy of **OPENING BRIEF OF APPELLANT BANOWSKY** by electronic service through the Court's portal system and email to the following:

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APPENDIX A

WSR 04-15-028
RULES OF COURT
STATE SUPREME COURT

[July 8, 2004]

IN THE MATTER OF THE ADOPTION OF) THE AMENDMENTS TO CRLJ 14A(b) AND) RALJ 1.1)	ORDER NO. 25700-A-792)
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The District and Municipal Court Judges' Association having recommended the adoption of the proposed amendments to CRLJ 14A(b) and RALJ 1.1, and the Court having considered the amendments and comments submitted thereto, and having determined that the proposed amendments will aid in the prompt and orderly administration of justice;

Now, therefore, it is hereby

ORDERED:

(a) That the amendments as attached hereto are adopted.

(b) That the amendments will be published in the Washington Reports and will become effective on September 1, 2004.

DATED at Olympia, Washington this 8th day of July 2004.

Alexander, C. J.

Johnson, J.

Bridge, J.

Madsen, J.

Chambers, J.

Sanders, J.

Owens, J.

Ireland, J.

Fairhurst, J.

Suggested Change

CRLJ 14A (b). REMOVAL TO SUPERIOR COURT

(a) [No change.]

(b) Claims in Excess of Jurisdiction - Generally. When a defendant, third party defendant, or cross claimant any party in good faith asserts a claim in an amount in excess of the jurisdiction of the district court or seeks a remedy beyond the jurisdiction of the district court, the district court shall order the entire case removed to superior court.

(c) - (e) [Unchanged.]

RULES FOR APPEAL OF DECISIONS OF COURTS OF LIMITED JURISDICTION (RALJ)

RULE 1.1 SCOPE OF RULES

(a) **Proceedings Subject to Rules.** These rules establish the procedure, called appeal, for review by the superior court of a final decision of a court of limited jurisdiction, subject to the restrictions defined in this rule. ~~These rules apply only to review of (1) district courts operating under RCW 3.30; (2) municipal departments operating under RCW 3.46; (3) alternative municipal courts operating under RCW 3.50 in municipalities exceeding 5,000 in population; (4) municipal courts operating under RCW 35.20; (5) all other courts operating under RCW Title 35 or 35A in municipalities exceeding 5,000 in population; and (6) any other court required by law to have a lawyer judge. These rules do not apply to review of other courts of limited jurisdiction, do not apply to review of a small claims court operating under RCW 12.40, and do not apply to review of a decision of a judge who is not admitted to the practice of law in Washington. These rules do not supersede the procedure for seeking de novo review when these rules do not apply. These rules do not apply to and do not supersede the procedure for seeking de novo review on the record of other decisions of a court of limited jurisdiction.~~

(b) These rules do not apply to the de novo review of a decision of a judge who is not admitted to the practice of law in Washington and do not apply to the de novo review on the record of a decision of a small claims court operating under RCW 12.40. The procedures for review of these decisions are set forth in CRLJ 73 and 75.

~~(b)~~ (c) [Unchanged.]

~~(c)~~ (d) [Unchanged.]

~~(d)~~ (e) [Unchanged.]

~~(e)~~ (f) [Unchanged.]

~~(f)~~ (g) [Unchanged.]

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of [RCW 34.08.040](#).

Reviser's note: The typographical errors in the above material occurred in the copy filed by the State Supreme Court and appear in the Register pursuant to the requirements of [RCW 34.08.040](#).

[Legislature](#)

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APPENDIX B



Board for Judicial Administration
January 24, 2003
Temple of Justice, Olympia

Members present: Chief Justice Gerry Alexander, chair; Judge William W. Baker; Mr. Dale Carlisle; Judge Vickie Churchill; Judge Sara Derr; Judge Stephen Dwyer; Judge Deborah Fleck; Judge Vicki Hogan; Judge Steve Holman; Judge Barbara Madsen; **Judge or Commissioner** Dirk Marler; Ms. Mary McQueen; Judge Robert McSeveney; Judge James M. Riehl, member-chair; Judge John Schultheis; Judge Karen Seinfeld and Judge Evan Sperline

Guests present: Professor David Boerner; Mr. Jim Bamberger; Ms. Pam Daniels; Mr. Mike Doubleday; Mr. Seth Fine; Ms. Rena Hollis; Mr. Mike Kenyon; Mr. Doug Levy; Ms. Londi Lindell; Ms. Pam Loginsky; Mr. Bob Mack; Ms. Andra Motyka; Judge Ann Schindler; Judge Greg Tripp; Mr. Charlie Williams

Staff present: Mr. Gil Austin; Mr. Rich Coplen; Ms. Jude Cryderman; Mr. Doug Haake; Mr. Jeff Hall; Ms. Janet McLane; Mr. Rick Neidhardt; and Ms. Yvonne Pettus

Call to order

Chief Justice Alexander called the meeting to order.

Minutes

It was moved by Judge Schultheis and seconded by Judge Seinfeld to approve the minutes of the December 18, 2002 meeting as published. The motion carried.

Time for Trial Task Force

Judge Riehl provided a brief history.

Judge Seinfeld reported the BJA Work Group (Judge Kessler, Judge Sperline and Judge Seinfeld) was asked to work on specific language to address the concerns raised at the December BJA meeting. Judge Seinfeld said the work group is not necessarily recommending that BJA adopt or not adopt but are providing possible refinements for consideration.

Judge Seinfeld reviewed issue 1: Striker/Greenwood issue with regard to unserved warrants. She said that Striker/Greenwood is actually a philosophical difference. Although, she continued, there is some showing of prejudice built into language.

Judge Sperline advised of concerns relating to issues 4, 5, and 6, which are the effects of excluded periods. Judge Sperline pointed out the three provisions that trigger restarting: 1) waiver of deadline by defendant; 2) stay by appellate court; 3) disqualification of judge, prosecutor or defense attorney.

Judge Sperline indicated it probably is not productive for BJA to debate the specific language, but pass along as an alternative proposal to the Supreme Court Rules Committee.

Professor Boerner advised that the Task Force (not a majority, but a representative group) had an opportunity to hold a conference call to discuss the recommendations proposed by BJA's Work Group. Professor Boerner provided the following:

Issue 1 – this issue involves actors, i.e., law enforcement, that are outside of the judiciary system. A concern is the term “unreasonable delay.” Law enforcement also has a concern about the resources needed to serve the warrants. Resources will have to be reallocated from other areas—law enforcement sees this as an “unfunded mandate.”

Issue 2 – this issue involves a buffer period. The simpler the rule is, the easier it will be to apply.

Issue 3 – the Task Force agrees with alternative A.

Judge Sperline advised that trial judges set “untimely” dates because they are unaware that the date set is outside the time period. Nothing happens to bring that information to the attention of the judge.

Issue 4 – Professor Boerner said this was unanimously approved on the conference call. The Board was advised that very few cases will need to deal with waivers.

Issue 5 – this issue deals with appellate stays.

Judge Seinfeld said that most stays are somewhat lengthy. Mr. Fine advised the Board that the original rule provided that stays were excluded period. The Task Force did not make policy changes.

Issue 6 – this option deals with disqualification of judge, prosecutor or defense attorneys. The Task Force agrees having different time periods makes sense – issues ought to be handled within a few days.

The Board discussed the disqualification time periods and agreed that the defense and prosecution disqualifications should be treated the same.

Justice Madsen voiced concern over the Task Force's proposal not taking into consideration the resources necessary for service of all warrants. She continued, resources simply are not available for law enforcement to serve all of the warrants.

The Board was advised that one proposal provided for two efforts to locate defendant – at residence and place of work. The King County Sheriff's department estimated this would cost their department approximately \$2 million per year, Pierce County estimated around \$100,000 per year, while Kitsap estimated \$88,000. Those additional resources are simply not available.

It was moved by Judge Seinfeld and seconded by Judge Hogan that BJA adopt and forward to the Supreme Court the final report with the following changes: 1) amend 3.3(d)(4) with alternative A and 2) relating to issue 6—amend to remove judge from resetting commencement date. Motion carried with Justice Madsen abstaining.

It was moved by Judge Seinfeld and seconded by Judge Fleck to forward all information to the Supreme Court Rules Committee. Motion carried.

Chief Justice Alexander thanked Professor Boerner and the members of the Task Force for their work related to Time for Trial. Professor Boerner

recognized the hard work of the Task Force and Rick Neidhardt of AOC.

CRLJ 14

Judge Marler advised the Board of the purpose of the proposed rule. He explained that some members of the bar are reluctant to file civil cases in district court due to the jurisdictional limit of the court. The proposed rule provides for transferring the case to a superior court upon filing of an amended complaint.

The Board agreed to change "a plaintiff in an amended complaint, third party defendants, or cross claimant" to "any party" in the proposed rule.

It was moved by Judge Dwyer and seconded by Judge McSeveney to forward CRLJ 14A (b), as amended by the BJA, to the Supreme Court with the recommendation to publish for comment. The motion carried.

Discussion with City Representatives Regarding Municipal Courts

Mr. Hall explained there are currently three issues for discussion:

Current contracts; Court Funding Task Force's Court of Limited Jurisdiction Committee on Structure; and Cities in King County that are in need of court services.

Ms. Londell advised the Board that cities that contract with King County District Courts have been advised by King County Executive Ron Sims, effective December 31, 2004 contract services will no longer be available. She continued, a negotiation team was established in March of 2002 in an attempt to meet with and negotiate options with the County. The County Executive has refused a meeting with the negotiation team. Ms. Londell pointed out that the King County District Court budget was cut by \$1.7 million, 35 court clerks have been laid-off and there are not enough clerks available to files cases in a timely manner.

Mr. Kenyon indicated a simple short-term solution is being offered through proposed legislation. He continued, they are asking for the support of the BJA or at least that BJA not oppose the legislation.

Judge McSeveney advised the district and municipal courts are inferior courts created under Title 3 RCW. He continued, the last major revisions were made in the 1984 Court Improvement Act.

Judge Schindler reported that the work group chairs met last week. They are in the process of assembling membership. She reported that Judge McSeveney agreed to participate.

Judge Dwyer indicated the proposal had to do with funding with two possible remedies – arbitration or the cities form their own municipal court. He continued, if the cities decide to form consortium courts that only handle infractions and misdemeanors, this will leave the district courts with cases that cost money to process but don't bring in any revenue. This will result in the extinction of the district court system.

Ms. Londell stated any assistance in working with the King County Executive would be appreciated. She continued, this is not about money but about providing court services to citizens.

The Board briefly discussed the proposed legislation. Judge Hogan stated she is strongly opposed to the BJA Executive Committee taking a new position on legislation when the Board has already agreed to a position.

The Board agreed that there would be no change in the position previously taken.

WSBA Report

Mr. Carlisle reported the BOG is looking at legislation for tort reform. The Bar is reviewing the model rules of ethics. The first meeting to review ethics will be held the end of January. The review group has been given an 18-month deadline.

Mr. Carlisle advised that the ABA will hold their mid-year meeting in Seattle in early February.

Other Business

Chief Justice Alexander recognized Mr. Copen's service as the first Executive Director of the BJA.

LFO

Ms. Hollis reported the clerks have indicated a willingness to assume the additional responsibility for collecting payment of LFOs. She continued, the clerks are concerned about proposed legislation to transfer responsibility for collecting LFOs from DOC to DSHS. In addition, they are concerned that language in the bill would require that the money collected will be forwarded to the clerks only once a month, when weekly payouts should be made to the victims.

General discussion took place regarding the proposal. It was agreed that the Clerks should take their proposal to the individual associations for consideration.

Ms. Hollis reviewed legislation of interest to the County Clerks.

Public Disclosure Commission

Mr. Hall briefly explained the changes proposed by the PDC.

It was moved by Judge Schultheis and seconded by Judge Churchill to endorse the proposed changes. The motion passed.

Court Funding Task Force

Ms. McQueen reported that five work groups have been created. They are 1) problem identification (co-chairs are Jan Michels and Jeff Amram); 2) Courts of Limited Jurisdiction—Delivery of Service (co-chairs are Judge Ann Schindler and Ron Ward); 3) Funding Alternatives (co-chairs are Ron Hjorth and Kirk Johns); 4) Implementation Strategies (co-chairs are Judge Deborah Fleck, Judge Steve Dwyer and John Cary); and 5) Public Education (co-chairs are Judge Tom Warren and Cheryl Bleakney). The co-chairs are in the process of finalizing their work group's membership. Ms. McQueen advised that a web site has been created for the Court Funding Task Force.

Legislative Update

Mr. Hall reminded the Board that the Executive Committee meets via conference call every Monday at 5:00 p.m. to discuss legislation. He reported Melanie Stewart (lobbyist for DMCJA) will take forward the changes to the Commission on Judicial Conduct. That proposal is changing district court judge membership to limited jurisdiction court judge.

He continued the AOC re-codification of criminal statutes bill has not been dropped.

Trial Court Coordination Councils

Ms. McLane provided a brief overview of the written reports submitted by the courts that received the grants. Ms. McLane suggested inviting a judge from each of the courts to provide an in-person report at a future BJA meeting.

Salary Commission

Mr. Hall reported the Salary Commission is recommending no increase the first year and a 2.5% increase the second year.

Ms. McQueen advised the Board that the Salary Commission's public hearings have been set as follows:

February 27	Vancouver
March 27	Yakima
April 24	Spokane
May 19	SeaTac

Chief Justice Alexander advised that in his letter to the Salary Commission, a COLA had been recommended. The Chief reported that some judges had expressed their unhappiness with the request for the COLA.

Judicial Retirement Work Group

No update.

Presiding Judges Conference

Judge Marler reported 42 have registered thus far for the conference. It will be held March 2-4 in Yakima. The focus of the conference will be the implementation of GR 29.

Best Practices Committee

Judge Sperline reported the Committee has been discussing court performance audits. They are also addressing issues relating to collections. He advised the next meeting is scheduled for February 28. He said the Committee is also considering holding meeting via video conferencing.

Court Reports

Court of Appeals

Judge Schultheis reported the AOC had assisted in providing information to the legislature regarding administrative hearings with de novo appeals to the Court of Appeals. Based on 176 cases per year, the de novo appeals would require an additional 16 judges.

Superior Courts

Judge Fleck reported the SCJA is working with DOC and JRA on community sentencing alternatives.

District and Municipal Courts

No report

Access to Justice

Judge Tripp thanked the Board for their support of the filing fee bill. He advised that the bill will also have the support of the Governor. They are currently seeking signatures for the bill.

There being no further business, the meeting was adjourned.

Respectfully submitted,
Jude Cryderman

Access Records

JIS LINK
Find Your Court Date
Search Case Records
Records Request
Judicial Info System (JIS)
Odyssey Portal
Caseload Reports

Find Resources

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Civic Learning
Resources, Publications, & Reports
Court Program Accessibility (ADA)
Jury Service Information
Whistleblower
Careers
Procurement

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APPENDIX C

25 Seattle U. L. Rev. 179

Seattle University Law Review

Summer 2001

Article

Philip A. Talmadge^{a1}

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A NEW APPROACH TO STATUTORY INTERPRETATION IN WASHINGTON

When the legislature enacts a statute, it intends to accomplish a particular purpose. Such a purpose may be shrouded in imprecise drafting, legislative jargon, or political compromise.¹ Nevertheless, it is the constitutional role of the courts in a particular case to implement the legislative purpose expressed in statute. It is in this practical application that the problems with the enactment arise.

***180** In a case or controversy, the courts use a variety of principles of statutory interpretation to assess precisely what the legislature meant in enacting a statute. Unfortunately, the canons of statutory construction developed by courts across the United States, including those in Washington, are often result-driven. There are literally so many canons of statutory construction, often diametrically opposed to one another, that the courts may pick and choose those canons most favorable to the ultimate disposition the court wishes to achieve. This leaves considerable power in the hands of the judiciary to make policy as the judges deem fit without regard to the legislature's actual intent in enacting a statute.

In this article, I will first explore Washington's existing law, both statutory and judicial, on statutory interpretation. I will then evaluate the mechanisms for construing statutes derived from common law and legislative sources. Finally, I will recommend a new paradigm for statutory construction so that legislative intent may be more accurately conveyed to the courts, abandoning many of the time-encrusted canons in favor of principles of interpretation adhering more specifically to the legislature's actual statutory language.

I. Washington Law on Statutory Construction

Washington law on statutory construction is found in statute, court rule, and case law. However, the common law rules of construction have been the predominant analytical force for interpreting statutes. Each aspect of interpretation is treated here in turn.

A. Statutes

A little known aspect of Washington law on statutory construction is that the legislature itself has established certain rules of construction in statute. As early as 1891, the legislature determined that the Washington Revised Code was to both be 'liberally construed' and 'not be limited by any rule of strict construction.'² The courts have not specifically employed this statutory provision, instead choosing generally to utilize common law rules of statutory construction, applying statutes liberally or strictly.

Where statutes are amended, the legislature has adopted a general policy against implied repealers; statutory provisions substantially the same as those of a statute existing when the provisions were enacted are deemed a continuation of that statute.³

***181** If the legislature has amended the same code section more than once in the same legislative session without internal reference, the various amendments may be given effect if they do not conflict; if they conflict, the last enacted amendment controls.⁴ The legislature delegated authority to the code reviser to publish the Washington Revised Code section with all of the amendments incorporated into that section, as well as to decodify repealed code sections which were repealed without reference to an amendment to the section.⁵

References to time,⁶ certified mail use,⁷ and numbers and gender⁸ are also addressed by legislative rule.

In recognition of separation of powers concerns,⁹ the legislature adopted a statute indicating court rules in conflict with statutory provisions render the statutory enactments of 'no further force or effect.'¹⁰ This statute has been found constitutional,¹¹ but the courts have limited its application to procedural statutes.¹² Wherever possible, however, the courts endeavor to harmonize conflicts between rules and statutes to give effect to both within their appropriate spheres.¹³

The legislative enactments on statutory construction, though not extensive in scope, are significant because they confirm a critical principle: ***182** the legislature may take an active role in directing how the courts are to interpret legislative enactments. By statute, the legislature may direct particularized expansive or restrictive interpretations of its work, or generally mandate that certain information regarding the enactment is authoritative. This is vital to the later discussion in this article of a new approach to statutory interpretation.

B. Court Rules

A second significant source of rules on statutory construction is found in court rules. In adopting procedural rules for Washington's courts, the Washington State Supreme Court has established policies for construction of statutes in a narrow band of circumstances.

By court rule, procedural statutes are superseded by the civil and criminal rules for superior court.¹⁴ In certain specific instances, the judiciary has preserved a statutory enactment on what is ostensibly a procedural matter.¹⁵ Whether the courts have the power to invalidate legislative enactments by judicial fiat is an open question in Washington constitutional law.¹⁶

C. Case Law

The final and most significant source of rules in Washington on statutory construction is case law. The Washington judiciary claims the exclusive power to authoritatively interpret the acts of the legislature.¹⁷ This claim rings a bit hollow in light of the legislature's power to amend a statute after the judicial interpretation of the legislature's act.¹⁸ Regardless of the exclusivity of the authority, the consequences ***183** of the judicial interpretation are very significant: the judiciary's interpretation of the statute becomes a part of the enactment as if it had been there since the legislature enacted the legislation.¹⁹

The Washington courts have developed a paradigm for analyzing a statute; the centerpiece of this paradigm is that the courts analyze a statute to carry out the intent of the legislature.²⁰ If the statute is plain and unambiguous, the courts enforce the statute as written.²¹ If the statute is ambiguous, susceptible to two or more reasonable interpretations, the courts resort to an interpretive process to ascertain the legislature's meaning.²² Each aspect of the paradigm is reviewed here in turn.

1. Legislative Intent

In numerous cases, Washington courts have indicated that their purpose in analyzing a statute is the implementation of legislative intent. *184²³ This purpose has been described variously as the court's 'primary goal'²⁴ or 'paramount duty.'²⁵

But in practical application, Washington courts have taken two distinct approaches to the intent of the legislature. On the one hand, the courts have adopted a literalist approach: take the words as the legislature stated them.²⁶ The second approach evaluates the 'spirit' or 'purpose' of the enactment and interprets the statute so as to avoid an absurd result compelled by the actual legislative language.²⁷ Neither *185 approach is exclusive, as Washington courts have used both. If, on the one hand, the courts say they lack the power to insert words into a statute that the legislature did not enact, it is difficult to then reconcile case law indicating the courts will supply language to avoid absurd results and to carry out the legislature's spirit instead of the strict letter of the law. If Washington courts have been troubled by these divergent models of statutory interpretation, they have not articulated such concern in a written opinion.

The difficulty inherent in the seemingly simple exercise of ascertaining the legislative body's 'intent' is striking. Of course, it is very difficult to discern precisely what 147 legislators and the governor or 535 members of Congress and the President had in mind, if anything, with regard to a piece of legislation. Not all legislators are actively involved in the enactment of a bill; not all legislators necessarily know the contents of a bill on which they voted.²⁸

By its nature, the legislative process expects legislators will develop expertise in certain types of legislation. Legislators serve on committees organized by subject matter and bills are directed to those committees for the critical initial work, including public hearings.²⁹ Particular legislators, by virtue of their key leadership positions as committee chairs, will have a greater say in the creation of legislation, as well as its content.³⁰ While the language of a statute expresses the collective judgment of the legislature, it is also true that this collective judgment may be the actual product of a single legislator or small group of legislators.

Many commentators contend that it is possible to discern legislative intent from a statute.³¹ They argue that groups are capable of forming intent; in fact, collective intent is common. Examples of where collective intent commonly occurs are within the military, an orchestra, a sports team, and a large corporation.

Philosopher Gilbert Ryle addressed this question decades ago. Ryle used the example of a person who, on visiting Oxford University and being shown the various 'colleges, libraries, playing fields, museums, *186 scientific departments and administrative offices, . . . then asks, 'But where is the University.'³² After discussing two other examples, Ryle writes:

These illustrations of category-mistakes have a common feature, which must be noticed. The mistakes were made by people who do not know how to wield the concepts University, division, and team-spirit. Their puzzles arose from [an] inability to use certain items in the English vocabulary.

The theoretically interesting category-mistakes are those made by people who are perfectly competent to apply concepts, at least in the situations with which they are familiar, but are still liable in their abstract thinking to allocate those concepts to logical types to which they do not belong.³³

This same concept has been applied to legislative intent:

To refuse to ascribe a ‘purpose’ to Congress in enacting statutory language simply because one cannot find three or four hundred legislators who have claimed it as a personal purpose[] is rather like (to use Professor Ryle's old example) refusing to believe in the existence of Oxford University because one can only find colleges.³⁴

Legislatures can and do form an intent, which may be objectively discovered. To understand an individual's true intent, it would be necessary to inspect the inner workings of the person's decision-making process, because individual intent is both objective and subjective. Individual intent is formed by internal values and impulses as well as external dynamics. By contrast, a legislature's intent is objective and external. ‘A legislature is an intrinsically public body and wears its inner thoughts on its sleeve, so to speak.’³⁵ Analyzing credible documentation of the legislature's process regarding a statute may enable a court to find legislative intent.

The fact that legislators have divergent degrees of input on legislation has lead commentators to conclude it is impossible to discern a single intent from a collective body.³⁶ In federal parlance, this analysis has been described as the ‘Busy Congress Model.’³⁷ Legislators are *187 busy people who lack personal knowledge about most of the bills on which they vote. Just as a corporate board member must rely on colleagues for information and advice about the issues that he or she votes on, so a legislator must rely on trusted colleagues when casting a vote. It is a common and acceptable practice to vote based on the advice of others rather than personal knowledge about the contents of bills. No large institution could function if its decision makers could not rely on the advice of others. Voting based on advice rather than personal knowledge is a common and perfectly appropriate way of managing massive decision making responsibilities. That some legislators lack personal knowledge related to the contents of bills in no way diminishes the potency of the statute's legislative intent.

In response to the views that intent may be discerned from a collective body, or that legislative intent is appropriately gleaned from the working of a busy legislative institution, some commentators not only contend that it is impossible to discover a single intent from a group as diverse as a legislative body,³⁸ but also argue that to rely on the institutional processes associated with a legislative body may be demeaning to the democratic process. For example, Justice Antonin Scalia of the United States Supreme Court criticizes the ‘Busy Congress Model’ as degrading the legislative process because it acknowledges that staff and lobbyists create laws with their accompanying legislative history; this diminishes the role of the people elected to make those judgments. According to Scalia, ‘[t]he legislative power . . . is nondelegable. Congress can no more authorize one committee to ‘fill in the details’ of a particular law in a binding fashion than it can authorize a committee to enact minor laws.’³⁹ Scalia and others would go farther and dispense *188 with the concept of legislative intent entirely, contending that the statutory text is the only real manifestation of legislative intent. This approach has been termed ‘textualism’ and has powerful historical antecedents.⁴⁰

The importance of textualism rests in its simplicity. Such an approach rests on the language of the legislation rather than arcane judicial rules of construction or unreliable legislative history materials. The meaning is more accessible and

comprehensible to officials and citizens affected by the legislation. The textual approach also tends to constrain judicial tendencies to engage in policymaking by construction.⁴¹

The debate on legislative intent has raged in federal circles, but Washington cases reveal little attention to the issue. While numerous Washington cases speak of legislative intent, they are devoid of serious discussion of the definition of the concept; by the very absence of definition to legislative intent, intent is what the courts say it is. This is hardly a satisfying articulation of a key concept in statutory interpretation. *189 Apparently, Washington courts have not been troubled in the least about a definition of legislative intent while the debate about the concept rages elsewhere.

However, an operating definition of legislative intent is possible. For the judiciary to speak in terms of legislative intent as a monolithic concept may be erroneous, but not fatal to the effort to discern the ‘intent’ of the legislature. The intent of the legislature is the aim or purpose of the enactment as objectively indicated in the language of the statute; the intent may be revealed in the process of a bill's enactment by the legislature. Although the subjective statements of individual legislators may contribute to understanding the legislature's objective intent as expressed in the statute's language, the touchstone for the judiciary's interpretive role must still be, first and foremost, the language of the statute.⁴²

This concept of legislative intent derived from the language of the statute may be flexible. If the legislature is seeking to remedy a very specific problem, its intention may be easy to discover. By contrast, if the problem is of greater magnitude, the legislature may envision a variety of potential ways of achieving the larger legislative goal and may afford the judiciary or the administrative agencies wider discretion in achieving the necessary goal.⁴³

*190 In any event, it is still appropriate to speak of the judiciary's obligation, based on separation of powers analysis, to effectuate the Legislature's intent in interpreting an enactment as the touchstone of statutory construction.⁴⁴

2. Ambiguous/Unambiguous Enactments

a. Plain Meaning Rule

Washington courts have long indicated that they will not construe a plain and unambiguous statute, that is, they will not resort to canons of construction or legislative history to analyze the meaning of a statute. This is often described as the plain meaning rule.⁴⁵

The concept of judicial reluctance to construe unambiguous legislative enactments runs deep in the Anglo-American legal tradition. Some commentators contend the plain meaning rule may be traced to nineteenth century England.⁴⁶

Early English cases indicated the courts would attempt to understand the ‘mischief’ Parliament was seeking to suppress and then would construe the statute in the fashion most advantageous to the suppression of the mischief.⁴⁷ Later English cases employed both a literal rule⁴⁸ and a so-called golden rule⁴⁹ in interpreting statutes. In *191 the United States, the plain meaning rule was effectively adopted by the United States Supreme Court as early as 1889,⁵⁰ but was not adopted by name until 1929.⁵¹

The plain meaning rule has been applied by Washington courts since territorial days, but the courts did not articulate the origin of the rule.⁵² In *Board of Trade v. Hayden*,⁵³ Justice Dunbar, who was present at the constitutional convention, implied the plain meaning rule was an essential public policy.⁵⁴ He contended the courts must give statutes their full effect, even if the result is unjust, arbitrary, or inconvenient.⁵⁵

In recent years, Washington courts routinely apply the plain meaning rule to avoid interpretation of clear and unambiguous statutes.⁵⁶

b. Elements of Ambiguity

The flaw in the plain meaning rule is that the Washington decisional law offers little guidance as to what a plain meaning is. A careful reading of Washington State Supreme Court authority indicating a statute is plain or unambiguous reveals precious little guidance as to how the court arrived at such a belief. Even in the face of dissenting views as to the plain and unambiguous meaning of the statute, the court has held to its paradigm.⁵⁷ In truth, in the absence of any clear *192 articulation of what distinguishes a plain and unambiguous enactment from a murky, ambiguous statute,⁵⁸ it is clear that the court has imposed a value judgment in choosing a particular interpretation of a statute. Indeed, perhaps the legislative history or interpretative canons would reveal the statute is neither plain nor ambiguous.⁵⁹

Perhaps it is best to acknowledge this rule for what it is: a device by which the judiciary can impose its normative choice on the Legislature's act. Favored statutes contain plain and unambiguous language and contrary legislative history materials can be ignored; unfavored ambiguous statutes require in-depth judicial construction of the legislature's true intent.⁶⁰

II. Tools for Statutory Construction

Once a Washington court determines a statute is ambiguous, it may resort to canons of statutory construction, principles developed in the common law, to give meaning to the legislative action. In fact, the courts assume the legislature is aware of its rules of construction.⁶¹ *193 The court may also resort to legislative history materials, materials generated inside and outside of the legislative process with respect to legislation, to attempt to discern what the legislature meant in enacting a law. Both the canons and legislative history materials have been used in Washington cases. Each is examined in turn.

A. Canons of Statutory Construction

Like other courts, the Washington judiciary makes reference to canons of judicial construction as if there were a tidy little volume in a judicial bookshelf some place that neatly sets forth all the applicable canons with their precise meaning. Unfortunately, no such exhaustive authoritative compilation of interpretive rules exists. Washington courts are free to invent or subtract canons at whim. The best that one can say about Washington law in this area is that certain canons have been used repeatedly by Washington courts. I attempt to highlight only a few of these many rules here.

Generally, courts seem to have a love-hate relationship with the statutory interpretive canons.⁶² Canons are intended to function as a basis for decision making, theoretically elevating decisions above mere result-oriented analysis because the rulings appear grounded in a historically tested maxim. Most members of the legal community appreciate the notorious and fundamental defects intrinsic to the canons such as their inconsistency and vagueness.⁶³

Despite these deeply rooted defects, courts seem unable to resist relying on them. Washington courts are no exception, and the canons are frequently invoked in Washington cases. While frequently invoked, the precise place of the canons in statutory interpretation is unclear. For example, the cases are not consistent on whether the canons may be invoked at any point in the statutory analysis or only if the statute is ambiguous and requires construction.⁶⁴

*194 One may divide Washington's canons of statutory construction into two broad canons: textual and extrinsic source.

1. Textual Canons

Textual canons are used to divine the meaning of a statute within the statute itself by looking to the words of the statutory text as well as linguistics, grammar, syntax, and the structure of the text for their strength.

Washington courts have used a variety of linguistic canons including *espressio unius*, which says that the expression of one thing suggests the exclusion of others;⁶⁵ *noscitur a sociis*, which says ‘the meaning of words may be indicated or controlled by those with which they are associated’;⁶⁶ *ejusdem generis*, which provides a specific statute will generally supersede a more general one or a general term must be interpreted to reflect the class of objects reflected in more specific terms accompanying it;⁶⁷ the ordinary usage rule which indicates that ‘an undefined term should be given its plain and ordinary meaning unless a contrary legislative intent is indicated’;⁶⁸ the dictionary definition rule, which says a court should follow a recognized dictionary’s definition of terms unless the legislature has provided a specific definition; *195⁶⁹ and the ‘shall’ rule, which indicates that the term ‘may’ is permissive, and does not create a statutory duty,⁷⁰ but the term ‘shall’ usually creates an imperative obligation⁷¹ unless unconstitutional⁷² or contrary to legislative intent.⁷³

The Washington State Supreme Court has also applied the grammar and syntax canons on several occasions, even to the point of examining the legislature’s use of commas and hyphens.⁷⁴

Finally, the Washington State Supreme Court routinely relies upon certain canons pertaining to the structure of the statutory text when it is doing its textual analysis. These structural maxims provide that each statutory provision should be read by reference to the whole act;⁷⁵ a court must avoid interpreting a provision in a way that would render other provisions of the act superfluous or unnecessary;⁷⁶ a court should interpret the same or similar terms in a statute the same way;⁷⁷ *196 a court should read provisos and statutory exceptions narrowly;⁷⁸ a court must not create exceptions in addition to those specified by the Legislature;⁷⁹ and a court may treat silence as acquiescence by the Legislature in judicial interpretations of a statute.⁸⁰

The textual canons are assumptions about legislative meaning derived from the use of language, grammar, and sentence structure of the statute itself. They are generally useful maxims that hue most closely to the statutory text. It is only when these textual canons rely upon extrinsic sources such as dictionary definitions that their reliability becomes questionable.

2. Extrinsic Source Canons

In contrast to the textual canons, the extrinsic source canons look to evidence outside the words of the statute to determine the meaning of a statute, rendering these canons somewhat less reliable than the textually based canons previously discussed. These canons look to information derived from the executive branch agencies, the attorney general, other statutes, the common law, and the constitution to interpret a statute.

Washington courts have frequently relied on administrative agency rules implementing statutory policy and opinions of the attorney general in construing statutes. Administrative agency rulemaking pursuant to the Administrative Procedure Act,⁸¹ and quasi-judicial administrative decisions⁸² are common sources of interpretation of statutes. Separate quasi-judicial administrative bodies also exist.⁸³ Courts often defer to the agency interpretation of a statute unless that interpretation is contrary to the plain meaning of a statute or is unreasonable in the eyes of the court.⁸⁴

*197 The Washington State Attorney General has the authority to give formal opinions upon the law by request of elected officials.⁸⁵ Just as the courts have deferred to agency interpretation of a statute, Washington courts have given some deference to formal attorney general opinions on the interpretation of a statute.⁸⁶:

A second group of extrinsic canons focuses on the relationship of an enactment to the larger body of Washington statutory law and interprets the enactment in a fashion designed to render that statutory law a consistent whole.⁸⁷ These canons include the following: the borrowed statute rule, which indicates that where the legislature borrows a statute, it impliedly adopts the statute's judicial interpretations;⁸⁷ the reenactment rule, which says that when the legislature reenacts a statute, it incorporates settled interpretations of the reenacted statute;⁸⁸ *in pari materia*, which says similar statutes should be interpreted similarly;⁸⁹ the presumption against repeals by implication;⁹⁰ the rule requiring *198 interpretation of provisions consistently with subsequent statutory amendments;⁹¹ the rule of continuity, which assumes that the legislature did not create discontinuities in legal rights and obligations without some clear statement;⁹² and courts presume when the legislature acts, it intends to change existing law.⁹³

A third group of extrinsic source canons addresses the relationship of a statute to the common law and include: a presumption in favor of following common law usage where the legislature has employed words or concepts with well-settled common law traditions;⁹⁴ a presumption that the legislature is aware of prior law including judicial or administrative interpretations of statutes;⁹⁵ and a presumption in favor of prospective application of a statute and its corollary canon, which rejects retroactive application of statutes.⁹⁶

*199 A final group of extrinsic canons addresses the relationship of statutory enactments to overarching constitutional principles. Courts generally interpret a statute so as to avoid constitutional problems.⁹⁷ Courts also interpret statutes to favor judicial review, especially for constitutional questions.⁹⁸ In the criminal context, principles of lenity⁹⁹ may have their roots in constitutional concerns.¹⁰⁰

3. A Detailed Example of a Canon in Operation

To place these canons of statutory interpretation in appropriate perspective, it is useful to view a canon in application in an actual case. The doctrine of *in pari materia* is a useful example of such a canon in operation.

In pari materia is an old canon, which has been used in Washington for at least eighty-seven years.¹⁰¹ In fact, it is held in such high regard, the Washington State Supreme Court has called it ‘a cardinal rule,’¹⁰² describing it as follows:

In ascertaining legislative purpose, statutes which stand in *in pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes. Also, the entire sequence of statutes relating to a given subject matter should *200 be considered, since legislative policy changes as economic and sociological conditions change.¹⁰³

The Court has relied on the canon in numerous instances, even where the provisions were passed in different bills in the same session:

Statutes in *pari materia* should be harmonized as to give force and effect to each[,] and this rule applies with peculiar force to statutes passed at the same session of the Legislature. . . . Although the two provisions had been acted on under separate bills, this court found that its obligation to harmonize statutes in *pari materia* was even greater when the two statutes had been enacted in the same legislative session.¹⁰⁴

As with so many canons, in *pari materia* may be manipulated to achieve a particular result.¹⁰⁵ The rule was applied in different cases involving the same set of facts, for example a sting operation was conducted and the two defendants were arrested for manufacturing 40,000 M-80's and 200 tennis balls filled with flash powder, or tennis ball bombs. The sting operation was undertaken after an eight-year-old both blew his hand off and had sheetrock and ceiling pieces imbedded into his fingers and bones after he found a tennis ball bomb in his brother's closet and lit it in the family's fireplace.¹⁰⁶

An issue on review was whether the device was regulated under the Explosives Act or the Fireworks Act. The Explosives Act specifically does not regulate fireworks,¹⁰⁷ hence the fireworks that the defendants were manufacturing might have been exempt from the fireworks law.¹⁰⁸ Thus, the defendants sought to avoid punishment under either act.

The defendants initially pled guilty to violations of the Explosives Act,¹⁰⁹ but later sought to withdraw their plea, arguing that what *201 they had actually manufactured were legal fireworks under section 70.77 of the Washington Revised Code.¹¹⁰ The majority found the Explosives Act and the Fireworks Act should be read in *pari materia* because they each 'govern the manufacture, purchase, sale, possession, transportation, et cetera, of potentially dangerous explosive devices, [and so] stand in *pari materia* due to the fact that they relate to the same person or thing, or the same class of persons or things.'¹¹¹ In so holding, the majority in effect agreed with the lower court's decision to ignore the plain meaning rule, reasoning that it would be 'absurd' for the explosives that the defendants manufactured to be unregulated by both the Explosives Act and the Fireworks Act.¹¹²

The dissent disagreed with the treating of the Explosives Act and the fireworks law in *pari materia*, arguing that it could not read the statutes in *pari materia* because one statute (the Explosives Act) predated the other (the Fireworks Act).¹¹³ The dissent asserted that the fireworks and explosives statutes could not be within the same statutory scheme because of the time difference in their enactment. Since the men were charged under the explosives statute, the dissent found the Explosive Act unambiguous, and the search for legislative intent by employing the canon of in *pari materia* was improper, warning that '[t]o broaden the use of in *pari materia* beyond these narrow boundaries--i.e., using it as a vessel to navigate beyond distinct statutory enactments--is to usurp the sought-after legislative intent by judicial construction out of whole cloth.'¹¹⁴

There is no direct link between the Explosives Act and the Fireworks Act. Consequently, different philosophies of statutory interpretation were used by the majority and dissent. Ultimately, the result in the case may be dictated by the tragedy that befell the child, rather than a clear articulation of the canon.

By plucking out useful canons and utilizing their rhetorical skill, different judges steer the same facts in different directions. This ability to achieve different results by using different canons is both the genius and curse of the canons.

To the uninitiated, or perhaps the cynical, Karl Llewellyn's acute observation that for each canon of statutory interpretation, there is an equal and opposite canon of judicial interpretation bears repetition.¹¹⁵ *202 Llewellyn was thus prompted to observe that the canons held little meaning:

When it comes to presenting a proposed construction in court, there is an accepted conventional vocabulary. As in argument over points of case-law, the accepted convention still[] unhappily requires discussion as if only one single correct meaning could exist. Hence[,] there are two opposing canons on almost every point. An arranged selection is appended. Every lawyer must be familiar with them all: they are still needed tools of argument. At least as early as Fortescue[,] the general picture was clear, on this, to any eye which would see.

Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: the good sense of the situation and a simple construction of the available language to achieve that sense, by tenable means, out of the statutory language.¹¹⁶

Llewellyn's observation was echoed by Justice Finley in *Schneider v. Forcier*.¹¹⁷ Llewellyn's criticism may be apt.

***203** If there are often conflicting interpretive canons for virtually every eventuality, the canons offer little practical guidance to the courts in their interpretive role. No single interpretive canon appears to have greater moment than another. This leaves the judiciary extremely wide latitude to substitute its own normative values for those of the legislature, the ostensible authors of the legislation. As noted earlier, the canons are not analytically precise in number, scope, or usage. The Washington State Supreme Court should decide with greater precision when the canons should be used in statutory construction, what canons should be employed, and the relative authoritative value of the canons in the judiciary's function of statutory analysis.

B. Legislative History

The ultimate extrinsic canon of statutory interpretation is found in the materials of the legislative process itself. When the language of the statute is ambiguous or the standard rules of interpretation are not helpful, Washington case law has recognized a variety of possible sources to discover the intent of the legislature in enacting a statute.¹¹⁸ However, the courts have not been entirely consistent in their treatment of these sources.

Of greatest utility are legislative findings in a preamble section of a bill as the findings represent an affirmative statement of legislative intent enacted by the legislature.¹¹⁹ Similarly, official section-by-section comments adopted by the legislature as part of the journal of one or both houses also retain a sense of official imprimatur to a particular interpretation of an enactment.¹²⁰ Plainly, these contemporaneous, collective expressions of legislative purpose are more significant than the individual, non-contemporaneous thoughts of legislators and others. After all, when divining legislative intent, the courts are looking to the collective decision of 147 legislators in a particular legislative session. The thoughts of a legislator or lobbyist expressed long after that session may have been affected by bias or the sheer passage of time.

***204** Courts have also looked to official documents of the legislature such as bill reports, which are the product of the legislative staff, as authoritative sources of legislative intent.¹²¹ Similarly, an official document used by the legislature in its deliberations such as a fiscal note, detailing the financial implications of a bill may be used to determine legislative intent,¹²² but some caution here may be in order as fiscal notes are ordinarily prepared by the executive or judicial branch agency charged with administration of the proposed law,¹²³ and the note may reflect agency bias with regard to the bill.¹²⁴

Transactional materials, those materials generated in the course of the enactment of the legislation, may also serve as a basis for understanding the legislature's work. Various drafts of a proposed bill can be very revealing as to the legislature's intent with regard to the final statutory language.¹²⁵ The court may look to model or uniform acts as sources where the legislature enacts such legislation.¹²⁶ Committee work, including statements of legislators during committee sessions; both oral and written testimony of witnesses before the relevant legislative committees; contemporaneous letters of legislators; and staff memoranda on the legislation can be of assistance in learning legislative *205 intent.¹²⁷ Materials pertaining to activities on the floor of each house of the legislature are also significant interpretive tools. Washington courts have used legislative debates in construing statutes,¹²⁸ but have been more reluctant to use the colloquy of legislators reported in legislative journals¹²⁹ as these colloquies are often staged for the benefit of the courts.¹³⁰

It is difficult to reconcile the disparate judicial treatment of floor colloquies in the case law. In *Johnson*,¹³¹ the Washington State Supreme Court found value in the exchange between the former chair of the Senate Select Committee on Product Liability and Tort Reform and the vice-chair of the Senate Judiciary Committee on an issue involving the 1981 Product Liability and Tort Reform Act.¹³² However, in *North Coast Air Services*,¹³³ the court declined to give pay significant heed to the exchange of two key members of that same select committee on the interpretation of that same 1981 legislation even though the exchange related to the precise issue before the court and indicated a clear legislative intent to overrule the court's decision in *Ohler*.¹³⁴

*206 An additional source of legislative intent is found in the action of the governor. A gubernatorial veto is deemed part of the legislative process.¹³⁵ Thus, veto messages of the governor are significant sources of legislative intent.¹³⁶

The least significant legislative construction tools are those materials created after the enactment of the legislation. Generally, the courts have not valued declarations of legislative intent offered by legislators¹³⁷ or lobbyists;¹³⁸ however, **law review** articles prepared by legislators commenting on legislation have been used to construe statutes.¹³⁹

In this discussion of interpretive sources for legislative intent, the author has intentionally grouped the materials in descending order of persuasive force. For example, legislative materials expressing an official, contemporaneous, and collective intention, such as the preamble to a bill, have greater persuasive force than a lobbyist's declaration submitted years after the bill's enactment. But it is important to note that no statute or case law gives official sanction to such an ordering of the persuasive power of legislative source materials.

In his excellent article on legislative history in Washington, former Representative Art Wang argued for greater legislative attention to its materials designed to describe the legislature's intention in enacting a bill. Specifically, Wang suggested the creation of a joint select legislative committee to study the issue of legislative history. This committee would examine such diverse suggestions as publication of bill reports and fiscal notes in the legislative journal, create conference committee reports, and provide for a legislatively controlled repository *207 for legislative history materials.¹⁴⁰ Wang did not describe how the courts should approach the interpretation of legislation. Although the joint select committee was never appointed, Wang's suggestions remain valuable recommendations of a thoughtful legislator.

While Washington courts have resorted to legislative history materials when in doubt about a statute's meaning, this approach has generally not been criticized. In contrast, interpretation of federal statutes by the United States Supreme Court has spawned a firestorm of controversy on the Court itself and by legal scholars.

Justice Antonin Scalia has been the foremost Court proponent of a new statutory interpretation style that eschews any reliance on legislative history. Justice Scalia's most succinct articulation of this view is found in *Green v. Bock Laundry Machine Co.*:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which [sic] voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated--a compatibility which [sic], by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest. ¹⁴¹

Scalia's approach, often termed 'formalism' or 'new textualism,' ¹⁴² is allegedly more democratic, relying on the proper role of legislative bodies in a democratic system.

In contrast, many commentators argue in response to Scalia for a more normative-based statutory interpretive model with the judiciary enjoying the power to ignore legislative history materials in favor of selecting certain key interpretive canons to make the best policy decision. ¹⁴³

The apparent flaw in all of the interpretive approaches, however, is the omission of the legislative branch, the very body whose intent the judiciary is in theory executing. The legislative branch certainly ***208** has a stake in how its views are interpreted. This stake is nowhere discussed in most statutory interpretation theories.

The legislature has not taken steps to better ensure that the courts truly execute its purpose in adopting legislation. Recognizing statutory interpretation as a key feature of separation of powers, it is crucial that the legislature address both the legislative history materials it generates and the interpretation of its enactments by the courts. Similarly, it is important for the court to treat the interpretation of statutes in a more coherent and realistic fashion. Toward these goals, a new paradigm for statutory interpretation in Washington is appropriate and possible.

III. A New Paradigm for Statutory Interpretation in Washington

The responsibility for developing a better system for interpreting statutes is jointly that of the legislature and the courts, each within their respective constitutional spheres. Although the courts may be the final authority on the interpretation of a statute, ¹⁴⁴ the legislature can prescribe what its objectives were in passing a law, indicate how a particular statute is to be treated by the courts, and express what materials regarding the legislative history of an enactment are authoritative. In turn, the courts can adopt more coherent, and less result-driven, principles of statutory interpretation, adhering more directly to the textual language employed by the legislature.

A. Legislature

The legislature should address statutory interpretation in several significant ways: by modifying how it drafts legislation, by amending section 1.12 of the Washington Revised Code to establish specific principles for guiding courts in their interpretation of the legislature's intent, and by carefully analyzing court decisions interpreting statutes to ensure that the judicial interpretation comports with the legislature's aims.

With respect to the first issue, the legislature, including members, legislative staff, and code reviser staff, can do more to advise the courts as to the reasons for a bill's enactment and the legislature's intent with regard to the bill. While not necessary for routine legislation, for significant legislative acts, the legislature should employ a preamble with findings as to the problems that the legislature hopes to address and the solutions intended. The legislature should consider *209 incorporation of an official section-by-section analysis of the bill in the final bill report on a bill.¹⁴⁵ Finally, the bill should contain a section with specific directions--such as liberal or strict construction--for specific sections of the legislation.

Apart from legislative direction as to specific legislation, the legislature should amend section 1.12 to provide general guidance to the courts in interpreting a statute. At a minimum, the legislature should indicate to the courts the hierarchy of interpretive tools beginning with the official bill reports. The legislature may even choose to direct the courts to disregard certain interpretive tools; for example, the non-contemporaneous testimony of legislators, lobbyists, and others may be rendered inadmissible on legislative intent. The decision about which of its own materials--bill reports, fiscal notes, committee materials and testimony, floor debates, or post-enactment declarations--reveals the actual collective intention of the legislature in enacting a bill is peculiarly within the purview of the legislature itself.¹⁴⁶

Finally, the most significant power of the legislature to ensure that judicial interpretations of its enactments are consistent with the legislature's intent is its amendatory power. If the legislature disagrees with a judicial decision interpreting a statute, it should immediately amend the statute to make the interpretation consistent with its views.¹⁴⁷ Indeed, the failure of the legislature to amend a statute in the face of a judicial interpretation has been viewed by the courts as acquiescence in the judicial construction of the statute.¹⁴⁸

B. The Judiciary

The decisional law of Washington's judiciary on statutory interpretation suffers from the lack of coherent and consistent principles. The standard treatment of statutes--evaluate the statute to determine if it is ambiguous and construe it using a variety of interpretive canons *210 if ambiguous--is highly artificial. No real rigorous principles guide the differentiation of plain from ambiguous statutes.

The better approach to judicial interpretation of statutes is to adhere to a standard previously expressed in Washington case law and elsewhere. The courts should simply deduce the legislature's collective intent from what the legislature said in the text of the statute, using any other official expressions of intent the legislature sets forth in the bill itself or in section 1.12 of the Washington Revised Code generally for all statutes.

To a degree, this approach to statutory interpretation means the courts should undertake to construe a statute, regardless of whether the courts believe the statute is plain or ambiguous. Instead, the courts should endeavor to ascertain the legislature's intent from the statutory language or any other official interpretive guides sanctioned by the legislature itself. The courts may employ the traditional judicial canons of statutory interpretation in such an analysis, but the courts should articulate which canons have primacy in the interpretation of statutes.

Finally, the judiciary may wish to consider a new doctrine of abstention in statutory construction. If a court's interpretation of a statute requires it to adopt one of two or more legitimate and competing policy viewpoints, the better course for the court may be to abstain from deciding the case and allow the legislature to resolve the controversy. For example, in *National Electrical Contractors Ass'n v. Riveland*,¹⁴⁹ various contractors and unions challenged the use of inmate labor on prison facilities when such inmate laborers were not licensed electricians and the Department of Corrections did not specifically comply with workplace safety laws. In response, the legislature not only enacted section 19.28 of the Washington Revised Code pertaining to licensure of electricians and section 42.17 relating to workplace safety, but also enacted section 72.10.110, encouraging use of inmate labor on correctional facilities, and

section 72.09.100, which directed the Department of Corrections to operate a comprehensive inmate work program and to 'remove statutory and other restrictions which have limited work programs in the past.'¹⁵⁰ The majority of the Washington State Supreme Court held that the licensure and workplace safety laws applied. The dissent disagreed, asserting the case was not justiciable in light of the diametrically competing policies; the *211 dissent contended that the legislature should properly resolve such issues.¹⁵¹

IV. Conclusion

Washington courts have uncritically employed an artificial paradigm for statutory construction. Despite ferment in the federal courts and scholarly journals on the proper role of the judiciary in interpreting statutes, Washington courts have not assessed whether its existing paradigm adequately implements legislative intent, the theoretical touchstone for the courts. Moreover, the courts' application of the paradigm is inconsistent and episodic. Hence, it is difficult to determine what rules actually apply at what time.

Moreover, the legislature, despite grumbling about courts' misconstruction of its enactments, has done little to give courts guidance with respect to the interpretation of particular enactments or statutes generally.

Both the legislative and judicial branches of government need to critically assess issues relating to statutory construction, each within its respective sphere. Each branch can do far more to improve its treatment of laws enacted by the first branch of our government.

Footnotes

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¹ Used in this context, I mean political compromise over the purpose or sections of the enactment. Some commentators, none of whom have been legislators, imply that legislative bodies intentionally make statutory language vague to achieve a political compromise. See, e.g., Kenneth Shepsle, [Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron](#), 12 *Int'l Rev. L. & Econ.* 239, 240-41 (1992); see also Reed Dickerson, [Statutory Interpretation: Dipping into Legislative History](#), 11 *Hofstra L. Rev.* 1125, 1142 (1983). The view was cited with approval by the Washington State Supreme Court with regard to the Growth Management Act in [Association of Rural Residents v. Kitsap County](#), 141 *Wash. 2d* 185, 188-89, 4 *P.3d* 115, 117 (2000):

The GMA was a legislative compromise, and how it is carried out and enforced is a reflection of this compromise. As one commentator has stated: 'unlike [the State Environmental Policy Act of 1971 (SEPA), Wash. Rev. Code § 43.21C (2000),] and [the Shoreline Management Act of 1971, Wash. Rev. Code § 90.58 (2000)], GMA was spawned by controversy, not consensus. The relative spheres of state mandate and local autonomy were the product of extremely difficult legislative compromise.' Richard L. Settle, [Washington's Growth Management Revolution Goes to Court](#), 23 *Seattle U. L. Rev.* 5, 34 (1999). Moreover, [b]ecause the recommendations of the Growth Strategies Commission were variously embraced, rejected, and ignored by the wrangling legislature, the GMA was not the finely-honed product of a law revision commission. Both installments of the Act were riddled with politically necessary omissions, internal inconsistencies, and vague language, sometimes consciously designed to defer the final reckoning to another day and, perhaps, another forum.

[Ass'n of Rural Residents](#), 141 *Wash. 2d* at 188-89, 4 *P.3d* at 117.

In my sixteen years in the Washington Legislature, I can recall no instance where we intentionally made the language of a statute ambiguous. This would be politically counterintuitive as both sides to such an agreement would legitimately fear the likely court decision interpreting the statute.

² [Wash. Rev. Code § 1.12.010](#) (2000).

- 3 Wash. Rev. Code § 1.12.020 (2000); *State ex rel. Duvall v. City Council*, 71 Wash. 2d 462, 429 P.2d 235 (1967) (amendatory statute deemed to continue former statutory proceedings where changes in amendatory act were procedural in nature); *State v. Carroll*, 81 Wash. 2d 95, 500 P.2d 115 (1972).
- 4 Wash. Rev. Code § 1.12.025(1) (2000); *In re Henderson*, 97 Wash. 2d 356, 644 P.2d 1178 (1982).
- 5 Wash. Rev. Code § 1.12.025(2) (2000).
- 6 Wash. Rev. Code § 1.12.040 (2000).
- 7 Wash. Rev. Code § 1.12.060 (2000) (registered mail and certified mail are interchangeable).
- 8 Wash. Rev. Code § 1.12.050 (2000).
- 9 *Marine Power & Equip. Co., Inc. v. Indus. Indemnity Co.*, 102 Wash. 2d 457, 687 P.2d 202 (1984) (under separation of powers, court has authority to set court rules even if inconsistent with rules set by the legislature); *State v. Fields*, 85 Wash. 2d 126, 530 P.2d 284 (1975); *State v. Smith*, 84 Wash. 2d 498, 527 P.2d 674 (1974) (courts have inherent power to adopt rules of procedure).
- 10 Wash. Rev. Code § 2.04.200 (2000).
- 11 *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1, 267 P. 770 (1928) (legislature could delegate power to supreme court to promulgate rules and could invalidate inconsistent statutes); *In re Messmer*, 52 Wash. 2d 510, 326 P.2d 1004 (1958).
- 12 The Washington State Supreme Court differentiated procedural from substantive concerns as follows:
Although a clear line of demarcation cannot always be delineated between what is substantive and what is procedural, the following general guidelines provide a useful framework for analysis. Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.
Smith, 84 Wash. 2d at 501, 527 P.2d at 676-77; see also *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984); *Petrarca v. Halligan*, 83 Wash. 2d 773, 522 P.2d 827 (1974).
- 13 *Emright v. King County*, 96 Wash. 2d 538, 637 P.2d 656 (1981).
- 14 CR 81; CrR 1.1.
- 15 E.g., CR 13(c)(1) (statutes on capacity of infants to sue and be sued); CR 60(e)(4) (Wash. Rev. Code §§ 4.72.010-.090 preserved).
- 16 See generally Hugh Spitzer, *Court Rulemaking in Washington*, 6 U. Puget Sound L. Rev. 31 (1982) (advocating shared judicial-legislative role in making court procedural rules in light of history of both branches in court rules).
- 17 See, e.g., *State v. Wilson*, 125 Wash. 2d 212, 216, 883 P.2d 320, 322 (1994) (court is ‘ultimate authority’ on meaning and purpose of statute); see also *Bellevue Fire Fighters Local 1604 v. City of Bellevue*, 100 Wash. 2d 748, 751 n.1, 675 P.2d 592, 594 (1984), cert. denied, 471 U.S. 1015 (1985) (citing *Davis v. County of King*, 77 Wash. 2d 930, 933-34, 468 P.2d 679, 681 (1970)) (courts are final authority on statutory construction); *Multicare Med. Ctr. v. Dep’t of Soc. & Health Servs.*, 114 Wash. 2d 572, 582 n.15, 790 P.2d 124, 130 (1990); *Short v. Clallam County*, 22 Wash. App. 825, 832, 593 P.2d 821, 825 (1979) (court is ‘final arbiter’ of legislative intent).
- 18 This power of the Legislature to amend a statute to alter the judicial interpretation is discussed infra at III-A. A fascinating example of the interplay between the branches in this regard is found in cases involving the standard of care for medical malpractice. In *Helling v. Carey*, 83 Wash. 2d 514, 519 P.2d 981 (1974), the Washington State Supreme Court held ophthalmologists could be held to a standard of care with respect to glaucoma higher than that practiced in the relevant medical community. The legislature amended the law relating to malpractice to define the standard of care more restrictively. The Court reaffirmed *Helling in Gates v. Jensen*, 92 Wash. 2d 246, 595 P.2d 919 (1979), despite the Legislature’s action and its specific reference in a bill report to its intent to overrule *Helling*.

- 19 See, e.g., *Ino Ino v. City of Bellevue*, 132 Wash. 2d 103, 137, 937 P.2d 154, 173 (1997); *State v. Regan*, 97 Wash. 2d 47, 51-52, 640 P.2d 725, 727-28 (1982).
- 20 A fairly typical recitation of this paradigm is found in *Whatcom County v. City of Bellingham*, 128 Wash. 2d 537, 546, 909 P.2d 1303, 1308 (1996):
 In interpreting a statute, we do not construe a statute that is unambiguous. *Food Servs. of Am. v. Royal Heights, Inc.*, 123 Wash. 2d 779, 784-85, 871 P.2d 590 (1994). If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences. *State v. Elgin*, 118 Wash. 2d 551, 555, 825 P.2d 314 (1992). The purpose of an enactment should prevail over express but inept wording. *Id.*; *State ex rel. Royal v. Bd. of Yakima County Comm'rs*, 123 Wash. 2d 451, 462, 869 P.2d 56 (1994). The court must give effect to legislative intent determined 'within the context of the entire statute.' *Elgin*, 118 Wash. 2d at 556; *Royal*, 123 Wash. 2d at 459. Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Stone v. Chelan County Sheriff's Dep't*, 110 Wash. 2d 806, 810, 756 P.2d 735 (1988); *Tommy P. v. Bd. of County Comm'rs*, 97 Wash. 2d 385, 391, 645 P.2d 697 (1982). The meaning of a particular word in a statute 'is not gleaned from that word alone[] because our purpose is to ascertain legislative intent of the statute as a whole.' *State v. Krall*, 125 Wash. 2d 146, 148, 881 P.2d 1040 (1994).
 See also *In re Detention of A.S.*, 138 Wash. 2d 898, 911, 982 P.2d 1156, 1163 (1999) (the 'primary objective in interpreting a statute is to ascertain and give effect to the intent of the Legislature' (citing *State v. Keller*, 98 Wash. 2d 725, 728, 657 P.2d 1384, 1386 (1983)) (quoting *In re Detention of LaBelle*, 107 Wash. 2d 196, 728 P.2d 138 (1986)).
- 21 *Food Servs. of Am. v. Royal Heights, Inc.*, 123 Wash. 2d 779, 871 P.2d 590 (1994).
- 22 See *Vashon Island Cmty. for Self-Gov't v. State Boundary Review Bd.*, 127 Wash. 2d 759, 903 P.2d 953 (1995).
- 23 *Knipe v. Austin*, 13 Wash. 189, 193, 44 P. 25, 26 (1895) ('The legislative mind may or may not have reasoned correctly on this proposition, but when we concede to it the right to enter upon an investigation of this kind, the results of the investigation expressed in an enactment cannot be called in question by the court.'). See also C.L. *Featherstone v. Dessert*, 173 Wash. 264, 268, 22 P.2d 1050, 1052 (1933) ('In the interpretation of a statute, the intent of the legislature is the vital thing, and the primary object is to ascertain and give effect to that intent.').
- 24 *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wash. 2d 9, 19, 978 P.2d 481, 485 (1999).
- 25 *State v. Johnson*, 119 Wash. 2d 167, 172, 829 P.2d 1082, 1084 (1992).
- 26 *Shelton Hotel Co. v. Bates*, 4 Wash. 2d 498, 508, 104 P.2d 478, 482 (1940) (quoting Black on Interpretation of Laws 48, 49, 53 (2d ed. 1911):
 Even if the court is fully persuaded that the legislature really meant and intended something entirely different from what is actually enacted, and that the failure to convey the real meaning was due to inadvertence or mistake in the use of language, yet, if the words chosen by the legislature are not obscure or ambiguous, but convey a precise and sensible meaning (excluding the case of obvious clerical errors or elliptical forms of expression), then the court must taken the law as it finds it, and give it its literal interpretation, without being influenced by the probable legislative meaning lying back of the words.
 A 'court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission.' *Auto. Drivers & Demonstrators Union Local 882 v. Dep't of Ret. Sys.*, 92 Wash. 2d 415, 421, 598 P.2d 379, 382-83 (1979) (citations omitted). See also *Vita Food Prods., Inc. v. State*, 91 Wash. 2d 132, 587 P.2d 535 (1978) (court may not add words to statute even if it believes the legislature intended something else but failed to express it); *Duke v. Boyd*, 133 Wash. 2d 80, 942 P.2d 351 (1997).
- 27 See *State v. Elgin*, 118 Wash. 2d 551, 555, 825 P.2d 314, 316 (1992); see also *State ex rel. Royal v. Bd. of Yakima County Comm'rs*, 123 Wash. 2d 451, 462, 869 P.2d 56, 62 (1994); *Janovich v. Herron*, 91 Wash. 2d 767, 592 P.2d 1096 (1979); *State v. Daniel J. Evans Campaign Comm'n*, 86 Wash. 2d 503, 546 P.2d 75 (1976) (holding that the spirit, purpose of a statute overcomes an inept effort by Legislature to state such a purpose in the statute).
 A similar analysis has been advanced in federal cases:
 'There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.' Nevertheless, in rare cases, the literal application of a statute will produce a result demonstratively at odds with the intentions of its drafters, and those intentions must be controlling. We have reserved some

'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning... would thwart the obvious purpose of the statute.'

Griffin v. Oceanic Contractors, Inc., 485 U.S. 564, 571 (1982) (quoting first [United States v. Am. Trucking Ass'ns, Inc.](#), 310 U.S. 534, 543 (1940); quoting second [Comm'r v. Brown](#), 380 U.S. 563, 571 (1965). See also [United States v. Ron Pair Enters., Inc.](#), 489 U.S. 235, 242 (1989) ('The plain meaning of legislation should be conclusive, except in the 'rare cases [[in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' In such cases, the intention of the drafters, rather than the strict language, controls. ') (quoting Griffin, 458 U.S. at 571).

28 In the 2000 legislative meeting, a 'short' session, for example, 866 bills were introduced in the House of Representatives and 763 in the Senate. In the regular and special sessions, 262 became law. See Senate Journal, 56th Legis. Sess. 1314-58 (Wash. 2000); House Journal, 56th Legis. Sess. 2199-2270 (Wash. 2000).

29 See Edward D. Seeberger, *Sine Die: A Guide to the Washington State Legislative Process* 45-54 (1989).

30 *Id.* at 41, 47-54.

31 See *supra* note 30, *infra* note 32.

32 Gilbert Ryle, *The Concept of Mind* 16-17 (1949). See also Michael Sinclair, *Guide to Statutory Interpretation* 91-93 (2000).

33 Ryle, *supra* note 32, at 16-17.

34 Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 *S. Cal. L. Rev.* 845, 866 (1992).

35 Sinclair, *supra* note 32, at 92.

36 See Shepsle, *supra* note 1.

37 See, e.g., [Bank One Chicago v. Midwest Bank & Trust Co.](#), 516 U.S. 264, 276-77 (Stevens, J., concurring) ('Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities.... [S]ince most Members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.').

From my own legislative experience, it is common practice for legislators to rely on the expertise of their colleagues serving on committees that prepared legislation. This is a significant, but not conclusive, factor. Legislators will often amend or vote against bills emerging from committees on which they did not serve.

38 Justice Scalia articulates this view in the following fashion:

[T]o tell the truth, the quest for 'genuine' legislative intent is probably a wild-goose chase anyway. In the vast majority of cases[,] I expect that Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted [by an administrative agency] represents merely a fictional, presumed intent....

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L.J.* 511, 517 (1989). See also Frank Easterbrook, *Statutes' Domains*, 50 *U. Chi. L. Rev.* 533, 547 (1983) ('Each member may or may not have a design. The body as a whole, however, has only outcomes.')

39 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law: An Essay* 35 (1997). See also [Blanchard v. Bergerson](#), 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring). Scalia responds to the majority's reliance on district court cases, which were inserted into the Congressional Report:

[The majority's use of the cited cases] displays the level of unreality that our unrestrained use of legislative history has attained.... As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant... but rather to influence judicial construction. What a heady feeling it must be for a young staffer[] to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.

40 This concept of greater reliance on the legislative text has been oft-repeated. '[I]t seems axiomatic that the words of a statute--and not the legislators' intent as such--must be the crucial elements both in the statute's legal force and in its proper interpretation.' Laurence H. Tribe, *Constitutional Choices* 30 (1985). Justice Oliver Wendell Holmes was particularly skeptical about excessive reliance on the process of the legislative institution. 'We do not inquire what the legislature meant; we ask only what the statute means.' Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 *Harv. L. Rev.* 417, 419 (1899). Putting the same thought in more colloquial terms: '[I]f my fellow citizens want to go to Hell[,] I will help them. It's my job.' Oliver Wendell Holmes, *Holmes-Laski Letters; The Correspondence of Mr. Justice Holmes and Harold J. Laski* 249 (Mark DeWolfe Howe ed., Cambridge Univ. Press 1953).

[N]ew textualism maintains that 'legislative intent' is a dysfunctional fiction that should be jettisoned. A corollary is that the use of legislative history in statutory interpretation is a waste of time at best and, at worst, an activity so manipulable that it is much more like looking over a crowd and picking out your friends than it is an objective historical recreation of what legislators collectively were contemplating.

Philip Frickey, John Minor Wisdom Lecture: *Wisdom on Weber*, 74 *Tul. L. Rev.* 1169, 1185 (2000).

41 See Eric S. Lasky, *Perplexing Problems with Plain Meaning*, 27 *Hofstra L. Rev.* 891, 895 (1999).

42 In effect, the courts must presume that the language of the statute controls. This concept has its analog in a judicial doctrine that eschews an examination by the courts into the procedures of the legislature in passing a bill. Under the enrolled bill doctrine, for example, the Washington State Supreme Court has expressed great reluctance on constitutional separation of powers grounds to go behind the face of a statute's enactment to examine the process by which the legislature enacted the measure. See, e.g., *Citizens Council Against Crime v. Bjork*, 84 *Wash. 2d* 891, 897-98 n.1, 529 *P.2d* 1072, 1076 n.1 (1975); see also *State ex rel. Reed v. Jones*, 6 *Wash. 452*, 34 *P. 201* (1893) (enrolled bill presented to Secretary of State is conclusive as to regularity of all proceedings constitutional enactment if bill is fair on its face); *State ex rel. Dunbar v. State Bd. of Equalization*, 140 *Wash. 433*, 249 *P. 996* (1926) (proper repassage of bill after veto); *Morrow v. Henneford*, 182 *Wash. 625*, 47 *P.2d* 1016 (1935) (legislation passed after 60 days of regular legislative session); *State ex rel. Bugge v. Martin*, 38 *Wash. 2d* 834, 232 *P.2d* 833 (1951) (scope and object of amendment); *Roehl v. PUD No. 1*, 43 *Wash. 2d* 214, 261 *P.2d* 92 (1953) (same); *State ex rel. Washington Toll Bridge Auth. v. Yelle*, 61 *Wash. 2d* 28, 377 *P.2d* 466 (1962) (inquiry of senators as to whether they were deceived by bill).

Similarly, Washington courts intrude only reluctantly upon the legislative decision to declare that a statute's enactment constitutes an emergency and must take effect immediately without the possibility of a referendum. See *CLEAN v. State*, 130 *Wash. 2d* 782, 807-813, 928 *P.2d* 1054, 1066-69 (1996); *State ex rel. Humiston v. Meyers*, 61 *Wash. 2d* 772, 776, 380 *P.2d* 735, 738 (1963).

The enrolled bill doctrine is a recognition that the legislature may control its own procedures for the enactment of legislation. It should be no different for statutory interpretation.

43 See William Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 *Colum. L. Rev.* 558, 564-65 (2000). See also Sinclair, *supra* note 32, at 119-33 (Sinclair describes these varying levels of judiciary discretion as 'tight' or 'loose coupling.' If the language and history of a statute indicates a 'tight coupling,' it is a signal to the judiciary to exercise virtually no discretion in its application of the statute. For example, a law setting the speed limit in school zones at twenty miles per hour would leave virtually no discretion in the statute's application. By contrast, a statute that calls for a speed limit that is 'reasonable and prudent for the conditions' would signal to the judiciary that it may more freely use its own discretion in the statute's application.)

44 This is important if the courts are truly to give meaning to the oft-expressed principle that courts do not consider the wisdom of an enactment in their interpretation of it. See, e.g., *Young v. Estate of Snell*, 134 *Wash. 2d* 267, 279-80, 287, 948 *P.2d* 1291, 1296-97 (1997) (courts may not question the wisdom and necessity of a statute).

45 A 'court will interpret words in the statute according to their usual or plain meaning as understood by the general public.' Black's Law Dictionary 796 (abr. 6th ed. 1991). The rule may trace back to biblical times: '[T]he concept calling for strict construction of statutes has roots in the Old Testament: 'You shall not add to the word which I command you, nor take from it. (Deut. 4:2)' *In re Kolinsky*, 100 *B.R.* 695, 704 (Bankr. S.D.N.Y. 1989). Even the framers of American government longed for a version of a plain meaning rule: 'Laws are made for men of ordinary understanding and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties which may make anything mean everything or nothing at pleasure.' Letter of June 12, 1823, S. Padover, *The Complete Jefferson* 323 (1943).

- 46 See generally Lasky, *supra* note 41, at 894-896; Bradley C. Karkkainen, 'Plain Meaning': Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 *Harv. J.L. & Pub. Pol'y* 401, 433 n.124 (1994).
- 47 Heydon's Case, 76 *Eng. Rep.* 637, 638 (1584). See Samuel Thorne, Equity of a Statute and Heydon's Case, 31 *U. Ill. L. Rev.* 202, 211 (1936).
- 48 '[I]f the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity.' *Queen v. Judge of the City of London Court*, 1 *Q.B.* 273, 290 (1892).
- 49 'We must... give to the words used by the legislature their plain and natural meaning, unless it is manifest from the general scope and intention of the statute that injustice and absurdity would result.' *Mattison v. Hart*, 139 *Eng. Rep.* 147, 159 (1854).
- 50 See *Lake County v. Rollins*, 130 *U.S.* 662, 670 (1889) (If the words of the statute convey a definite meaning that involves no absurdity, nor any contradiction of other parts of the statute, then the statute's facial meaning must be accepted).
- 51 *United States v. Missouri Pac. R.R. Co.*, 278 *U.S.* 269, 278 (1929) ('Where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.') See also *Caminetti v. United States*, 242 *U.S.* 470, 485 (1917) (where the statutory language is plain, and only one meaning is discernible, no interpretation is required and construction canons need not be employed).
- 52 See, e.g., *Wheeler v. Port Blakely Mill Co.*, 2 *Wash. Terr.* 71, 74, 3 *P.* 635, 636 (1881). See also *Bd. of Trade v. Hayden*, 4 *Wash.* 263, 280, 30 *P.* 87, 91 (1892); *Howlett v. Cheatum*, 17 *Wash.* 626, 629-30, 50 *P.* 522, 523 (1897); *State v. Rathbun*, 22 *Wash.* 651, 653, 62 *P.* 85, 86 (1900).
- 53 4 *Wash.* 263, 30 *P.* 87 (1892).
- 54 *Id.*, 4 *Wash.* at 281, 30 *P.* at 91.
- 55 *Id.*
- 56 See, e.g., *Davis v. Dep't of Licensing*, 137 *Wash. 2d* 957, 964, 977 *P.2d* 554, 556 (1999). See also *State v. Enstone*, 137 *Wash. 2d* 675, 680, 974 *P.2d* 828, 830 (1999); *State v. Chapman*, 140 *Wash. 2d* 436, 998 *P.2d* 282 (2000); *Hendrickson v. State*, 140 *Wash. 2d* 686, 2 *P.3d* 473 (2000).
- 57 See, e.g., *Davis*, 137 *Wash. 2d* at 977-79, 977 *P.2d* at 563-64 (Alexander, J., dissenting).
- 58 The United States Supreme Court in *United States v. Turkette*, 452 *U.S.* 576, 580 (1981), conceded the absence of any guiding standard on this issue: '[T]here is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language.'
- 59 See Lasky, *supra* note 41, at 910.
- 60 An example of how the judiciary imposes its normative values on legislative decisionmaking is found in the Washington State Supreme Court interpretation of the 1981 Product Liability and Tort Reform Act. Although the legislature expressly stated that the standard for failure to warn and defective design products cases was 'negligence,' *Wash. Rev. Code* § 7.72.030(1) (2000), the Washington State Supreme Court ignored the statutory language, determining that the standard was strict liability. See *Falk v. Keene Corp.*, 113 *Wash. 2d* 645, 782 *P.2d* 974 (1989); see also *Soproni v. Polygon Apartment Partners*, 137 *Wash. 2d* 319, 333-34, 971 *P.2d* 500, 507-08 (1999) (Talmadge, J., dissenting). How the court could reinterpret 'negligence' in *Wash. Rev. Code* § 7.70.010(1) to be 'strict liability' was a trick of interpretive legerdemain. Similarly, the legislature's mandate in the Growth Management Act, *Wash. Rev. Code* §36.70A, that interim urban growth boundaries be established by counties to prevent urban level growth outside the core urban areas of Washington was not respected by the Washington State Supreme Court in *Association of Rural Residents v. Kitsap County*, 141 *Wash. 2d* 185, 4 *P.3d* 115 (2000), and *Wenatchee Sportsmen's Ass'n v. Chelan County*, 141 *Wash. 2d* 169, 4 *P.3d* 123 (2000). A boundary was not a boundary, in the Court's view. Plainly, the Washington State Supreme Court imposed its policy judgment in these cases on the 'plain' legislative language.

- 61 See, e.g., *State v. Blilie*, 132 Wash. 2d 484, 492, 939 P.2d 691, 694 (1997) (citing *State ex rel. Gebhardt v. Superior Court*, 15 Wash. 2d 673, 690, 131 P.2d 943, 951 (1942)). But Judge Richard Posner expressed his difficulty with assuming that a legislative body enacts law in light of judicial methodologies of interpretation:
There is no evidence that members of Congress, or their assistants who do the actual drafting, know the code [of statutory interpretation] or that if they know, they pay attention to it. Nor, in truth, is there any evidence that they do not; it is remarkable how little research has been done on the question that one might have thought lawyers would regard as fundamental to their enterprise. Probably, though, legislators do not pay attention to it, if only because, as Llewellyn showed, the code is internally inconsistent. We should demand evidence that statutory draftsmen follow the code before we erect a method of interpreting statute on the improbable assumption that they do.
Richard Posner, *Statutory Interpretation--In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 806 (1983).
- 62 Canons, or ‘maxims,’ of construction were originally conceived of as wise saws, rules of interpretation that capture some of the wisdom of ages. See Sinclair, *supra* note 32, at 140.
- 63 The most well-know articulation of the canons' defects came from Karl Llewellyn. See Karl Llewellyn, *Remarks On the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Constructed*, 3 Vand. L. Rev. 395 (1950).
- 64 Even in his adherence to textualism, Justice Scalia makes room for the canons of construction:
I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using establishes canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.
Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).
- 65 See *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wash. 2d 245, 280, 4 P.3d 808, 827 (2000); *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wash. 2d at 17-18 (citing *Weyerhaeuser Co. v. Tri*, 117 Wash. 2d 128, 133-134, 814 P.2d 629, 631 (1991)).
- 66 *State v. Jackson*, 137 Wash. 2d 712, 729, 976 P.2d 1229, 1237 (1999) (citing *Ball v. Stokley Foods, Inc.*, 37 Wash. 2d 79, 87-88, 221 P.2d 832 (1950)). See also *City of Mercer Island v. Kaltenbach*, 60 Wash. 2d 105, 109, 371 P.2d 1009, 1012 (1962); *Ball v. Stokely Foods, Inc.*, 37 Wash. 2d 79, 87-88, 221 P.2d 832, 837-38 (1950) .
- 67 *Simpson Inv. Co. v. State*, 141 Wash. 2d 139, 156-57, 3 P.3d 741, 750 (2000) (‘In other words, the precise terms modify, influence or restrict the interpretation or application of the general terms where both are used in sequence or collocation in legislative enactments.’). See also *Nat'l Elec. Contractors Ass'n*, 138 Wash. 2d at 24, 978 P.2d at 488 (citing *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wash. 2d 621, 630, 869 P.2d 1034, 1039 (1994); *Davis v. Dep't of Licensing*, 137 Wash. 2d 957, 970, 977 P.2d 554, 559 (1999)). This canon, however, is only supposed to be employed when ‘the statute contains an enumeration by specific words which [sic] suggests a class is not ‘exhausted by the enumeration.’” *City of Seattle v. State*, 136 Wash. 2d 693, 699, 965 P.2d 619, 622 (1998) (quoting Norman J. Singer Sutherland, *Statutory Construction* § 47.18 (15th ed. 1992)); *Dean v. McFarland*, 81 Wash. 2d 215, 221, 500 P.2d 1244, 1248 (1972).
- 68 *Ravenscroft v. Washington Water Power Co.*, 136 Wash. 2d 911, 920, 969 P.2d 75, 80 (1998) (citing *Cowishe Canyon Conservancy v. Bosley*, 118 Wash. 2d 801, 813, 828 P.2d 549, 556 (1992)).
- 69 *Western Telepage, Inc. v. City of Tacoma*, 140 Wash. 2d 599, 609-10, 998 P.2d 884, 890 (2000) (citing *C.J.C. v. Corp. of Catholic Bishop*, 138 Wash. 2d 699, 709, 985 P.2d 262, 267 (1999)); *Ravenscroft*, 136 Wash. 2d at 920, 969 P.2d at 80 (1998). In *Ravenscroft*, where a statute made private landowners liable for ‘artificial latent conditions,’ the court looked to the dictionary to define ‘artificial’ and the common law to define ‘latent’ without acknowledging that the statute had any ambiguity. The court employed these methods while denying an ambiguity and determining the statute had a ‘plain meaning.’ *Id.* at 922, 924-5, 969 P.2d at 81-82. It is also interesting to note that in one case, seven different dictionaries were used to arrive at the plain meaning of words. See *Kitsap Co. v. Allstate Ins. Co.*, 136 Wash. 2d 567, 964 P.2d 1173 (1998).
- 70 *Nat'l Elec. Contractors Ass'n*, 138 Wash. 2d at 28, 978 P.2d at 490 (citing *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wash. 2d 371, 381, 858 P.2d 245, 251 (1993)).

- 71 See, e.g., *State v. Martin*, 137 Wash. 2d 149, 154-55, 975 P.2d 450, 452-53 (1999); see also *State v. Mollichi*, 132 Wash. 2d 80, 86, 936 P.2d 408, 411 (1997); *State v. Krall*, 125 Wash. 2d 146, 148, 881 P.2d 1040, 1041 (1994); *Erector Co. v. Dep't of Labor & Indus.*, 121 Wash. 2d 513, 518, 852 P.2d 288, 291 (1993).
- 72 See *In re Elliott*, 74 Wash. 2d 600, 607-610, 446 P.2d 347, 352-54 (1968).
- 73 See *N.W. Natural Gas Co. v. Clark County*, 98 Wash. 2d 739, 743, 658 P.2d 669, 671 (1983); *Niichel v. Lancaster*, 97 Wash. 2d 620, 625, 647 P.2d 1021, 1023 (1982).
- 74 See *In re Personal Restraint of Smith*, 139 Wash. 2d 199, 204, 986 P.2d 131, 133-34 (1999) (discussing the 'last antecedent' rule of statutory construction); see also *In re Sehome Park Care Ctr., Inc.*, 127 Wash. 2d 774, 781-82, 903 P.2d 443, 447 (1995) ('the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one'). Compare to *Simplot v. Knight*, 139 Wash. 2d 534, 543-545, 988 P.2d 955, 959-60 (1999) (the use of a hyphen between the payees' names rendered draft patently ambiguous as to the payor's intent).
- 75 *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wash. 2d 245, 280-81, 4 P.3d 808, 827-28 (2000); *Davis v. Dep't of Licensing*, 137 Wash. 2d 957, 970-71, 977 P.2d 554, 559-60 (1999); *City of Seattle v. State*, 136 Wash. 2d 693, 698, 965 P.2d 619, 621 (1998); *State v. Talley*, 122 Wash. 2d 192, 213, 858 P.2d 217, 228-29 (1993).
- 76 *City of Bellevue v. East Bellevue Cmty. Council*, 138 Wash. 2d 937, 946-47, 983 P.2d 602, 607 (1999). See also *Davis*, 137 Wash. 2d at 969, 977 P.2d at 558-59; *City of Seattle v. Dep't of Labor & Indus.*, 136 Wash. 2d 693, 701, 965 P.2d 619, 623 (1998).
- 77 *Washington State Legislature v. Lowry*, 131 Wash. 2d 309, 327, 931 P.2d 885, 894-95 (1997). See also *Pfeifer v. City of Bellingham*, 112 Wash. 2d 562, 569-570, 772 P.2d 1018, 1022 (1989); *Garvey v. St. Elizabeth Hosp.*, 103 Wash. 2d 756, 759, 697 P.2d 248, 249 (1985); *State v. Turpin*, 94 Wash. 2d 820, 825, 620 P.2d 990, 993 (1980); *State v. Wright*, 84 Wash. 2d 645, 652, 529 P.2d 453, 458 (1974).
- 78 See, e.g., *Welch v. Southland Corp.*, 134 Wash. 2d 629, 636, 952 P.2d 162, 166 (1998).
- 79 *Washington State Republican Party*, 141 Wash. 2d at 280-81, 4 P.2d at 827-28.
- 80 See note 148, *infra*.
- 81 Wash. Rev. Code §§34.05.310-.395 (2000).
- 82 Wash. Rev. Code §§34.05.410-.494 (2000) (a separate Office of Administrative Hearings addresses such administrative appeals); Wash. Rev. Code §§ 34.12.010-.160 (2000).
- 83 E.g., Wash. Rev. Code §§ 51.52.010-.200 (2000) (Board of Industrial Appeals); Wash. Rev. Code §§ 43.21B.010-.330 (2000) (Pollution Control Hearings Board); Wash. Rev. Code §§ 36.70A.260-.902 (2000) (Growth Management Hearings Board); Wash. Rev. Code §§ 41.56.010-.490 (2000) (Public Employment Relations Commission).
- 84 See, e.g., *Waggoner v. Ace Hardware Co.*, 134 Wash. 2d 784, 754-55, 953 P.2d 88, 91 (1998); *Dep't of Fisheries v. Chelan County PUD No. 1.*, 91 Wash. 2d 378, 383, 588 P.2d 1146, 1149 (1976); *State v. Roth*, 78 Wash. 2d 711, 715, 479 P.2d 55, 57-58 (1971). Unlike federal courts, Washington courts have rarely given administrative rulings a presumption of correctness unless the ruling is issued from a specialized agency or such a presumption is legislated. See *U.S.W. Communications Inc. v. Washington Utils. & Transp. Comm'n*, 134 Wash. 2d 74, 118, 949 P.2d 1337, 1360 (1997); see also *ARCO Prods. Co. v. Washington Utils. & Transp. Comm'n*, 125 Wash. 2d 805, 811-12, 888 P.2d 728, 732 (1995); *Marguerite M. Sullivan, Brown & Williamson v. FDA: Finding Congressional Intent Through Creative Statutory Interpretation--A Departure from Chevron*, 94 Nw. U. L. Rev. 273, 285-291 (1999).
- 85 Wash. Rev. Code §§43.10.030(7), .110 (2000).
- 86 See, e.g., *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wash. 2d 787, 803, 920 P.2d 581, 588 (1996) (Attorney General opinions (AGO) are entitled to great weight); see also *Washington Educ. Ass'n v. Smith*, 96 Wash. 2d 601, 606, 638 P.2d 77, 80 (1981). But see *Washington Fed'n of State Employees v. Office of Fin. Mgmt.*, 121 Wash. 2d 152, 164, 849 P.2d 1201, 1207 (1993) (an AGO is entitled to less weight when it is interpreting a statute). Notably,

the Washington State Supreme Court has 'held that an AGO 'constitutes notice to the Legislature of the Department's interpretation of the law,' finding acquiescence where the Legislature had not subsequently acted to 'overturn the Department's interpretation.'⁸⁷ *City of Seattle v. State*, 136 Wash. 2d 693, 703, 965 P.2d 619, 624 (1998) (citing *Bowles v. Dep't of Ret. Sys.*, 121 Wash. 2d 52, 63-64, 847 P.2d 440, 446 (1993)).

87 See *Town of Republic v. Brown*, 97 Wash. 2d 915, 917-18, 652 P.2d 955, 957 (1982); *Jenkins v. Bellingham Mun. Court*, 95 Wash. 2d 574, 627 P.2d 1316 (1981); *Pac. First Fed. Sav. & Loan Ass'n v. Pierce County*, 27 Wash. 2d 347, 355, 178 P.2d 351, 355 (1967). Compare with *In re Taylor*, 105 Wash. 2d 67, 69-70, 711 P.2d 345, 347 (1985) ('Absent a clearer indication of legislative intent, we cannot accept petitioner's theory of incorporation.').

88 See *Longview Fibre Co. v. Cowlitz Co.*, 114 Wash. 2d 691, 698, 790 P.2d 149, 153 (1990) (a mere Attorney General Opinion prior to reenactment was 'settled' enough for the Court); see also *Washington Educ. Ass'n*, 96 Wash. 2d at 606, 638 P.2d at 80; *Ellis v. Dep't of Labor & Indus.*, 88 Wash. 2d 844, 567 P.2d 224 (1977); *McKinney v. Estate of MacDonald*, 71 Wash. 2d 262, 427 P.2d 974 (1967); *Yakima Valley Bank & Trust Co. v. Yakima City*, 149 Wash. 552, 271 P. 820 (1928).

89 *State v. Tili*, 139 Wash. 2d 107, 985 P.2d 365 (1999). See also *Enter. Leasing v. City of Tacoma*, 139 Wash. 2d 546, 554-6, 988 P.2d 961, 966 (1999); *Harmon v. DSHS*, 134 Wash. 2d 523, 542, 951 P.2d 770, 779 (1998).

90 *Gilbert v. Sacred Heart Hosp.*, 127 Wash. 2d 370, 375, 900 P.2d 552, 554 (1995). See also *Jenkins v. State*, 85 Wash. 2d 883, 540 P.2d 1363 (1975) (implied repeals are disfavored); *Herrett Trucking Co. v. State Pub. Serv. Comm'n*, 58 Wash. 2d 542, 364 P.2d 505 (1961). But see *Walton v. Absher Const. Co., Inc.*, 101 Wash. 2d 238, 242, 676 P.2d 1002, 1004 (1984) ('However, an implied repeal will be found where: (1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction.'). (citing *In re Chi-Dooh Li*, 79 Wash. 2d 561, 563, 488 P.2d 259, 261 (1971)).

91 See *State v. Blilie*, 132 Wash. 2d 484, 939 P.2d 691 (1997); see also *Brown*, 97 Wash. 2d at 917-18, 625 P.2d at 957; *State v. Horton*, 59 Wash. App. 412, 416, 798 P.2d 813, 815-16 (1990).

92 See, e.g., *State Dep't of Ecology v. Theodoratus*, 135 Wash. 2d 582, 589, 957 P.2d 1241, 1244 (1998); see also *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wash. 2d 504, 507, 833 P.2d 381, 382 (1992); *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wash. 2d 450, 458, 938 P.2d 827, 832; *Cowiche Canyon Conservancy v. Bosley*, 118 Wash. 2d 801, 828 P.2d 549 (1992).

93 *Spokane County Health Dist. v. Brockett*, 120 Wash. 2d 140, 154, 839 P.2d 324, 331 (1992). See also *Johnson v. Morris*, 87 Wash. 2d 922, 926, 557 P.2d 1299, 1303 (1976); *Fisher Flouring Mills Co. v. State*, 35 Wash. 2d 482, 490, 213 P.2d 938, 942 (1950). 'It is not to be presumed that a legislative body would enact a statute without other purpose than to declare what is already indisputably and confessedly the law.' *United States v. Douglas-Willan Sartoris Co.*, 22 P. 92, 94 (Wyo. 1889). But a legislative body may clarify an earlier enactment where an ambiguity arose about the statute. *State v. Riles*, 135 Wash. 2d 326, 343, 957 P.2d 655, 663 (1998).

94 'Presumption in favor of following common law usage where Legislature has employed words or concepts with well-settled... as they looked to common law settled definition of 'latent.' *Ravenscroft v. Washington Water Power Co.*, 136 Wash. 2d 911, 924, 969 P.2d 75, 82 (1998). See also *In re Recall of Pearsall-Stipek*, 141 Wash. 2d 756, 10 P.3d 1034 (2000); *In re Tyler's Estate*, 140 Wash. 679, 689, 250 P. 456, 460 (1926).

95 *Dep't of Transp. v. State Employee Ins. Bd.*, 97 Wash. 2d 454, 462, 645 P.2d 1076, 1080 (1982).

96 *State v. T.K.*, 139 Wash. 2d 320, 329, 987 P.2d 63, 67-68 (1974). See also *In re Shepard*, 127 Wash. 2d 185, 898 P.2d 828 (1995); *Yellam v. Woerner*, 77 Wash. 2d 604, 464 P.2d 947 (1970); *State v. Belgarde*, 119 Wash. 2d 711, 722, 837 P.2d 599, 604-05 (1992) ('A statute operates prospectively when the precipitating event for [its] application... occurs after the effective date of the statute, even though the precipitating event had its origin in a situation existing prior to the enactment of the statute.'). (quoting *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, 83 Wash. 2d 523, 535, 520 P.2d 162, 170 (1974)). But see *McGee Guest Home, Inc. v. Dep't of Soc. and Health Servs.*, 142 Wash. 2d 316, 12 P.3d 144 (2000) (curative or remedial amendment may be retroactive).

- 97 Washington State Republican Party v. Washington State Pub. Disclosure Comm'n, 141 Wash. 2d 245, 280, 4 P.3d 808, 827 (2000). See also *Duskin v. Carlson*, 136 Wash. 2d 550, 557, 965 P.2d 611, 614 (1998); *City of Seattle v. Montana*, 129 Wash. 2d 583, 590, 919 P.2d 1218, 1222 (1996).
- 98 This presumption in favor of judicial review is furthered by the rule that constitutional questions are reviewed de novo. See *Washam v. Sonntag*, 74 Wash. App. 504, 507, 874 P.2d 188, 191 (1994).
- 99 Washington Courts accept the rule of lenity. See, e.g., *State v. Tili*, 139 Wash. 2d 107, 113, 985 P.2d 365, 369 (1999); see also *In re Personal Restraint of Hopkins*, 137 Wash. 2d 897, 901, 976 P.2d 616, 617 (1999). The rule of lenity comes into play only when there are two reasonable interpretations of a criminal statute. *In re Post-Sentencing Review of Charles*, 135 Wash. 2d 239, 250, 955 P.2d 798, 803 (1998).
- 100 For example, statutes involving a deprivation of liberty are strictly construed. *In re Cross*, 99 Wash. 2d 373, 379, 662 P.2d 828, 832 (1983). See also *In re Carson*, 84 Wash. 2d 969, 973, 530 P.2d 331, 333 (1975).
- 101 See *State v. Savidge*, 75 Wash. 116, 120, 134 P. 680, 682 (1913) (where statutes are part of a general system relating to the same class of subjects and rest upon the same reasons, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish); see also *White v. City of N. Yakima*, 87 Wash. 191, 195, 151 P. 645, 647 (1915) ('Laws that are in pari materia will be read together for the purpose of ascertaining the legislative intent.').
- 102 *State v. Fairbanks*, 25 Wash. 2d 686, 690, 171 P.2d 845, 848 (1946) ('It is a cardinal rule that two statutes dealing with the same subject will, if possible, be so construed as to preserve the integrity of both.').
- 103 *State v. Wright*, 84 Wash. 2d 645, 650, 529 P.2d 453, 457 (1974) (citing *Connick v. Chehalis*, 53 Wash. 2d 288, 333 P.2d 647 (1958)).
- 104 *Harmon v. Pierce County Bldg. Dep't*, 106 Wash. 2d 32, 36-37, 720 P.2d 433, 435 (quoting *Int'l Commercial Collectors, Inc. v. Carver*, 99 Wash. 2d 302, 307, 661 P.2d 976 (1983)).
- 105 See *In re Personal Restraint of Yim*, 139 Wash. 2d 581, 989 P.2d 512 (1999).
- 106 *State v. Yokley*, 91 Wash. App. 773, 774-75, 959 P.2d 694, 695 (1998).
- 107 Wash. Rev. Code §70.74.010(3) provides in pertinent part: 'For the purposes of this chapter small arms ammunition, small arms ammunition primers, smokeless powder not exceeding five pounds, and black powder not exceeding five pounds shall not be defined as explosives....' Further, Wash. Rev. Code §70.74.010(27) states that '[t]he term 'pyrotechnic' shall be held to mean and include any combustible explosive compositions or manufactured articles designed and prepared for the purpose of producing audible or visible effects which are commonly referred to as fireworks.'
- 108 *Yim*, 139 Wash. 2d at 592-94, 989 P.2d at 517-18. See generally Wash. Rev. Code §§70.77.126, .236 (2000).
- 109 Wash. Rev. Code § 70.74 (2000).
- 110 *Yim*, 139 Wash. 2d 581, 989 P.2d 512.
- 111 *Id.* at 591-92, 989 P.2d at 517-18.
- 112 *Yokely*, 91 Wash. App. 773, 779-80, 959 P.2d at 698.
- 113 *Yim*, 139 Wash. 2d at 559-60, 989 P.2d 521-22 (Sanders, J., dissenting).
- 114 *Id.* at 601, 989 P.2d at 522.
- 115 Karl Llewelyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395 (1950).
- 116 *Id.* at 401.

- 117 67 Wash. 2d 161, 167-68, 406 P.2d 935, 939 (1965) (Finley, J., dissenting) (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 544 (1947)):
The essence of the matter is the fact that the rules or maxims of statutory interpretation should be recognized and treated as nothing more than aids or tools which [sic] may or may not be pertinent or useful in determining the meaning of statutory language. There is nothing mandatory about the applicability of a rule of statutory interpretation, i.e., nothing compelling in an ultimate sense in determining the meaning of statutory language. See for instance *In re Horse Heaven Irrigation Dist.*... wherein this realistic approach to the rules of construction was adopted as the law of this state. Actually, today it should be clear without citation of authority and without prolonged explanation, that every statutory maxim or rule of interpretation has its countervailing or opposite maxim or rule. As Mr. Justice Frankfurter said: ‘Nor can canons of construction save us from the anguish of judgment. Such canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment concluding a complicated process of balancing subtle and elusive elements. Insofar as canons of construction are generalizations of experience, they all have worth. In the abstract, they rarely arouse controversy. Difficulties emerge when canons compete in soliciting judgment, because they conflict rather than converge. For the demands of judgment underlying the art of interpretation, there is no vademecum.’
Llewelyn's comments on the interpretive canons have not always been accepted. Another commentator, William Eskridge, Jr., observed that Llewelyn's comment on opposite canons meant, ‘The canons have no independent value in statutory interpretation and are just window dressing for results reached for other reasons.’ William Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 679 (1999). But Eskridge believes it would be difficult to test if the canons constrain judges or make interpretation more predictable: ‘The democratic value potentially served by the canons needs to be tempered by the observation that our polity might not want statutory interpretation always to mimic the results reached or would have been reached by the legislature.’ *Id.* at 681. Eskridge candidly espouses a role for the courts permitting them to disregard legislative intent.
- 118 See generally Arthur Wang, *Legislative History in Washington*, 7 U. Puget Sound L. Rev. 571 (1984).
- 119 See *Spokane County Health Dist. v. Brockett*, 120 Wash. 2d 140, 839 P.2d 324 (1992); see also *Oliver v. Harborview Med. Ctr.*, 94 Wash. 2d 559, 618 P.2d 76 (1980); *Hartman v. Washington State Game Comm'n*, 85 Wash. 2d 176, 179, 532 P.2d 614, 616 (1975); *Whatcom County v. Langlie*, 40 Wash. 2d 855, 246 P.2d 836 (1952); *State ex rel. Berry v. Superior Court*, 92 Wash. 16, 159 P. 92 (1916).
- 120 *Equipto Div. Aurora Equip. Co. v. Yarmouth*, 134 Wash. 2d 356, 366, 950 P.2d 451, 456 (1998).
- 121 See *Young v. Estate of Snell*, 134 Wash. 2d 267, 280, 948 P.2d 1291, 1297 (1997); see also *Noble Manor v. Pierce County*, 133 Wash. 2d 269, 277-78, 943 P.2d 1378, 1383 (1997); *State v. Reding*, 119 Wash. 2d 685, 690, 835 P.2d 1019, 1021-22 (1992); *Biggs v. Vail*, 119 Wash. 2d 129, 134-36, 830 P.2d 350, 353-54 (1992); *Johnson v. Cont'l W., Inc.*, 99 Wash. 2d 555, 663 P.2d 482 (1983). But see *State v. Shore*, 113 Wash. 2d 83, 90, 776 P.2d 132, 136 (1989) (criticizing bill report accuracy).
- 122 See *Davis v. Dep't of Licensing*, 137 Wash. 2d 957, 977 P.2d 554 (1999); see also *City of Ellensburg v. State*, 118 Wash. 2d 709, 717, 826 P.2d 1081, 1085 (1992).
- 123 See *Wash. Rev. Code* §43.88A.010 (2000); see also *Wash. Rev. Code* §43.88A.020 (2000) (office of financial management to coordinate development of fiscal notes with appropriate state agencies).
- 124 See Seeberger, *supra* note 29, at 54, 56.
- 125 Sequential drafts of a bill may be indicative of legislative intent. *Howlett v. Cheetham*, 17 Wash. 626, 632, 50 P. 522, 524 (1897). See also *Spokane County Health Dist. v. Brockett*, 120 Wash. 2d 140, 153, 839 P.2d 324, 331 (1992); *Bellevue Firefighters Local 1604 v. City of Bellevue*, 100 Wash. 2d 748, 750-51, 675 P.2d 592, 594 (1984); *State v. Frampton*, 95 Wash. 2d 469, 475-78, 627 P.2d 922, 925-26 (1981). But see *Hama Hama Co. v. Shorelines Hearing Bd.*, 85 Wash. 2d 441, 450, 536 P.2d 157, 162-63 (1975) (criticizing the reliance on sequential drafts). The rejection of a particular amendment by the legislature may not be used by the judiciary to ascertain legislative intent. *Spokane County Health Dist.*, 120 Wash. 2d at 153, 839 P.2d at 331. See also *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wash. 2d 46, 63-64, 821 P.2d 18, 26 (1991). But see *State v. Clark*, 129 Wash. 2d 805, 812-13, 920 P.2d 187, 190 (1996) (rejected amendment indicative of legislature's intent); *Buchanan v. Simplot Feeders Ltd. P'ship*, 134 Wash. 2d 673, 688, 952 P.2d 610, 617 (1998) (legislative history of unenacted bill relevant).

- 126 [McCarver v. Manson Park & Recreation Dist.](#), 92 Wash. 2d 370, 374, 597 P.2d 1362, 1364 (1974). See also [In Re Marriage of Little](#), 96 Wash. 2d 183, 191 n.3, 634 P.2d 498, 503 n.3 (1981).
- 127 See, e.g., [In re Marriage of Kovacs](#), 121 Wash. 2d 795, 854 P.2d 629 (1993) (letter, remarks of committee chair, and prime sponsor of bill to other house); see also [Biggs v. Vail](#), 119 Wash. 2d 129, 135, 830 P.2d 350, 353 (1992) (Bar Association statement); [State v. Turner](#), 98 Wash. 2d 731, 658 P.2d 658 (1983) (committee action, staff analyses, hearing testimony); [State v. Anderson](#), 94 Wash. 2d 176, 616 P.2d 612 (1980) (committee memoranda, transcript); [State v. Herrmann](#), 89 Wash. 2d 349, 572 P.2d 713 (1977) (letter).
In [Nelson v. McClatchy Newspapers, Inc.](#), 131 Wash. 2d 523, 936 P.2d 1123 (1997), the court cited a staff memorandum as authority for an interpretation of a statute. *Id.* at 531, 936 P.2d at 1127. But subsequently in the opinion, the court indicated a staff memorandum on a bill introduced after the initiation of the litigation was not authoritative in describing legislative intent. *Id.* at 532 n.5, 936 P.2d at 1127 n.5.
- 128 See [CLEAN v. State](#), 130 Wash. 2d 782, 810, 928 P.2d 1054, 1067 (1996); see also [Sofie v. Fibreboard Corp.](#), 112 Wash. 2d 636, 771 P.2d 711 (1989) (legislative floor remarks), amended by 55 Wash. App. 685, 780 P.2d 260 (1989). But see [In re F.D. Processing, Inc.](#), 119 Wash. 2d 452, 832 P.2d 1303 (1992) (one legislator's floor remarks not enough to establish legislative intent).
- 129 See [Snow's Mobile Homes, Inc. v. Morgan](#), 80 Wash. 2d 283, 494 P.2d 216 (1972) (colloquy recognized); see also [Johnson v. Cont'l W., Inc.](#), 99 Wash. 2d 555, 663 P.2d 482 (1983) (colloquy recognized). But see [N. Coast Air Servs. Ltd. v. Grumman Corp.](#), 111 Wash. 2d 315, 759 P.2d 405 (1988) (colloquy not recognized).
- 130 Seeberger, *supra* note 29, at 72; see also Wang, *supra* note 118, at 591.
- 131 99 Wash. 2d 555, 663 P.2d 482 (1983).
- 132 *Id.*, 99 Wash. 2d at 561, 663 P.2d at 485.
- 133 111 Wash. 2d 315, 759 P.2d 405 (1988).
- 134 The court stated:
We are not persuaded that this floor exchange supports defendant's position. First, the answer of a single legislator should not create an intent different from that in the official committee report if the answer is inconsistent with the report. Second, the question and answer are ambiguous. Senator Bottiger said the bill would overrule Ohler, but to overrule Ohler would eliminate the discovery rule in product cases. That is not the effect of this statute; indeed it statutorily recognizes a different form of what had been a judicially created discovery rule. The statute, despite the floor colloquy, did not overrule Ohler, it modified the conditions necessary to trigger running of the statute of limitations.
[N. Coast Air Servs.](#), 111 Wash. 2d at 326, 759 P.2d at 410.
- 135 [Allied Daily Newspapers v. Eikenberry](#), 121 Wash. 2d 205, 213, 848 P.2d 1258, 1262 (1993). See also [State ex rel. Stiner v. Yelle](#), 174 Wash. 402, 408, 25 P.2d 91, 93 (1933).
- 136 [State Dep't of Ecology v. Theodoratus](#), 135 Wash. 2d 582, 594, 957 P.2d 1241, 1247 (1998). See also [Spokane County Health Dist. v. Brockett](#), 120 Wash. 2d 140, 153-54, 839 P.2d 324, 331; [State v. Anderson](#), 81 Wash. 2d 234, 240, 501 P.2d 184, 188 (1972).
- 137 See, e.g., [Woodson v. State](#), 95 Wash. 2d 257, 623 P.2d 683 (1980); see also, e.g., [City of Yakima v. Int'l Ass'n of Firefighters, AFL-CIO, Local 469](#), 117 Wash. 2d 655, 818 P.2d 1076 (1991); [City of Spokane v. State](#), 198 Wash. 682, 687, 89 P.2d 826, 828-29 (1939).
- 138 See, e.g., [W. Telepage, Inc. v. City of Tacoma](#), 140 Wash. 2d 599, 611, 998 P.2d 884, 891 (2000) (noncontemporaneous understanding of lobbyist as to legislative intent not reflective of legislature's rationale for enacting law). 'While lobbyists refer to themselves as the "Third House," this appellation has no grounding in our [c]onstitution.' *Id.* at 611 n.6, 998 P.2d at 891 n.6.

- 139 See, e.g., *Johnson v. Cont'l W., Inc.*, 99 Wash. 2d 555, 560, 663 P.2d 482, 485 (1983); see also, e.g., *Scott v. Cascade Structures*, 100 Wash. 2d 537, 673 P.2d 179 (1983). But see *Anderson*, 94 Wash. 2d at 188, 501 P.2d at 618 (nonlegislative authors of manual for Criminal Justice Training Commission).
- 140 Wang, *supra* note 118, at 604-05.
- 141 490 U.S. 504, 528 (1989) (Scalia, J., concurring).
- 142 See Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 Minn. L. Rev. 199, 204-05 (1999).
- 143 See Eskridge, *supra* note 117, at 684.
- 144 See note 17, *supra*.
- 145 See, e.g., 1981 Wash. Senate Journal 629-637 (section-by-section analysis of 1981 Product Liability and Tort Reform Act).
- 146 Courts have made clear that they want the legislature to maintain historical materials for court use. *Seattle Times v. Benton County*, 99 Wash. 2d 251, 255 n.1, 661 P.2d 964, 966 n.1 (1983). See generally, *Wash. Rev. Code* §40.14.100 (2000).
- 147 As a former legislator, I would argue that the pertinent standing legislative committees and their staffs have an affirmative obligation to monitor new judicial decisions on issues within their committee jurisdiction and to take steps to enact legislation at the next legislative session to correct judicial errors of interpretation.
- 148 See, e.g., *Soproni v. Polygon Apartment Partners*, 137 Wash. 2d 319, 327 n.3, 971 P.2d 500, 505 n.3 (1999); see also, e.g., *McKinney v. State*, 134 Wash. 2d 388, 403, 950 P.2d 461, 469 (1998); *Manor v. Nestle Food Co.*, 131 Wash. 2d 439, 446 n.2, 932 P.2d 628, 631 n.2 (1997); *State v. Coe*, 109 Wash. 2d 832, 846, 750 P.2d 208, 215-16 (1988); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 789, 719 P.2d 531, 537 (1986).
- 149 138 Wash. 2d 9, 978 P.2d 481 (1999).
- 150 *Wash. Rev. Code* § 72.09.100 (2000).
- 151 [W]e have legitimate and diametrically conflicting legislative policies before us. The majority's determination to apply chapter 19.28 RCW and WISHA to inmates working on Department facilities potentially hobbles use of prison inmates' labor on correctional facilities projects, despite the strong legislative policy in favor of inmate labor's being used in the construction and repair of prison facilities. At the same time, to apply the provisions of *RCW 72.09.100*, which speaks only in broad terms of removing unspecified statutory and other restrictions on inmate labor, to negate the licensure requirements for employees, seems far too broad an invitation to the courts selectively to apply the statutory mandates otherwise designed to protect the public and workers. In the absence of a clear policy choice from the Legislature and the Governor, the parties have asked us to resolve this public policy conflict.
- Resolution of the matter is within the easy purview of the Governor and the Legislature. Those are the branches of government constitutionally empowered and best able to broker the various interests at play in this case. For the Court to allow itself to be drawn into what is in essence a sociopolitical dispute is to misperceive our role in our tripartite form of government.
- Nat'l Elec. Contractors Ass'n*, 138 Wash. 2d at 41-42, 978 P.2d at 497 (Talmadge, J., dissenting).

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APPENDIX D

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Legislative History in Washington

I. INTRODUCTION

Federal¹ and state² courts increasingly use legislative history³ as an aid in construing statutes to determine the intent or

1. The "trend toward more liberal use" makes consideration of legislative history by the U.S. Supreme Court "almost a matter of routine." G. FOLSOM, *LEGISLATIVE HISTORY* 4-5 (1972). For early articles noting the increasing use of extrinsic evidence of legislative intent in federal courts, see Jones, *Extrinsic Aids in the Federal Courts*, 25 *IOWA L. REV.* 737,737 (1940); Nutting, *The Relevance of Legislative Intention Established by Extrinsic Evidence*, 20 *B.U.L. REV.* 601, 602 (1940); Note, *Trends in the Use of Extrinsic Aids in Statutory Interpretation*, 3 *VAND. L. REV.* 586, 588 (1950) [hereinafter cited as *Trends*]. For a statistical documentation of the increased use of legislative history by the U.S. Supreme Court from 1938 to 1979, see Carro & Brann, *Use of Legislative Histories by the United States Supreme Court: A Statistica! Analysis*, 9 *J. LEGIS.* 282, 288-89 (1982). A study of the 1981-82 U.S. Supreme Court Term found:

No occasion for statutory construction now exists when the Court will *not* look at the legislative history. . . . The Court has greatly expanded the types of materials and events that it will recognize in the search for congressional intent. . . . Yet . . . legislative history is rarely the determinative factor in statutory construction.

Wald, *Some Observations of the Use of Legislative History in the 1981 Supreme Court Term*, 68 *IOWA L. REV.* 195, 195 (1983) (emphasis in original) (footnote omitted).

2. "To the extent such [legislative history] materials exist, however, there is a growing tendency in state courts to resort to them." G. FOLSOM, *supra* note 1, at 6 (footnote omitted). See Rhodes, White & Goldman, *The Search for Intent: Aids to Statutory Construction in Florida*, 6 *FLA. ST. U. L. REV.* 383, 385 (1978) [hereinafter cited as *Florida*]; and Comment, *Statutory Interpretation in California: Individual Testimony as an Extrinsic Aid*, 15 *U.S.F.L. REV.* 241, 241 (1980) [hereinafter cited as *California*] (both articles discussing national trends toward increased use of legislative history without specifically distinguishing federal and state courts).

The trend in Washington state courts is discussed *infra* in text accompanying notes 9-51.

3. As used in this Comment, "legislative history" refers to the drafting and introduction of a bill, memorial, or resolution in a state legislature or in Congress, its sequential history towards enactment including committee reports, the amendatory process, debates, vetoes, and supporting documents. Legislative history is considered an extrinsic aid to interpretation, as opposed to an intrinsic aid within the text of the act. 2A *C. SANDS, STATUTES AND STATUTORY CONSTRUCTION* § 48.01 (4th ed. 1973). As used in this Comment, "legislative history" does not include other aspects of "preenactment history," *id.* § 48.03, or "post-enactment history," *id.* § 48.20. It does not include an act modifying a prior act, nor does it include administrative construction of a statute.

The term "legislative history" is used in judicial opinions with two quite different significations. In a broad sense, it refers to the evolution of legislation on the general subject of a statute, including the history of social factors prompting the legislation and previous acts on the same general subject matter. The term is more commonly used "to signify the history of the progress of a particular statute through the stages of its passage." Jones, *supra* note 1, at 753-54; see R. DICKERSON, *THE INTERPRETATION AND APPLI-*

purpose⁴ behind the legislation. In order to provide the courts with useful information, legal practitioners need to know what legislative materials are available, how to obtain them, and what materials courts are likely to consider relevant. In contrast to congressional materials,⁵ state legislative history remains largely untapped by lawyers.⁶

While legislative history may have been largely unavailable in many states in the past,⁷ much is now available in Washing-

CATION OF STATUTES 137 (1975). This Comment uses the term in the latter sense. *Legislative* history is distinguishable from "general history of a political, social, or economic nature; legal history in the sense of the state of the law at a given point in time; and statutory history in the sense of the development of a text in the course of repeated enactments[.]" although these other kinds of history may also be useful for statutory interpretation. G. FOLSOM, *supra* note 1, at 1 (emphasis in original); see also *id.* at 8-12.

4. It is beyond the scope of this Comment to consider the differences between legislative intent and legislative purpose. From the standpoint of determining what materials are available as part of legislative history, there is minimal difference. For discussions of legislative intent versus legislative purpose, see, e.g., R. DICKERSON, *supra* note 3, at 67-102; Jones, *supra* note 1, at 740-41.

5. G. FOLSOM, *supra* note 1, provides a practical guide to obtaining and using congressional materials. There is a sharp contrast between the availability of materials from Congress as compared to most state legislatures. See Horack, *Cooperative Action for Improved Statutory Construction*, 3 VAND. L. REV. 382, 387 (1950) [hereinafter cited as *Cooperative Action*]; Johnstone, *The Use of Extrinsic Aids to Statutory Construction in Oregon*, 29 OR. L. REV. 1, 4 (1949) [hereinafter cited as *Oregon*]; Jones, *supra* note 1, at 737-38; Trends, *supra* note 1, at 591-93.

6. For an example where lawyers failed to provide the court with appropriate documents of legislative history, see *Lau v. Nelson*, 89 Wash. 2d 772, 776, 575 P.2d 719, 722 (1978), *rev'd in part*, *Roberts v. Johnson*, 91 Wash. 2d 182, 588 P.2d 201 (1978), discussed *infra*, note 21.

7. ". . . [I]n most states there is little available official documentation from which the legislative intent may be ascertained." G. FOLSOM, *supra* note 1, at 5. ". . . [T]he absence of [available] documentation [of the legislature's internal processes] is one of the principal shortcomings of most state legislatures. . . ." D. Frohnmeyer, *Legislative Intent: Its Meaning, Use, and Abuse* 6 (July 1979) (unpublished manuscript) (available in the office of the University of Puget Sound Law Review). See also *Cooperative Action*, *supra* note 5, at 387; Horack, *The Disintegration of Statutory Construction*, 24 IND. L. J. 335, 341 (1949); Jones, *supra* note 1, at 737-38; Nutting, *supra* note 1, at 602; *Florida*, *supra* note 2, at 385 n.11; Trends, *supra* note 1, at 591-94.

For a comprehensive national survey describing the availability of legislative materials in each state, see GUIDE TO STATE LEGISLATIVE MATERIAL (M. Fisher ed. 1983). For a partial listing by state, see National Conference of State Legislatures, *Mechanisms to Trace Legislative Histories* (November 1981) (unpublished manuscript) (available from National Conference of State Legislatures, Denver, Colorado). For outdated national surveys, see Bradley, *Legislative Recording in the United States*, 29 AM. POL. SCI. REV. 74 (1935); Cashman, *Availability of Records of Legislative Debates*, 24 REC. A. B. CTRY N.Y. 153 (1969).

For more detailed discussion of the availability of legislative materials and their use by courts in individual states, see (arranged alphabetically by state) *California*, *supra* note 2 (California); Comment, *The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria*, 12 PAC. L.J. 189 (1980) (Cali-

ton State. However, three problems contribute to the failure to fully utilize available legislative history. First, Washington courts have failed to articulate consistent theories or standards for determining how to apply evidence of legislative history. In many cases, the courts fail to explain adequately why they consider certain historical records to be appropriate or what weight they give to different types of legislative materials. Second, many lawyers do not know how to research Washington State legislative materials,⁸ or they assume that state legislative history is unavailable. Yet, it is the obligation of attorneys to use evidence of legislative history in a creative and effective manner

fornia); Smith, *Legislative Intent: In Search of the Holy Grail*, 53 CAL. ST. B. J. 294 (1978) (California); White, *Sources of Legislative Intent in California*, 3 PAC. L. J. 63 (1972) (California); Florida, *supra* note 2 (Florida); Note, *The Inadequacies of Legislative Recording in Iowa*, 35 IOWA L. REV. 88 (1949) (Iowa); Snyder, *Researching Legislative Intent*, 51 KAN. B. A. J. 93 (1982) (Kansas); Note, *The Use of Extrinsic Aids in Statutory Interpretation in Kentucky*, 36 KY. L.J. 190 (1948) (Kentucky); Meyer, *Legislative History and Maryland Statutory Construction*, 6 MD. L. REV. 311 (1942) (Maryland); Divilbiss, *The Need for Comprehensive Legislative History in Missouri*, 36 J. MO. B. 520 (1980) (Missouri); Comment, *Statutory Interpretation—The Need for Improved Legislative Records in Missouri*, 38 MO. L. REV. 84 (1973) (Missouri) [hereinafter cited as *Missouri* (1973)]; Cashman, *supra* this note, at 157-58 (New York); Oregon, *supra* note 4 (Oregon); Note, *The Legislative Branch in Utah*, 1966 UTAH L. REV. 416, 453-54 (Utah); Wise, *Legislative Histories—State and Federal*, in MODERN LEGAL RESEARCH: ANALYSIS AND INFORMATION SOURCES 221 (1979) (sponsored by Wash. St. B.A. Continuing Legal Educ. Committee) (Washington); Comment, *Statutory Construction—Legislative Intent—Use of Extrinsic Aids in Wisconsin*, 1964 WIS. L. REV. 660 (Wisconsin) [hereinafter cited as *Wisconsin* (1964)]; Comment, *Statutory Construction—Use of Extrinsic Aids in Wisconsin*, 1940 WIS. L. REV. 453 (Wisconsin).

Caution is required in using dated references because many state legislatures are rapidly upgrading their institutional capabilities. In Washington, the legislature adopted the concept of the "continuing legislature" beginning in 1973. Annual legislative sessions became the rule rather than the exception. Professional committee staff were employed on a year-round basis for each house and replaced the Legislative Council as standing committees became functional in the interim periods between sessions. Nonpartisan committee staff prepared a substantive "Bill Report" for each bill passed out of committee beginning approximately in 1974. Interview with Tim Burke, Asst. Staff Director of the Washington House of Representatives, Office of Program Research, Olympia (Jan. 26, 1984). Senate Bill Reports were entered on the Legislative Information Service (LIS) computer beginning in 1982 and House Bill Reports beginning in 1983. Standing committees routinely tape-recorded committee meetings in the House of Representatives beginning in 1973. *Id.* They began in the Senate in 1974. Interview with Sid Snyder, Secretary of the Washington State Senate, in Olympia (Jan. 26, 1984). Floor debate was tape-recorded in both houses beginning in 1969. Interview with Dean Foster, Chief Clerk of the Washington House of Representatives, in Olympia (Jan. 26, 1984).

8. Responsibility for the failure to use state legislative history also rests with law schools that emphasize judicial methods and processes, sometimes at the sacrifice of the legislative process. Law schools may also fail to provide specific training in research techniques for state legislative materials. See Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 453-54 (1950).

and to bring it to the attention of the courts. Third, access to legislative history is more difficult than necessary because of the limitations of the published *Journals* of the Washington State Senate and House of Representatives and the failure of the legislature to improve access to other documents. Nonetheless, it is in the legislature's interest to enhance the accuracy of judicial interpretations of legislative intent by improving access to records documenting that intent.

This Comment begins with an examination of court usage of Washington State legislative history and illustrates the lack of consistent judicial standards for acceptance of evidence of legislative intent. It then describes a systematic process that lawyers may use to identify and obtain relevant legislative history in Washington, and at the same time, points out defects in the current record-keeping system. It concludes with recommendations to the Washington State Legislature to improve the accessibility and usefulness of state legislative history. Adoption of these recommendations would not only aid the legal researcher, but also provide the legislature with a better means to convey intent and would provide the the courts with reliable information to make more accurate judicial readings of legislative intent.

II. JUDICIAL USAGE

A. *Background and Scope*

Washington State courts have consistently relied on legislative history to determine legislative intent when construing an ambiguous statute.⁹ As early as 1897, the Washington Supreme Court turned to the history of sequential drafts in an amended bill in order to determine the intent of the legislature.¹⁰ In 1903, the court directly addressed the issue of "to what extent the courts may examine into the history of legislation or resort to

9. This Comment is limited to a discussion of Washington State legislative history. As discussed *supra* note 1, federal courts have liberally used legislative history to construe acts of Congress. See generally 2A C. SANDS, *supra* note 3, §§ 48.01-.20; G. FOLSOM, *supra* note 1, at 12-19; Sparkman, *Legislative History and the Interpretation of Laws*, 2 ALA. L. REV. 189 (1950); Annot., 56 L.Ed. 2d 918 (1979); Annot., 70 A.L.R. 5 (1931).

10. *Howlett v. Cheetham*, 17 Wash. 626, 50 P. 522 (1897). The court considered a series of amendments to the original bill and determined that the explicit repeal of a statute in the final act was inadvertent and that the legislative intent *not* to repeal the statute should control. *Id.* at 632, 50 P. at 524. The court also considered other relevant legislation, including a subsequent act passed in the same session of the legislature which amended the allegedly repealed statute under consideration. *Id.* at 633-34, 50 P. at 524-25.

extrinsic circumstances when attempting to construe the legislative intent in a statute containing ambiguities."¹¹ The court concluded that it was appropriate to consider "the history of the statute in question in order to determine the legislative intent,"¹² and decided that the omission of a word in the statute was due to a clerical error at the time the bill was enrolled.¹³

In subsequent decisions, courts consistently followed this rule.¹⁴ By 1965, the court considered it "an elementary principle of statutory interpretation that legislative intention may be inferred from extrinsic evidence" such as legislative history.¹⁵ The language of the statute is the starting point for consideration,¹⁶ but ambiguity is often inherent in even the most precisely drafted statutes because of the difficulties in translating an idea

11. *Scouten v. Whatcom*, 33 Wash. 273, 280, 74 P. 389, 391 (1903).

12. *Id.* at 284, 74 P. at 392.

13. *Id.* at 284, 74 P. at 393. A similar incident happened as recently as 1981, when the word "proscribed" was inadvertently transformed to "prescribed" after the bill had already passed both houses of the legislature. See 1981 Wash. Op. Att'y Gen. No. 14, at 11-12, also discussed *infra* note 105.

14. See, e.g., *State v. Turner*, 98 Wash. 2d 731, 735, 658 P.2d 658, 660 (1983); *Washington Fed'n of State Employees v. State*, 98 Wash. 2d 677, 684, 658 P.2d 634, 638 (1983); *Department of Transp. v. State Employees' Ins. Bd.*, 97 Wash. 2d 454, 458, 645 P.2d 1076, 1078 (1982); *Green River Community College v. Higher Educ. Personnel Bd.*, 95 Wash. 2d 108, 113, 622 P.2d 826, 830 (1980), *aff'd on rehearing*, 95 Wash. 2d 962, 633 P.2d 1324 (1981); *State v. Coma*, 69 Wash. 2d 177, 183, 417 P.2d 853, 857 (1966); *Ropo, Inc., v. City of Seattle*, 67 Wash. 2d 574, 577, 409 P.2d 148, 150 (1965); *In re Bale*, 63 Wash. 2d 83, 87, 385 P.2d 545, 547 (1963); *State ex rel. Bugge v. Martin*, 38 Wash. 2d 834, 840-41, 232 P.2d 833, 836-37 (1951); *Shelton Hotel v. Bates*, 4 Wash. 2d 498, 508, 104 P.2d 478, 482 (1940); *State ex rel. Fair v. Hamilton*, 92 Wash. 347, 352, 159 P. 379, 381-82 (1916).

15. *Ropo, Inc. v. City of Seattle*, 67 Wash. 2d 574, 577, 409 P.2d 148, 150 (1965).

16. *Id. Cf.* "The frequent reliance of the federal courts in the United States on legislative history has prompted the jibe that the court will not look at the act unless the legislative history is obscure!" Correy, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. B. REV. 624, 636 (1954).

Several minority opinions by Justice Rosellini have criticized the majority for misuse of legislative history and failure to adequately consider the intrinsic evidence of the statute itself. See, e.g., *Human Rights Comm'n v. Cheney School Dist. No. 30*, 97 Wash. 2d 118, 130, 641 P.2d 163, 169 (1982) (Rosellini, J., concurring) ("[I] disagree with an approach to statutory interpretation which looks first to legislative history, and only later to the language of the statute. . . ."); *State v. Frampton*, 95 Wash. 2d 469, 508, 627 P.2d 922, 942 (1981) (Rosellini, J., dissenting) ("[L]ook to the language of the statutes and the principles of construction to find the legislative intent. . . ."); *State v. Martin*, 94 Wash. 2d 1, 29 n.4, 614 P.2d 164, 178 n.2 (1980) (Rosellini, J., dissenting) ("[E]xtreme caution should be used in resorting to legislative history. . . ."); *State v. Herrmann*, 89 Wash. 2d 349, 364, 572 P.2d 713, 720 (1977) (Rosellini, J., dissenting) ("To find the meaning of a statute, all other legitimate avenues of search should be exhausted before resort is had to [legislative history] which itself is so clouded with ambiguity.").

into written words.¹⁷ When faced with ambiguity, the court relies heavily on the history of the statute as the "most compelling indication of the legislature's intent."¹⁸ The court has even found that "resort to legislative history is not only permissible but necessary"¹⁹ to determine the purpose behind an ambiguous statute.

As a corollary to the rule permitting examination of legislative history in the case of ambiguity, Washington courts have found it inappropriate to consider the legislative history of an unambiguous statute.²⁰ Because legislative history is not relevant in every case of statutory construction, courts may simply fail to consider legislative history without enunciating this rule. In a 1978 case, the Washington Supreme Court refused to consider legislative history in interpreting the repeal of a statute, insisting that an amendatory act was necessary instead of a repealing act.²¹

17. *State v. Coma*, 69 Wash. 2d 177, 182-83, 417 P.2d 853, 857 (1966).

18. *In re Bale*, 63 Wash. 2d 83, 87, 385 P.2d 545, 547 (1963).

19. *Coma*, 69 Wash. 2d at 183, 417 P.2d at 857.

20. See, e.g., *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wash. 2d 283, 288, 494 P.2d 216, 219 (1972); *Shelton Hotel v. Bates*, 4 Wash. 2d 498, 508-09, 104 P.2d 478, 482-83 (1940) (citing *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269 (1929), quoting *State ex rel. Dunbar v. State Bd.*, 140 Wash. 433, 249 P. 996 (1926)). The rule against consideration of the legislative history of an unambiguous statute also extends to consideration of prior or subsequent acts. *Parkhurst v. City of Everett*, 51 Wash. 2d 292, 294, 318 P.2d 327, 328 (1957) (citing *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 P. 869 (1909)).

21. *Lau v. Nelson*, 89 Wash. 2d 772, 776, 575 P.2d 719, 721 (1978), *rev'd in part*, *Roberts v. Johnson*, 91 Wash. 2d 182, 588 P.2d 201 (1978). The court held that the legislature's act of repealing the automobile host-guest statute, WASH. REV. CODE § 46.08.080 (1961), served only to restore the minority common-law rule in this state requiring proof of gross negligence for a host to be liable to his guest. This rule was identical to the rule in the repealed statute, thus negating any purpose in the repealing act. Nevertheless, the court failed to consider any legislative material evidencing a contrary intent. Writing for a unanimous court in *Lau*, Justice Rosellini, whose criticism of the use of legislative history is noted, *supra* note 16, rejected what the plaintiff "suggested" to be legislative intent because the language of the repealing act did not explicitly disclose an intent to adopt a different rule. "Such an intent could have been expressed only by an amendatory act." 89 Wash. 2d at 776, 575 P.2d at 722.

The *Lau* decision has been highly criticized. See Note, *Roberts v. Johnson, A Welcome Change Tainted by an Outmoded Approach to Statutory Interpretation*, 2 U. PUGET SOUND L. REV. 408 (1979) [hereinafter cited as Note, *Roberts v. Johnson*]; Memorandum from David D. Cheal, Counsel to Washington State House of Representatives Judiciary Committee to Rep. Rick Smith (March 30, 1978) (available from Washington State House of Representatives Office of Program Research) [hereinafter cited as Cheal Memorandum]. Although the standard of care requirement was subsequently overruled in *Roberts v. Johnson*, 91 Wash. 2d 182, 188, 588 P.2d 201, 204 (1978), *Roberts* specifically reaffirmed the *Lau* holding that the repeal of a statute restores the rule at common law, apparently regardless of legislative intent. *Id.*

In recent years, the rule denying consideration of legislative history appears to be cited primarily in dissenting opinions, in which the minority criticizes the majority for unnecessarily resorting to legislative history to construe what the minority perceives is an unambiguous statute.²² In at least one case, the court majority elaborately discussed legislative history, only to conclude that a statute was unambiguous and the legislative history was irrelevant.²³

Courts distinguish between questions based on procedural history and questions of intent based on the history of the substantive content of an act.²⁴ Even when the court finds ambiguity in the manner in which the statute was enacted, it will not turn to the history of how passage complied with internal procedures of the legislature,²⁵ nor will it consider the internal rules of

[The *Lau* decision] shows either (1) the inadequacy of indications of legislative intent outside the language of the bill, (2) neither petitioner's counsel nor amicus counsel attempted to show legislative intent, or (3) the court doesn't give a damn about committee reports, journal colloquy, or the like.

Cheal Memorandum, *supra*, at 2.

There is ample evidence in the legislative history of the repeal of the host-guest statute to show that the legislative intent was to eliminate the harsh requirement of proving gross negligence. See Note, *Roberts v. Johnson*, *supra*, at 414-17. Nevertheless, the court failed to consider this evidence. Moreover, in holding that *only* an amendatory act could suffice to demonstrate intent, the court implicitly rejected any consideration of legislative history beyond the text of the statute itself.

The court's failure to consider legislative history is partly the responsibility of the *Lau* counsel. Neither the brief for the plaintiff nor the brief of amicus curiae cited committee reports, committee minutes, committee debate, floor debate, or colloquies. Although the briefs traced the history of related acts and the progress of the bill through the legislative process, counsel apparently assumed that the legislative intent was self-evident and merely cited the "obvious" and "clear" intent of the legislature. See Brief of Petitioner at 26, *Lau v. Nelson*, 89 Wash. 2d 772, 575 P.2d 719 (1978); Brief of Amicus Curiae at 12, *Lau v. Nelson* 89 Wash. 2d 772, 575 P.2d 719 (1978). The court dismissed the argument of legislative intent as a mere suggestion by the petitioner. 89 Wash. 2d at 776, 575 P.2d at 721.

22. See, e.g., *Department of Transp. v. State Employees' Ins. Bd.*, 97 Wash. 2d 454, 464, 645 P.2d 1076, 1081 (1982) (Dimmick, J., dissenting); *State v. Frampton*, 95 Wash. 2d 469, 528, 627 P. 2d 922, 952 (1981) (Dore, J., dissenting) ("The majority has found a clear, well reasoned and orderly statute to be ambiguous, and has fabricated legislative intent from impermissible inferences."); *State v. Herrmann*, 89 Wash. 2d 349, 364, 572 P.2d 713, 720 (1977) (Rosellini, J., dissenting). See *supra* note 16, for further examples of dissenting opinions.

23. See *McCarver v. Manson Park & Recreation Dist.*, 92 Wash. 2d 370, 374-78, 597 P.2d 1362, 1365-66 (1979).

24. See *State ex rel. Bugge v. Martin*, 38 Wash. 2d 834, 840-41, 232 P.2d 833, 836-37 (1951); *Scouten v. Whatcom*, 33 Wash. 273, 279-80, 74 P. 389, 391-92 (1903).

25. See, e.g., *Bugge*, 38 Wash. 2d at 840-41, 232 P.2d at 837 ("[W]e will not go behind an enrolled enactment to determine the method, the procedure, the means or the manner by which it was passed in the houses of the legislature."); *State ex rel. Reed v.*

legislative bodies to be relevant to legislative intent.²⁶

The initial inquiry is whether legislative history should be considered at all and whether it should be scrutinized liberally or restrictively.²⁷ Once a Washington court has determined that extrinsic evidence of legislative history is appropriate in construing a statute, a wide variety of legislative documents are acceptable. However, Washington courts²⁸ have never specified the

Jones, 6 Wash. 452, 453-68, 34 P. 201, 201-09 (1893).

26. See *Washington Water Power Co. v. Washington State Human Rights Comm'n*, 91 Wash. 2d 62, 69-70, 586 P.2d 1149, 1154 (1978) (rules of a legislative body are not legislative history and are not proper sources to examine for legislative intent).

27. For arguments generally supporting the liberal use of legislative history, see G. FOLSOM, *supra* note 1; de Sloovere, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527 (1940); Fordham & Leach, *supra* note 8; Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); *Cooperative Action*, *supra* note 5; *Oregon*, *supra* note 5; Jones, *supra* note 1; Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886 (1930); *Florida*, *supra* note 2; Sparkman, *supra* note 9; *Missouri* (1973), *supra* note 7; *Wisconsin* (1964), *supra* note 7.

For arguments generally favoring a narrower use of legislative history or emphasizing the potential for abuse, see R. DICKERSON, *supra* note 3, at 137-97; Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1 (1965); Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947); Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination*, 9 CAL. W.L. REV. 128 (1972); Nutting, *supra* note 1; Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Stringham, *Crystal Gazing: Legislative History in Action*, 47 A.B.A. J. 466 (1961); Wald, *supra* note 1; Wasby, *Legislative Materials as an Aid to Statutory Interpretation: A Caveat*, 12 J. PUB. L. 262 (1963); *California*, *supra* note 2; D. Frohnmeyer, *supra* note 7; see also *United States v. Public Utils. Comm'n*, 345 U.S. 295, 319-20 (1953) (Jackson, J., concurring).

28. In contrast to decisions by the Washington courts, there are few federal cases which rely on Washington State legislative history. Federal courts historically have shown greater receptivity to the use of legislative history than have state courts. See *supra* notes 1 & 5.

The U. S. Court of Appeals has taken notice of the introduction of a bill in the state legislature initiated by the Secretary of State and has cited the absence of mention of the plaintiff's suit in the legislative *Journal*. See *American Constitutional Party v. Munro*, 650 F.2d 184, 186 (9th Cir. 1981). A federal district court cited the Governor's message to the legislature urging consideration of a bill, the introduction of bills proposed by a gubernatorially-appointed commission, and a substitute bill drafted by a federal agency and enacted into law without substantial amendment. See *United States v. Anderson*, 109 F. Supp. 755, 757-59 (E.D. Wash. 1953).

In a 1981 federal district court case where plaintiffs sought an injunction against enforcement of a state law, the plaintiffs' brief relied extensively on the elaborate legislative history of the act. The brief illustrates the use of sources that are available to reward persistent research efforts. It encompassed depositions from several legislators and other state elected officials, committee staff memoranda, memoranda from the state Attorney General regarding the bill, a detailed procedural history of the bill, the testimony of legislators and other witnesses at committee hearings, debate in committee and on the floor of the legislature, legislative colloquies, committee and floor amendments which passed and which failed, a letter distributed by one legislator on the floor of the Senate,

permissible scope of legislative evidence which should be considered, or weighed its relative value except in the most general terms. Generally, appropriate extrinsic evidence includes the legislative history of prior and related statutes and the administrative interpretation of a statute, as well as the legislative history of the statute itself.²⁹

The recent decision in *State v. Turner*³⁰ implies that Washington courts may consider almost any aspect of legislative history as potentially relevant. In a unanimous decision³¹ regarding a state truancy law, the court initially compared sequential drafts of the bill as originally introduced and the substitute bill as reported out by committee.³² It also contrasted the ultimately passed House bill to its companion Senate bill³³ and to other bills on the same subject.³⁴ Moreover, the court included in its discussion of legislative history three separate committee staff memoranda to the committee chairmen and to individual committee members in both the House and Senate,³⁵ two committee staff analyses of the bill as enacted (prepared after final passage by the legislature),³⁶ and tape-recorded testimony at a committee hearing both from committee staff and from four outside witnesses.³⁷ *Turner* appears to open the door significantly for consideration of legislative history without indicating any limits to credibility and relevance and without indicating the relative weight that should be given to any particular legislative materi-

and a letter from one legislator to the Governor urging approval of the bill. See Memorandum for Plaintiff in Support of Motion for Partial Summary Judgment, *Seattle School Dist. No. 1 v. State*, No. C81-276T (W.D. Wash. 1981). Although the court did not distinguish the various aspects of legislative history cited in the brief, it referred to the acceptance and rejection of amendments to the bill in granting summary judgment for declaratory and injunctive relief on one issue. See *Seattle School Dist. No. 1 v. State*, No. C81-276T, slip op. at 4 (W.D. Wash. Dec. 18, 1981) (memorandum opinion and order granting partial summary judgment). The court also cited the voluminous affidavits and exhibits in determining that material issues of fact were in dispute and denying summary judgment on alternative grounds. *Id.* at 5.

29. *Ropo, Inc. v. City of Seattle*, 67 Wash. 2d 574, 577, 409 P.2d 148, 150-51 (1965). See *Department of Transp. v. State Employees' Ins. Bd.*, 97 Wash. 2d 454, 458, 645 P.2d 1076, 1078 (1982).

30. 98 Wash. 2d 731, 658 P.2d 658 (1983).

31. Justice Rosellini, a critic of the use of legislative history as discussed *supra* note 16, did not participate in the decision. *Turner*, 98 Wash. 2d at 731.

32. *Id.* at 736, 658 P.2d at 660-61.

33. *Id.* at 737, 658 P.2d at 661.

34. *Id.* at 737 n.3, 658 P.2d at 661 n.3.

35. *Id.* at 737-38, 658 P.2d at 661-62.

36. *Id.* at 737, 658 P.2d at 662.

37. *Id.* at 737-38, 658 P.2d at 662.

als. The court did not appear to take notice of its expansive treatment of legislative history, perhaps because all of the legislative evidence was consistent.

Two months later, at the trial court level, *Turner* was applied to encompass an even broader scope of legislative history. In his oral opinion in *Seattle School District v. State*³⁸ (*School Funding II*), Judge Doran recognized a variety of extrinsic evidence: (1) numerous quotations from legislative floor colloquies,³⁹ floor debates,⁴⁰ and standing and joint committee discussions;⁴¹ (2) the failure to amend an act by a subsequent legislature;⁴² (3) the absence of evidence of intent from the legislative history of one statute in comparison with others;⁴² (4) the failure to amend a bill which was the precursor to the bill ultimately enacted;⁴⁴ (5) an amendment to an early version of the bill;⁴⁵ (6) a section ultimately vetoed by the Governor;⁴⁶ (7) a law which never became effective because of the failure of a proposed constitutional amendment;⁴⁷ (8) a citizens' group proposal for the legislation ultimately enacted;⁴⁸ (9) an oral opinion of the Attorney General;⁴⁹ (10) a law ultimately declared unconstitutional;⁵⁰ and (11) the failure of the legislature to correct an unconstitutional law.⁵¹

Despite the abundance of relevant legislative materials considered in *Turner* and *School Funding II*, Washington courts have frequently commented on the scarcity, ambiguity, or absence of legislative history.⁵² The shortcomings of the legisla-

38. *Seattle School Dist. v. State*, No. 81-2-1713-1 (Thurston County Super. Ct. Apr. 29, 1983) (oral opinion) (available in the office of the University of Puget Sound Law Review) [hereinafter cited as *School Funding II*].

39. *Id.* at 39-40, 72-73, 110-11. A floor colloquy, discussed *infra* text accompanying notes 104-12, takes place during a floor debate when one legislator yields to another legislator's question.

40. *School Funding II*, *supra* note 38, at 73, 84, 113. The decision is ambiguous as to whether these were part of general floor debate or part of a specific colloquy.

41. *Id.* at 46, 56, 107-08, 112, 115-16.

42. *Id.* at 67.

43. *Id.* at 77.

44. *Id.* at 84.

45. *Id.* at 104.

46. *Id.* at 109.

47. *Id.* at 112.

48. *Id.* at 113.

49. *Id.* at 118.

50. *Id.* at 118-19.

51. *Id.* at 119, 124.

52. *See, e.g.,* *Washington Educ. Ass'n v. Smith*, 96 Wash. 2d 601, 612, 638 P.2d 77,

tive history available to the courts in these cases may be due to several factors. If the particular issue in dispute never occurred to legislators during the course of enactment, legislative history is likely to be ambiguous or irrelevant. Legislative documents may have been lost, never recorded, or never preserved, particularly for legislation enacted prior to the 1970's.⁵³ Lawyers may have failed to provide the court with appropriate documents of legislative history.⁵⁴ The absence of legislative history may also be due to the failure of the courts to indicate consistently what legislative documents they will consider.

It may not be possible or desirable to specify categorically the scope of appropriate legislative history materials. Materials may change with each legislative session, making fixed rules undesirable. Moreover, the courts need flexibility in determining relevance or in according weight to any particular evidence of legislative history, depending on the circumstances of each case. Otherwise, the potential exists for participants in the legislative process to take undue advantage in manufacturing evidence for court consideration. Nevertheless, the failure to articulate consistent reasons for considering or rejecting certain evidence of legislative history makes it difficult for the lawyer to determine what evidence should be submitted. Currently, there are few clear limits as to what aspects of legislative history will be accepted as relevant evidence. At times, the courts have taken into account changes in the language of the bill itself,⁵⁵ bill introductions and comments by the authors or proponents of a bill,⁵⁶ committee work,⁵⁷ floor action,⁵⁸ events and testimony

83 (1981) (Dore, J., dissenting) ("vacuum of legislative history"); *State v. Martin*, 94 Wash. 2d 1, 28 n.4, 614 P.2d 164, 178 n.2 (1980) (Rosellini, J., dissenting) ("paucity of information available in the legislative journals and printed bills with respect to legislative intent"); *McCarver v. Manson Park & Recreation Dist.*, 92 Wash. 2d 370, 375, 597 P.2d 1362, 1365 (1979) ("limited legislative history available"); *Marchioro v. Chaney*, 90 Wash. 2d 298, 307, 582 P.2d 487, 492 (1978), *aff'd*, 442 U.S. 191 (1979) ("scanty"); *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wash. 2d 441, 451, 536 P.2d 157, 163 (1975) ("absence of any explanation" in "floor comments or committee notes"); *State v. Conifer Enter., Inc.*, 82 Wash. 2d 94, 97, 508 P.2d 149, 151 (1973) ("legislative intent is seldom recorded"); *Murphy v. Department of Licensing*, 28 Wash. App. 620, 623, 625 P.2d 732, 734 (1981) ("finding no legislative history"); *State v. Edmonds Mun. Ct.*, 27 Wash. App. 762, 766, 621 P.2d 171, 174 (1980) ("absent a legislative history").

53. See *supra* note 7.

54. See, e.g., *Lau v. Nelson*, 89 Wash. 2d 772, 575 P.2d 719 (1978), *rev'd in part*, *Roberts v. Johnson*, 91 Wash. 2d 182, 588 P.2d 201 (1978), discussed *supra* note 21.

55. See *infra* text accompanying notes 61-75.

56. See *infra* text accompanying notes 76-85.

57. See *infra* text accompanying notes 86-103.

subsequent to legislative passage,⁵⁹ and the legislature's failure to act.⁶⁰

B. *Changes in the Language of the Bill*

One of the most apparent aspects of legislative history is the change in the language of the bill itself through the process of sequential drafts from introduction to enactment. With few exceptions, Washington courts⁶¹ find significance in the changes made between drafts of a bill as the bill works its way through the amendatory process in the state legislature.⁶² This applies to substitute bills as well as to amendments by either house.⁶³ In appropriate circumstances, courts draw inferences from sequential drafts of a bill on the presumption that legislators were aware of prior drafts.⁶⁴ For example, a court gave effect to an amendment which struck the word "biennially" and substituted the word "quadrennially," even when the legislature inadvertently failed to make a corresponding change elsewhere in the

58. See *infra* text accompanying notes 104-12.

59. See *infra* text accompanying notes 113-26.

60. See *infra* text accompanying notes 127-37.

61. For federal cases recognizing the significance of sequential drafts of state legislation, see *supra* note 28.

62. See, e.g., *Harris v. Groth*, 99 Wash. 2d 438, 446, 663 P.2d 113, 117 (1983) (substitute bill compared to *proposed* bill never formally introduced); *State v. Turner*, 98 Wash. 2d 731, 736, 658 P.2d 658, 661 (1983) (substitute bill); *State v. Cleppe*, 96 Wash. 2d 373, 379, 635 P.2d 435, 438 (1981) (two substitute bills plus additional amendments); *State v. Martin*, 94 Wash. 2d 1, 19, 614 P.2d 164, 173 (1980) (Horowitz, J., concurring) (distinguishing *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wash. 2d 441, 536 P.2d 157 (1975)); *Gates v. Jensen*, 92 Wash. 2d 246, 253-54, 595 P.2d 919, 924 (1979) (substitute bill); *Marchioro v. Chaney*, 90 Wash. 2d 298, 307-08, 582 P.2d 487, 492-93 (1978), *aff'd*, 442 U.S. 191 (1979) (constitutional amendment); *State ex rel. Troy v. Yelle*, 27 Wash. 2d 99, 107-08, 176 P.2d 459, 463-64 (1947) (amendments to bill linked to amendments to separate appropriations bill); *Ayers v. City of Tacoma*, 6 Wash. 2d 545, 557-58, 108 P.2d 348, 352 (1940) (amendments to bill title); *State ex rel. Griffin v. Superior Ct.*, 70 Wash. 545, 548, 127 P. 120, 121 (1912) (differing drafts of companion bills); *Howlett v. Cheetham*, 17 Wash. 626, 632-34, 50 P. 522, 524-25 (1897) (unintended repealer); *State v. Runions*, 32 Wash. App. 669, 676-77, 649 P.2d 144, 148 (1982), *rev'd on other grounds*, 100 Wash. 2d 52, 665 P.2d 1358 (1983) (Reed, J., dissenting) (amended act as model for court rule under consideration).

63. A substitute bill is essentially a single committee amendment in the house of origin which strikes the entire bill and inserts new language. It may be adopted on the floor, rejected on the floor (returning consideration to the unamended original bill), or replaced by a second substitute bill if it is rereferred to committee in the house of origin. While one house can amend the complete text of the other house's bill, it cannot substitute it.

64. *State v. Frampton*, 95 Wash. 2d 469, 477-78, 627 P.2d 922, 925-26 (1981) (citing *State v. Martin*, 94 Wash. 2d 1, 19, 614 P.2d 164, 173 (1980) (Horowitz, J., concurring)).

bill to strike "two years" and insert "four years."⁶⁵ Consideration of sequential drafts has been rejected or criticized in a few cases. In *Hama Hama Co. v. Shorelines Hearing Board*,⁶⁶ the majority rejected this approach:

The unstated assumption of such a sequential focus is that each subsequent draft is consciously, deliberately, and meticulously drafted in view of all of the language in each preceding draft. But as a very pragmatic, starkly realistic fact of life, the time constraints and pressures inherent in the legislative process may operate to prevent the legislature from functioning in such a deliberate and conscious fashion. . . .

This is not to imply that the sequential approach is per se an improper method of construction. On the contrary, it may serve as a useful tool under the appropriate circumstances, but even then its value should not be considered conclusive. In the instant case, the sequential approach is particularly of dubious value because the assumption on which the validity of the approach must rest—total legislative awareness of prior drafts—is negated by the fact that the [act] is replete with inconsistencies, errors, and apparent oversights.⁶⁷

Minority opinions in two other cases have continued this criticism of using sequential drafts.⁶⁸

65. *State ex rel. Fair v. Hamilton*, 92 Wash. 347, 352, 159 P. 379, 381-82 (1916).

66. 85 Wash. 2d 441, 536 P.2d 157 (1975).

67. *Id.* at 449-50, 536 P.2d at 162-63.

The court also quoted Radin, *supra* note 27, at 873: "Successive drafts of a statute are not stages in its development. . . . [W]e never really know why one gave way to any other. There were doubtless many reasons, some of them likely enough to be personal, arbitrary, and capricious. . . ." Subsequent decisions have cited *Hama Hama Co.* for the proposition that the sequential approach *is* valid, so long as the act is not replete with mistakes. See *State v. Martin*, 94 Wash. 2d 1, 19, 614 P. 2d 164, 173 (1980) (Horowitz, J., concurring).

68. See *Martin*, 94 Wash. 2d at 28-29 n.4, 614 P.2d at 178 n.2 (Rosellini, J., concurring); *State v. Frampton*, 95 Wash. 2d 469, 522-24, 627 P.2d 922, 949-50 (1981) (Dore, J., dissenting). In *Martin*, Justice Rosellini continued the criticism of the sequential approach: "It is not a proper judicial function to speculate upon and attribute controlling meaning to an unexplained change in legislative drafts that is just as likely to have occurred through happenstance. Seldom is there a reliable explanation for changes in legislative drafts available." 94 Wash. 2d at 29 n.4, 614 P.2d at 178 n.2. In his dissenting opinion in *Frampton*, Justice Dore argued against the sequential approach, even though in other cases he has strongly supported the use of legislative history. See, e.g., *Human Rights Comm'n v. Cheney School Dist. No. 30*, 97 Wash. 2d 118, 641 P.2d 163 (1982), discussed *infra* notes 77-78 and accompanying text. The majority in *Frampton* found significance in a Senate amendment which deleted a section of the original House death penalty bill. 95 Wash. 2d at 522, 627 P.2d at 949. Justice Dore argued that this was

In addition to examining drafts developed in seriatim in the process of enactment, Washington courts consider the sequence of how an act amends or relates to other prior acts and how sequential amendments enacted subsequently in other legislation affect the act in question.⁶⁹ They may also consider related bills in the same session of the legislature.⁷⁰

In most cases, it is proper for the courts to find significance when the legislature amends the language of a bill between the time it is introduced and the time it is finally enacted. When the legislature clearly and consciously makes a substantive choice to reject certain language and to replace it with other language, there should be a strong presumption that the legislative action is an indication of intent. For example, an amendment to replace a dollar figure with a different amount shows clear legislative intent, even if it is necessary to look beyond the language of the statute. But courts should also be aware of potential perils

irrelevant because the Senate's action in adopting a striking amendment to the entire House bill meant that the House bill was "dead" and that only the Senate amendment could be considered. This argument disregards the bicameral nature of the Washington State Legislature. He also objected to the comparison to the text of the original House bill because the text was not printed in the House *Journal* at the time of introduction. "Going behind the journals is not reliable for determination of legislative intent. . . ." *Id.* at 523, 627 P.2d at 950. This ignores the fact that the text of bills has never been printed in either the Senate or House *Journals* since the time of statehood. Under this theory, the court would be able to consider legislative colloquies, floor amendments, procedural aspects of committee reports, and parliamentary rulings, all of which are reproduced in the *Journals*, but not the *bill itself*. Justice Dore correctly noted that a variety of inferences could be drawn from the omission of the section and that therefore it was difficult to conclusively determine legislative intent. He then inferred intent from the *absence* of legislative colloquy. *Id.* at 523-24, 627 P.2d at 950.

69. "The entire sequence of statutes enacted by the same legislative authority, relating to the same subject matter, should be considered. . . ." *In re Marriage of Little*, 96 Wash. 2d 183, 189, 634 P.2d 498, 502 (1981); *see also* *State v. Zuanich*, 92 Wash. 2d 61, 71-79, 593 P.2d 1314, 1320-24 (1979) (Stafford, J., dissenting) (criticizing the majority for ignoring the history of the statute prior to the amendatory act in question); 2A C. SANDS, *supra* note 3, § 56.02.

Although relevant to the consideration of sequential drafts, prior and subsequent enactments are not considered part of legislative history as that term is narrowly used for the purposes of this Comment. *See supra* note 3.

70. *See State v. Turner*, 98 Wash. 2d 731, 737, 658 P.2d 658, 661 (1983) (companion and related bills in other house not enacted); *State ex rel. Troy v. Yelle*, 27 Wash. 2d 99, 107-08, 176 P.2d 459, 463-64 (1947) (amendments to bill tied to related amendments to appropriations bill); *Howlett v. Cheetham*, 17 Wash. 626, 633-34, 50 P. 522, 524 (1897) (subsequent amendment in same session to allegedly repealed statute); *Prante v. Kent School Dist. No. 415*, 27 Wash. App. 375, 381-82, 618 P.2d 521, 525 (1980) (relationships with appropriations bill). *See also Kammerer v. Western Gear Corp.*, 96 Wash. 2d 416, 428 n.3, 635 P.2d 708, 715 n.3 (1981) (Stafford, J., dissenting) (repeal of an act signed by Governor 19 days after signing original act).

in this approach. Change may not necessarily mean that the legislative intent is to reject the concept of the old language in favor of that of the new. The dangers in relying on word changes as a reflection of legislative intent are particularly apparent where an addition is made without a corresponding deletion,⁷¹ or vice versa;⁷² where an entire bill is stripped and replaced with entirely new language and unrelated concepts;⁷³ or where new language is adopted for procedural⁷⁴ or purely political reasons.⁷⁵

C. Bill Introductions

Washington courts have considered the mere introduction of bills as relevant evidence because the introduction of a bill may have probative value under certain circumstances.⁷⁶ In one

71. For example, the new language may represent an entirely unrelated concept with the old language merely serving as a vehicle to place the new concept before the legislature. Alternatively, the new language may merely repeat the same concept and serve as an affirmation rather than as an expression of change.

72. For example, the legislature may not intend any significance in the deletion because it believes the stricken language is redundant.

73. An amendment which strikes everything after the enacting clause and inserts substitute language is most frequently used by one house of the legislature on a bill originating in the other house. In some cases, it may merely serve to save time by considering a single comprehensive amendment instead of a series of minor amendments. It may also be used to enhance the bargaining position of one house against the other because it creates an "all or nothing" situation when the bill returns to the opposite house for concurrence. It may indicate a rejection of the concept of the original bill, but often serves as a means of presenting an independent concept instead of a replacement concept. The language of the amendment alone may not be sufficient for a court to infer whether the concept of an amendment replaces and rejects the original concept or whether it merely supplants the original concept with an independent one. In the latter case, adoption of the independent concept may not signify a rejection of the original one.

74. For example, a bill may be introduced but not passed in one house of the legislature. Language which is similar but not identical to the original bill may be offered as an amendment to an unrelated bill and enacted into law. The language of the amendment may represent a refined alternative replacing the original bill. However, it is also possible that the language was modified merely for procedural reasons, because internal legislative rules prohibit offering an amendment which is identical to a bill then before that house of the legislature. In the latter case, a court should not infer a legislative intent to distinguish between the language of the amendment and the language of the original bill.

75. For example, if the legislature adopts an amendment offered by a member of the majority party and rejects a similar amendment offered by a member of the minority party, a court should infer a legislative intent to distinguish between the language of the two amendments if there are valid substantive differences, but not if they are substantively identical.

76. See, e.g., *Kammerer v. Western Gear Corp.*, 96 Wash. 2d 416, 428 n.3, 635 P.2d 708, 715 n.3 (1981) (Stafford, J., dissenting) (failure of a bill introduced to authorize punitive damages mentioned in support of more direct evidence of rejection of the concept); *Automobile Drivers & Demonstrators Union Local No. 882 v. Department of Retirement Sys.*, 92 Wash. 2d 415, 421, 598 P.2d 379, 382 (1979), cert. denied, 444 U.S.

recent case, the Washington Supreme Court found significance in the introduction of a bill amending the statute in question, even though the amendatory bill was introduced twenty years after enactment of the statute.⁷⁷ Moreover, the amendatory language was totally unrelated to the subject matter of the statute and the bill never even came to a vote in either house of the legislature.⁷⁸ In another recent case, the dissent argued that bills introduced but not yet enacted at the time of the decision demonstrated a legislative intent to distinguish between a real gun and something which only appears to be a deadly weapon.⁷⁹ This argument was not discussed in either of the court's other

1040 (1980) (issue raised repeatedly); Puget Sound Gillnetters Ass'n v. Moos, 88 Wash. 2d 677, 683, 565 P.2d 1151, 1154 (1977), *vacated on other grounds*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1978) (introduction of department-request legislation as evidence of department's administrative construction of statute); *In re Bale*, 63 Wash. 2d 83, 89, 385 P.2d 545, 548 (1963) (parenthetical mention of failure to act on bills introduced in three consecutive Legislatures to overturn an administrative construction of a statute; introduction has "some probative value"). *Puget Sound Gillnetters* is also of interest because it cites a newspaper article as evidence of administrative intent to request a bill introduction. 88 Wash. 2d at 683, 565 P.2d at 1154.

77. See *Human Rights Comm'n v. Cheney School Dist.* No. 30, 97 Wash. 2d 118, 121-24, 641 P.2d 163, 164-66 (1982). Writing for the court, Justice Dore first examined the 1957 statute and legislative *Journals* to determine whether the Human Rights Commission had the authority to award damages for humiliation and mental suffering. In the absence of any evidence of legislative intent on this point, he then considered a 1977 bill to change the Commission's "tribunal" to an administrative law judge. *Id.* at 121, 691 P.2d at 164.

78. The 1977 bill replacing the agency's tribunal structure with an administrative law judge passed out of committee in the house of origin and was amended and debated on the floor, but was then rereferred to committee. Although the court acknowledged that there was never any discussion of the authority to assess damages, it found that the "rejection" of the bill implied that the legislature did not want the tribunal to have the power to award such damages. *Id.* at 123, 691 P.2d at 166. The legislature responded to this decision in 1983 by specifically granting authority to award limited damages for humiliation and mental suffering. Act of May 17, 1983, ch. 293, § 1, 1983 Wash. Laws 1422.

79. *State v. Hentz*, 99 Wash. 2d 538, 548, 663 P.2d 476, 481 (1983) (Dolliver, J., dissenting). The author, prime sponsor of one of these bills, specifically sought to avoid having the introduction of the bill influence the case then under consideration. He planned a floor colloquy at the time of the introduction of the bill to state that there was no intent to either confirm or repudiate the lower court's interpretation of the statute in question. After discussions with the Chief Clerk of the House and others, he chose not to do so because a colloquy at that particular time would have disrupted proceedings, because the companion Senate bill had already been introduced without a similar colloquy, and because it seemed too speculative that the court would misuse the mere introduction of a bill as evidence of legislative intent. The companion Senate bill has now been enacted. Act of April 22, 1983, ch. 73, 1983 Wash. Laws 433.

opinions.⁸⁰

In addition to the introduction of a bill by a legislator, Washington courts have treated comments by nonlegislative initiators or authors of the bill as relevant aspects of legislative history. For example, the courts have considered a letter and minutes of testimony from the head of an administrative agency recommending legislation that was ultimately enacted five years later.⁸¹ They have also cited a Governor's inaugural address urging the legislature to pass a bill.⁸² The courts have also referred to officially published comments to a section taken from a uniform act⁸³ or patterned after a model act.⁸⁴

Although there may be isolated circumstances where the introduction of a bill has probative value, there is tremendous potential for abuse and misinterpretation by the courts. Consideration of introductions also invites creative legislators to attempt misleading the courts by introducing bills merely for the purpose of suggesting legislative intent without any actual intent to pass the bill.⁸⁵ Court consideration of bill introductions also creates legislative dilemmas. If a bill is introduced to expressly reject a court's decision, but does not pass, there is a risk that the court may conclude from this inaction that the legislature agrees with the decision. This ignores the multitude of reasons why a bill does not pass, including simply a lack of time. Yet, if a corrective bill is not introduced, the court may also conclude that the legislature agrees with the judicial interpretation. In the absence of exceptional circumstances, courts should refrain from attaching significance to the mere introduction of a bill in the legislature. The potential for abuse and misinterpretation is too great. In the rare circumstances where a court finds it appropriate to consider a bill introduction as evidence, it should

80. *State v. Hentz*, 99 Wash. 2d 538, 663 P.2d 476 (1983) (plurality opinion); 99 Wash. 2d at 546, 663 P.2d at 480 (Dore, J., concurring).

81. *State v. Coma*, 69 Wash. 2d 177, 184-85, 417 P.2d 853, 857-58 (1966).

82. *State v. Conifer Enter., Inc.*, 82 Wash. 2d 94, 96, 508 P.2d 149, 151 (1973).

83. *In re Marriage of Little*, 96 Wash. 2d 183, 191-92, 634 P.2d 498, 503 (1981).

84. *McCarver v. Manson Park & Recreation Dist.*, 92 Wash. 2d 370, 374, 597 P.2d 1362, 1364 (1979).

85. If courts are to place much weight on the mere introduction of a bill or the failure to pass a bill, perhaps the legislature could respond by resorting to an anomaly. If a legislator sought to overturn a decision, but feared the lack of time or support to accomplish his or her purpose, perhaps the legislator should introduce legislation directly opposite to his or her actual intent (i.e., confirming the decision) and then "kill" the bill. This would demonstrate legislative rejection of the court's position. It is much easier to kill a bill in the legislature than to pass one. *See also* text accompanying notes 127-37.

set forth a clear rationale and should indicate the circumstances which justify giving any weight to such evidence.

D. Committee Work

Once a bill is written and introduced, it is almost always referred to a committee. Courts recognize that much of the work of a legislative body is done at the committee level, and accordingly give great weight to the report of the legislative committee recommending passage of a bill.⁸⁶ Washington courts have recognized a variety of committee materials, but surprisingly few cases cite actual committee reports.⁸⁷

From a functional standpoint, the "Bill Report"⁸⁸ serves as a substantive committee report. This document describes the purpose and substance of the bill. It is prepared by committee staff when a bill is signed out of committee. Washington courts, however, have referred to Bill Reports relatively infrequently.⁸⁹

86. G. FOLSOM, *supra* note 1, at 33; *see also* Zuber v. Allen, 396 U.S. 168, 186 (1969).

87. In the Washington State Legislature, committee reports are technically mere procedural recommendations such as "Do pass as amended" listing the number of committee members who signed the report. This is recorded in the *Journal* with no substantive comment on the bill.

88. A Bill Report is prepared by committee staff after a bill is voted out of committee in each house, but is not specifically reviewed or voted on by the committee or the committee chairperson. It is prepared in typewritten form and also entered on the Legislative Information System (LIS) computer. When a bill is scheduled for floor action by the Rules Committee, the Bill Report is published in the daily Calendar and distributed on the floor to all members of the legislature prior to the amendatory process of Second Reading and the vote on final passage during Third Reading. Along with the actual text of the bill and any amendments or any "Fiscal Note," this is the only document which all members of the legislature consistently have before them at the time of the vote on the floor. Individual legislators frequently raise a "Point of Order" on the floor and object if these documents are not before them at the time a bill is brought up for consideration.

A typical Bill Report currently includes a background statement, a summary of the provisions of the bill, a summary of changes made in committee by amendment or by adoption of a substitute bill, and references to other relevant documents such as fiscal notes. The Bill Report also contains a list of proponents and opponents who testified before the committee and a very brief outline of arguments made pro and con, although some of this information may not be entered in the LIS computer or in the daily floor Calendar. Occasionally, the Bill Report will also contain a Minority Report signed by dissenting committee members and sometimes giving their reasoning, but there is no corresponding Majority Report with accompanying rationale. For the purposes of this Comment, the term "committee report" refers to the Bill Report.

89. For cases in which Bill Reports were cited and used by the courts, *see, e.g.*, Washington Fed'n of State Employees v. State, 98 Wash. 2d 677, 685 n.10, 658 P.2d 634, 638 n.10 (1983); State v. Sherman, 98 Wash. 2d 53, 59 n.3, 653 P.2d 612, 616 n.3 (1982); Kucher v. County of Pierce, 24 Wash. App. 281, 287 n.4, 600 P.2d 683, 687 n.4 (1979).

The infrequency of citations to Bill Reports is partially due to the fact that the

In one Washington Supreme Court case, the dissent extensively quoted a Bill Report as evidence of legislative intent to overturn an earlier case altering the standards of negligence in medical malpractice.⁹⁰ The majority did not discuss the Bill Report, but instead relied on a change in wording to distinguish the intent of the substitute bill from that of the original bill.⁹¹ In a subsequent case, the Washington Court of Appeals criticized the dissent's use of the Bill Report.⁹² Shortly before taking a seat on the Washington Supreme Court, Judge Dore treated the Bill Report as an "alleged committee report" and determined that the language quoted by the dissent did not appear in the actual committee report published in the *Journal*.⁹³ Without citing any authority, he concluded that "[a]ny memos, reports, or statements not contained in a written committee report read into the journal, cannot be used to interpret legislative intent in passing the measure."⁹⁴ Because the legislature has not published Bill Reports in the *Journal*, adoption of this standard would preclude court consideration of such substantive committee reports.

In addition to Bill Reports, Washington courts have also recognized reports prepared by a legislative committee conducting an interim study between legislative sessions.⁹⁵ They have also cited other materials issued officially by committees,

documents are not published and consequently may not be located by lawyers and brought to the attention of the court.

90. *Gates v. Jensen*, 92 Wash. 2d 246, 256, 595 P.2d 919, 925 (1979) (Dolliver, J., dissenting).

91. *Gates*, 92 Wash. 2d at 253-54, 595 P.2d at 925.

92. *LeBeuf v. Atkins*, 28 Wash. App. 50, 53 n.1, 621 P.2d 787, 788 n.1 (1980).

93. *Id.*

94. *Id.*

95. See *Kammerer v. Western Gear Corp.*, 96 Wash. 2d 416, 428 n.3, 635 P.2d 708, 715 n.3 (1981) (Stafford, J., dissenting) (Report of the Committee on the Law of Damages to the Washington State Legislature); *State v. Coma*, 69 Wash. 2d 177, 185, 417 P.2d 853, 858 (1966) (recommendation of Legislative Council). In *Green River Community College v. Higher Educ. Personnel Bd.*, 95 Wash. 2d 108, 116 n.3, 622 P.2d 826, 831 n.3 (1980), the report of the Temporary Advisory Council on Higher Education, appointed by the legislature and composed of both legislators and nonlegislators, was found to be "probative of the legislature's intent." The dissent also discussed the report, but reached a different conclusion in interpreting the recommendation. *Green River*, 95 Wash. 2d at 122, 622 P.2d at 834 (Brachtenbach, J., dissenting). The courts have also recognized the report of an interim select committee, regardless of whether the legislature took the unusual step of entering the text of the report in the *Journal*. Compare *Glover v. Tacoma Gen. Hosp.*, 98 Wash. 2d 708, 716, 658 P.2d 1230, 1235 (1983) (citing the Senate Select Committee on Tort Reform and Product Liability Reform Final Report) with *Sahlie v. Johns-Manville Corp.*, 99 Wash. 2d 550, 554, 663 P.2d 473, 475 (1983) (citing the report of the same committee in the *Senate Journal*).

even when issued *after* enactment.⁹⁶ Courts have recently turned to staff memoranda for further evidence of legislative intent. In some cases, the memoranda are not clearly identified and may actually be committee reports.⁹⁷ In one case, the court cited a staff memorandum to the entire committee.⁹⁸ In another case, the court quoted from one staff memorandum to an individual committee member and also cited other memoranda both to committee chairpersons and to other individual committee members.⁹⁹

Courts have also been willing to take into account individual testimony at committee meetings. This includes the comments of legislators,¹⁰⁰ staff,¹⁰¹ and other nonlegislators.¹⁰² Even letters in the committee files from individual nonlegislators have been considered.¹⁰³ Although it may be desirable to accord considerable weight to these items in certain contexts, it would be helpful if the courts more clearly acknowledge the scope of the

96. See *State v. Turner*, 98 Wash. 2d 731, 737, 658 P.2d 658, 661-62 (1983) ("Committee Analysis" of both House and Senate committees); *Kucher v. County of Pierce*, 24 Wash. App. 281, 287 n.4, 600 P.2d 683, 687 n.4 (1979) ("Summary of Enacted Laws of Interest to Bench and Bar" issued by Senate Judiciary Committee).

97. See *State v. Anderson*, 94 Wash. 2d 176, 187, 616 P.2d 612, 617-18 (1980).

98. See *State v. Douty*, 92 Wash. 2d 930, 937, 603 P.2d 373, 376 (1979).

99. See *State v. Turner*, 98 Wash. 2d 731, 737-38, 658 P.2d 658, 661-62 (1983). The quantity of legislative materials evidencing a consistent legislative intent appears to justify the use of private communications in this case.

100. See *State v. Anderson*, 94 Wash. 2d 176, 187-88, 616 P.2d 612, 617-18 (1980) (transcript of Senate standing committee meeting); *School Funding II*, *supra* note 38, at 46, 56, 107, 112, 115. These cases do not clearly identify whether the committee meetings were public hearings, work sessions, or executive sessions, and do not indicate whether the comments were made by legislators as witnesses or as committee members engaged in debate. Another case recognizes "recorded discussion" before a committee without identifying whether the speakers were legislators or not. *State v. Sherman*, 98 Wash. 2d 53, 59 n.3, 653 P.2d 612, 616 n.3 (1982).

101. See *State v. Turner*, 98 Wash. 2d 731, 737-38, 658 P.2d 658, 661-62 (1983) (tape-recording from State Archives of Senate committee hearing). Courts have even recognized a post-enactment affidavit from the former staff of a legislative committee. See *State v. Coma*, 69 Wash. 2d 177, 185, 417 P.2d 853, 858 (1966).

102. See *State v. Turner*, 98 Wash. 2d 731, 737-38, 658 P.2d 658, 661-62 (1983) (tape-recording); *State v. Anderson*, 94 Wash. 2d 176, 187-88, 616 P.2d 612, 617-18 (1980) (transcript) (citing general beliefs of persons attending committee meeting); *State v. Coma*, 69 Wash. 2d 177, 184, 417 P.2d 853, 858 (1966) (committee minutes of testimony).

103. *State v. Herrmann*, 89 Wash. 2d 349, 354, 572 P.2d 713, 715 (1977) (letter from former State Attorney General 26 years after enactment); *State v. Coma*, 69 Wash. 2d 177, 184, 417 P.2d 853, 857-58 (1966) (letter from agency administrator requesting legislation); *State v. Runions*, 32 Wash. App. 669, 676 n.13, 649 P.2d 144, 148 n.13 (1982) (Reed, J., dissenting) (letter from prosecutor regarding bill which became model for court rules under consideration).

evidence they will consider and identify the capacity in which the individual testified.

E. Floor Action

Washington courts frequently, but inconsistently, recognize floor debate as having evidentiary value. Floor debate on a bill typically occurs after a bill emerges from committee and reaches the floor for consideration by an entire house of the legislature. Colloquies¹⁰⁴ are cited most often, perhaps because they are routinely published in the *Journal* and thus are most accessible to lawyers and to the courts. Most legislators are probably aware that the question-and-answer process on the floor is transcribed and published and used by the courts in determining legislative intent. Legislators often use the colloquy specifically for this purpose,¹⁰⁵ although they may use it for other purposes as well.¹⁰⁶ Although courts sometimes attempt to restrict their use of colloquies to speeches by proponents, sponsors, or committee

104. See *supra* note 39.

105. The legislative colloquy may be spontaneous and relatively informal, or it may be planned for deliberate reasons. For example, there was an informal agreement that no substantive House amendments would be adopted in the 1983 revisions to the State Environmental Policy Act (SEPA), S.B. 3006, 48th Leg. (1983). Instead, both proponents and opponents negotiated to clarify legislative intent through the use of an extended colloquy. Both sides knew of the planned colloquy and referred to the forthcoming colloquy during their floor remarks.

Another example involved a bill to restore certain administrative authority to the Tacoma Human Rights Commission. H.B. 100, 47th Leg. (1981) (ultimately enacted as an amendment to S. B. 3704). A problem arose because the bill could have been construed to preempt the authority of the Seattle Human Rights Commission on "gay rights." If this issue had been addressed directly, the bill could not have passed for political reasons. Therefore, the prime sponsor of the bill arranged for colloquies in both the Senate and House to clarify that the proposed legislation was intended to expand local authority rather than to preempt it, using examples on subjects other than "gay rights." When it became apparent that the original bill was not going to pass, the sponsor amended the same language on another bill and repeated the question-and-answer process, referencing the earlier colloquy on the original bill. The value of this planned colloquy was demonstrated when the Attorney General subsequently issued an opinion carefully following all the tracks which the sponsor had intentionally laid. See 1981 Wash. Op. Att'y Gen. No. 14, at 5-7. There is no guarantee that the answer provided in a legislative colloquy is well thought-out, informed, or accurate. Colloquies vary widely. See also Moorehead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 A.B.A. J. 1314 (1959).

106. Legislators routinely use colloquies for a variety of purposes, including jokes, intimidation or embarrassment of an opponent, the quest for simple factual information, feeling out the receptiveness of another legislator to an amendment, conveying an argumentative position, circumventing time limitations on debate, or stalling.

members carrying the bill,¹⁰⁷ they may not know or identify the capacity in which the legislator is speaking.¹⁰⁸ This also applies to legislative debate outside of the colloquy process. General floor debate has been cited,¹⁰⁹ but state courts have not specifically discussed the weight which it should receive. Courts have also specifically allowed evidence of debate at a constitutional convention.¹¹⁰ In addition to floor debate, even the actual floor vote has been considered.¹¹¹

An argument can be made that colloquies should receive greater weight than other floor remarks because most legislators know that they will be published. Yet, most explanatory remarks on bills are initially made by the sponsor or committee chair without resort to the colloquy. Because these floor remarks are made in open session before the public, are recorded and available for transcription, and for the variety of motives underlying

107. While statements and opinions of individual legislators generally are not considered by the courts in construing legislation, statements made in answer to questions on the floor by the chairman of the committee in charge of the bill may be taken as the opinion of the committee as to the meaning of the bill.

Snow's Mobile Homes, Inc. v. Morgan, 80 Wash. 2d 283, 291, 494 P.2d 216, 221 (1972).

See also, *International Paper Co. v. Department of Revenue*, 92 Wash. 2d 277, 283-84, 595 P.2d 1310, 1313-14 (1979) (Rosellini, J., dissenting) (vice-chairman and sponsor of amendment); *State v. Zuanich*, 92 Wash. 2d 61, 79-83, 593 P.2d 1314, 1324-26 (1979) (Stafford, J., dissenting) (bill cosponsor and committee chairman); *Prante v. Kent School Dist. No. 415*, 27 Wash. App. 375, 381, 618 P.2d 521, 524-25 (1980) (chairman).

108. See, e.g., *Human Rights Comm'n v. Cheney School Dist. No. 30*, 97 Wash. 2d 118, 122-23, 641 P.2d 163, 165-66 (1982) (chairman, but not identified as such in the decision); *Emwright v. County of King*, 96 Wash. 2d 538, 545, 637 P.2d 656, 660 (1981) (chairman, but not identified as such in the decision); *Prante v. Kent School Dist. No. 465*, 27 Wash. App. 375, 381, 618 P.2d 521, 524-25 (1980); *Kucher v. County of Pierce*, 24 Wash. App. 281, 285-86, 600 P.2d 683, 686 (1979).

Kucher is remarkable for quoting in full a question-and-answer sequence which appears to be a joke. The only relevance apparent is that the punch-line was delivered by an ex-legislator then serving as a fellow judge on the court of appeals.

109. See, e.g., *Washington Fed'n of State Employees v. State*, 98 Wash. 2d 677, 685, 658 P.2d 634, 638 (1983); *Department of Transp. v. State Employees' Ins. Bd.*, 97 Wash. 454, 459, 645 P.2d 1076, 1079 (1982).

110. See *Yelle v. Bishop*, 55 Wash. 2d 286, 292-94, 347 P.2d 1081, 1085-86 (1959). Because the minutes of the 1889 constitutional convention were incomplete, the court relied on a newspaper's "first-hand account of a contemporaneous event." *Id.* at 292, 347 P.2d at 1085.

111. The court considered the vote count of 42-1 in the Senate and 85-0 in the House to be "informative" in *Prante v. Kent School Dist. No. 415*, 27 Wash. App. 375, 386, 618 P.2d 521, 527 (1980). In another case, the dissent noted the closeness of a vote. *Thurston v. Greco*, 78 Wash. 2d 424, 443, 474 P.2d 881, 892 (1970) (Rosellini, J., dissenting). There is little justification for considering any vote count. Would it be more informative or less informative if the vote count were 25-24 and 50-48? Informative of what?

colloquies,¹¹² there appears to be little reason for categorically assigning any greater weight to colloquies as opposed to general remarks during debate.

F. Events Subsequent to Passage

Events subsequent to legislative passage but prior to enactment are also considered to be relevant legislative history. When vetoing or signing a bill, the Governor acts in a legislative capacity.¹¹³ Therefore, correspondence between the Governor and the Attorney General regarding legal advice in interpreting a bill prior to signing is relevant,¹¹⁴ as is a Governor's veto message.¹¹⁵ Courts will also take notice of a law which never took effect because of the failure of a proposed constitutional amendment.¹¹⁶ When legislation must go to a vote of the people—a constitutional amendment, initiative, or referendum—courts also have referred to arguments published by the state in the official voter's pamphlet.¹¹⁷

With rare and unexplained exceptions,¹¹⁸ courts have refused to consider post-enactment statements by participants

112. See *supra* note 106.

113. *Lynch v. Department of Labor & Indus.*, 19 Wash. 2d 802, 810-11, 145 P.2d 265, 269 (1944); *State v. Brasel*, 28 Wash. App. 303, 309, 623 P.2d 696, 699 (1981).

114. *Lynch*, 19 Wash. 2d at 810-11, 145 P.2d at 269.

115. *State v. Brasel*, 28 Wash. App. 303, 309, 623 P.2d 696, 699 (1981).

116. *School Funding II*, *supra* note 38, at 112.

117. See *Marchioro v. Chaney*, 90 Wash. 2d 298, 305, 307, 582 P.2d 487, 491, 492 (1978), *aff'd*, 442 U.S. 191 (1979) (constitutional amendment); *Port of Longview v. Taxpayers*, 85 Wash. 2d 216, 231-32, 533 P.2d 128, 129 (1974) (constitutional amendment); *State ex rel. Pub. Util. Dist. No. 1 v. Wylie*, 28 Wash. 2d 113, 127-31, 182 P.2d 706, 714-16 (1947) (conflicting interpretations in arguments on initiative; majority vote indicates prevailing argument); *Lynch v. Department of Labor & Indus.*, 19 Wash. 2d 802, 811-13, 145 P.2d 265, 269-71 (1944) (presumption voters relied on argument in referendum); *Bayha v. Public Util. Dist. No. 1*, 2 Wash. 2d 85, 98-99, 97 P.2d 614, 620-21 (1939) (initiative); *Denny v. Wooster*, 175 Wash. 272, 279, 27 P.2d 328, 330 (1933) (initiative).

118. One dissenting opinion cited a speech by a legislator at a symposium on a recently enacted law which discussed the extensive legislative history of the act. The majority opinion recognized neither the speech nor much of the legislative history. See *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wash. 2d 441, 461, 536 P.2d 157, 170 (1975) (Horowitz, J., dissenting).

One opinion cited the post-enactment affidavit from the former staff of a legislative committee. *State v. Coma*, 69 Wash. 2d 177, 185, 417 P.2d 853, 858 (1966). Another opinion cited the testimony before a legislative committee of the author of an initiative measure under consideration, even though the testimony occurred thirteen years after the initiative and five years before the court's decision. *State ex rel. Pub. Util. Dist. No. 1 v. Wylie*, 28 Wash. 2d 113, 129, 182 P.2d 706, 715 (1947).

as to what the legislative intent was at the time of enactment.¹¹⁹ The classic case rejecting post-enactment statements of legislative intent is *City of Spokane v. State*,¹²⁰ in which the court refused to admit depositions of the Governor, Speaker of the House, and chairmen of the relevant House and Senate committees, along with affidavits of 33 Senators and 68 Representatives in one Legislature and of 33 Senators and 70 Representatives in the succeeding Legislature. Post-enactment affidavits by individual legislators have since consistently been rejected.¹²¹

Another inconsistency may result when courts admit law review articles, but not other post-enactment evidence from participants in the legislative process. The problem occurs when a participant writes the law review article. In at least two cases, the court cited such an article without mentioning that the author played a major role in drafting the act which the court was interpreting.¹²² In another case, the court cited the article, but also acknowledged that the author was sponsor of the bill and chairperson of the committee which studied the problem.¹²³ The court further acknowledged that citing opinions in the article conflicted with the rule against relying on a legislator's post-enactment statements of intent, but still found the historical background described in the article to be "instructive."¹²⁴

119. This approach is contrary to that used in California, where post-enactment testimony of individual legislators is allowed to objectively reiterate legislative events, but not to subjectively report opinion, intentions, or motive. This approach is strongly criticized in *California*, *supra* note 2. See also Smith, *supra* note 7.

120. 198 Wash. 682, 685-87, 89 P.2d 826, 828-29 (1939).

121. "[O]ne cannot rely on affidavits or comments of individual legislators to establish legislative intent. What may have been the intent of an individual legislator may not have been the intent of the legislative body that passed the act." *Johnson v. Continental West, Inc.*, 99 Wash. 2d 555, 560-61, 663 P.2d 482, 485 (1983). See also *Woodson v. State*, 95 Wash. 2d 257, 264, 623 P.2d 683, 686-87 (1980); *Pannell v. Thompson*, 91 Wash. 2d 591, 598, 589 P.2d 1235, 1239-40 (1979); *State v. Leek*, 26 Wash. App. 651, 657-58, 614 P.2d 209, 212-13 (1980) (emphasizing *individual* affidavits (as opposed to committee chairman) not made at the time the legislature considered the proposal).

The U.S. Court of Appeals has also specifically rejected a post-enactment affidavit from a single legislator. "[T]he affidavit of a single legislator . . . might be entitled to some weight if it had been made contemporaneously with the passage of the legislation. Coming one year later, it is entitled to no weight and cannot be relied on as indicative of legislative motivation or intent." *American Constitutional Party v. Munro*, 650 F. 2d 184, 188 (9th Cir. 1981).

122. See *Glass v. Stahl Specialty Co.*, 97 Wash. 2d 880, 888, 652 P.2d 948, 954 (1982); *In re Marriage of Little*, 96 Wash. 2d 183, 192, 634 P.2d 498, 503 (1981).

123. *Johnson v. Continental West, Inc.*, 99 Wash. 2d 555, 560, 663 P.2d 482, 486 (1983).

124. *Id.* at 560-61, 663 P.2d at 485.

Although courts generally reject post-enactment statements by individuals, they have considered other post-enactment documents from committee staff¹²⁵ or other legislative sources, including the Legislative Report.¹²⁶ Although these documents are prepared by theoretically independent legislative staff and not by legislators with individual biases, the distinction could easily become blurred.

G. Failure of the Legislature to Act

The aspect of legislative history that appears to give the courts the most difficulty is the failure of the legislature to act under specific circumstances. Washington courts have considered the failure to amend the statute in a subsequent bill,¹²⁷ the rejection of a minority report urging statutory change,¹²⁸ the rejection of amendments to a bill,¹²⁹ the failure to repudiate administrative or judicial constructions,¹³⁰ the failure to correct

125. See *supra* note 96.

126. *Johnson*, 99 Wash. 2d at 561-62, 663 P.2d at 486; see *infra* note 147.

127. See, e.g., *Human Relations Comm'n v. Cheney School Dist. No. 30*, 97 Wash. 2d 118, 121-24, 641 P.2d 163, 163-65 (1982) (discussed *supra* notes 77-78 and accompanying text); *Clallam County Deputy Sheriff's Guild v. Board of Clallam County Comm'rs*, 92 Wash. 2d 844, 851, 601 P.2d 943, 946 (1979) (questionable dicta finding "probative value" when a bill failed to pass the Senate Rules Committee in the waning days of a legislative session and, therefore, could not be scheduled on the Senate floor calendar); *Strunk v. State Farm Mut. Auto. Ins. Co.*, 90 Wash. 2d 210, 213-14, 580 P.2d 622, 624 (1978) (bill vetoed by Governor); *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wash. 2d 283, 291, 494 P.2d 216, 220-21 (1972).

128. See *Kammerer v. Western Gear Corp.*, 96 Wash. 2d 416, 428 n.3, 635 P.2d 708, 715 n.3 (1981) (Stafford, J., dissenting).

129. See *Ayers v. City of Tacoma*, 6 Wash. 2d 545, 557-58, 108 P.2d 348, 353 (1940) (tabling amendment to title of a bill in one house after the other house had already adopted a different title amendment); *State v. Edmonds Mun. Ct.*, 27 Wash. App. 762, 765, 621 P.2d 171, 173 (1980) (rejecting proposed amendments to the Justice Court act); *School Funding II*, *supra* note 38, at 84 (rejecting a proposed amendment to the Basic Education Act, even though the actual bill then used as a vehicle, see *infra* note 143, was not the bill which ultimately passed).

130. See, e.g., *Department of Transp. v. State Employees' Ins. Bd.*, 97 Wash. 2d 454, 462, 645 P.2d 1076, 1080 (1982) (failure to repudiate statutory construction employed by agencies entitled to great weight when statute was amended five times in prior years without altering construction); *Washington Educ. Ass'n v. Smith*, 96 Wash. 2d 601, 606, 638 P.2d 77, 80 (1981) (legislative acquiescence to Attorney General's interpretation where lobbying organization admitted unsuccessful attempts to amend statute); *Green River Community College v. Higher Educ. Personnel Bd.*, 95 Wash. 2d 108, 117-18, 622 P.2d 826, 832 (1980) (act amended six times in five separate years without disturbing administrative interpretation); *Ellis v. Department of Labor & Indus.*, 88 Wash. 2d 844, 855, 567 P.2d 224, 229 (1977) (Hicks, J., dissenting) (failure to pass bill altering judicial construction).

an unconstitutional act,¹³¹ the rejection of a companion bill,¹³² and the subsequent repeal of an act.¹³³ Courts have even evaluated the alleged absence of intent in certain bills.¹³⁴

Court decisions based on the failure of a legislative body to act, however, have long been criticized.¹³⁵ Notwithstanding the questionable value to be accorded legislative inaction, Washington courts have not been consistent. In some cases, they have refused to find significance in legislative silence. They have rejected the evidentiary value of the failure to adopt an amendment or enact a bill,¹³⁶ and have at times found no significance in the failure to repudiate an administrative or judicial construction of a statute.¹³⁷ Washington courts have not yet enunciated a clear policy as to when they will find significance in legislative inaction.

III. FINDING LEGISLATIVE HISTORY IN WASHINGTON

When confronted with potential ambiguity in a state statute, the researcher should take at least some initial steps to trace the legislative history of the statute.¹³⁸ The first step is to compare the statute in question with prior or subsequent versions of the same statute. Language changes in sequential stat-

131. See *School Funding II*, *supra* note 38, at 119, 124.

132. See *State v. Turner*, 98 Wash. 2d 731, 737 & n.3, 658 P.2d 658, 661 & n.3 (1983).

133. See *Kammerer v. Western Gear Corp.*, 96 Wash. 2d 416, 428 n.3, 635 P.2d 708, 715 n.3 (1981) (Stafford, J., dissenting) (act repealed thirteen days after signed by Governor). Although the repeal of an act is not normally considered the same as a legislative failure to act, it appears analogous under the unique circumstances of this case.

134. In *Human Rights Comm'n v. Cheney School Dist.* No. 30, 97 Wash. 2d 118, 121, 641 P.2d 163, 164 (1982), the court somehow inferred the lack of authority for an administrative body to award certain damages from the absence of such mention in the 1957 *Journal*. See also *School Funding II*, *supra* note 38, at 77.

135. "There could hardly be less reputable legislative material than legislative silence." R. DICKERSON, *supra* note 3, at 181-82. See also, e.g., H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1394-1401 (1958).

136. See, e.g., *Buchanan v. International Bhd. of Teamsters*, 94 Wash. 2d 508, 518-20, 617 P.2d 1004, 1008-10 (1980) (Horowitz, J., dissenting) ("legislators express intent by enacting statutes, not by remaining silent"); *Murphy v. Department of Licensing*, 28 Wash. App. 620, 624-25, 625 P.2d 732, 734-35 (1981).

137. See *Jepson v. Department of Labor & Indus.*, 89 Wash. 2d 394, 400, 406-07, 573 P.2d 10, 14 (1977); *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wash. 2d 441, 459-60, 536 P.2d 157, 167-68 (1975) (Horowitz, J., dissenting).

138. For purposes of this discussion, this Comment assumes that a lawyer has already taken the normal steps of checking other relevant statutes, regulations, and cases.

utes may be indicated in the *Revised Code of Washington Annotated* ("RCWA"). The RCWA will also indicate the year the statute was enacted or amended. Direct evidence of language changes is found in amendatory acts recorded in the appropriate volumes of session laws.¹³⁹ Session laws will reveal the statute as enacted, including any amendments to the prior statute, but will not show any internal legislative history as to the metamorphosis of the amendatory act, either in the legislature or by partial veto of the Governor.

Consulting the session laws will also reveal how the legislature grouped and considered potentially interrelated sections of a bill. The organization reflected in the session laws may be lost when the statute is codified. Moreover, only the session laws will reveal whether a challenge to the statute is feasible under the state constitution because of a potential defect in the title or multiple subjects in the bill,¹⁴⁰ or because the bill amends other statutes by reference.¹⁴¹ Consulting the session laws will also reveal the bill number¹⁴² of the measure as it proceeded through the legislature. The bill number is necessary for checking internal legislative history of an act, whether the act was composed entirely of new sections or whether it was an amendatory act. The bill number for each Legislature is the basic unit for the organization of information within the legislature.¹⁴³

139. Session laws are published by both the Statute Law Committee of Washington State and by West Publishing Company. Each session of the legislature is considered separately, even when they are in the same year, and each law is numbered sequentially for each session. Under present practice, new sections are indicated in underlining at the beginning of the section, new language in an amended section is underlined, and deleted language in an amended section is in parentheses and crossed out. Each edition of the Revised Code of Washington lists, at the end of each section, prior amendatory acts to the section by reference to session law chapter and section. Subsequent amendatory acts can be located by referring to tables and indices in subsequent volumes of session laws.

140. WASH. CONST. art. II, § 19.

141. *Id.* § 37.

142. Bill numbers reveal the house in which the act originated (i.e., House bill or Senate bill). An "engrossed bill" or "reengrossed bill" is one which has been amended on the floor of the house of origin. A substitute bill, as discussed *supra* note 63, has also been amended in the house of origin. However, a bill which is labeled House Bill No. X, as opposed to Engrossed House Bill No. X or Substitute House Bill No. X, does not necessarily mean that the bill has *not* been amended. The label only reflects actions taken in the house of origin, not in the opposite house.

Currently, House bills are numbered sequentially for each two-year Legislature beginning with House Bill No. 1; Senate bills are numbered beginning with Senate Bill No. 3001. In previous years, the numbering sequence has varied for Senate bills.

143. In a few cases, the bill number may be misleading. A bill in the legislature may serve purely as a vehicle—substantive work may have been done on another bill and

Once the bill number has been identified, the next step should be to consult the legislative history listed in the *Legislative Digest and History of Bills*.¹⁴⁴ It will show the sponsors of the bill, the committees to which the bill was referred, any recommendations by the committees, whether any amendments or substitute bills were adopted on the floor of either house, vetoes, and other pertinent information. It will not show any public hearings, work sessions, or executive sessions by a committee other than the committee's final recommendation. Because sequential drafts of a bill may be significant,¹⁴⁵ the identification of any amendments or substitute bills may be important. The *Legislative Digest and History of Bills* provides the easiest source to determine whether any amendments or substitute bills were adopted, although it will not reveal whether any amendments were defeated or disclose the substance of the amendments adopted. In most cases, the *Legislative Digest and History of Bills* provides a quick key to determine at what stage of the legislative process any amendments were adopted, thereby significantly narrowing the attorney's research. Also, Washington courts have cited this publication as evidence of the procedural history of a bill.¹⁴⁶

Next, the researcher may find it worthwhile to check the *Legislative Report*¹⁴⁷ for a summary of the bill's purpose and

then transferred by amendment in place of or in addition to the language of the bill serving as the vehicle. This frequently happens with major items in dispute between the two houses, especially budget and revenue bills. It may also happen on other subjects when one bill gets "stuck" in the second house after passing the first house and the first house amends a bill originating in the second house to try to force the second house to concur. In these situations, the legislative history of the original bill should be relevant, even though never enacted into law under the original bill number. These situations can usually be identified by checking the index of the *Legislative Digest and History of Bills* for all relevant bills on the subject matter, checking the history of related bills to see if they made significant progress through the legislative process, and then comparing the language of the bills in question.

144. During the legislative session, the *Legislative Digest and History of Bills* is published in a series of editions with periodic looseleaf supplements ultimately supplanted by the following edition. At the end of each regular session or at the end of a sequence of sessions, a one or two-volume paperback final edition is published detailing dates of major steps in the progress of a bill. The digest contained in this volume may be helpful for a quick synopsis of the substance of the bill, but should not be heavily relied upon.

145. See *supra* text accompanying notes 61-75.

146. See *Clallam County Deputy Sheriff's Guild v. Board of Clallam County Comm'rs*, 92 Wash. 2d 844, 851, 601 P.2d 943, 946 (1979).

147. The *Legislative Report* is published in two paperback one-volume editions at the end of each regular session or sequence of sessions. The preliminary edition is availa-

background. This is an official publication derived primarily from committee Bill Reports, but it is written by staff after bills are enacted to give an unofficial and informal summary of a bill's purpose and a brief description of the substantive content and effects of each enacted bill. Although it is only occasionally cited by courts,¹⁴⁸ it may be helpful in providing general background information. It also includes the text of veto messages from the Governor and a summary of budgetary information.

The *Journal of the House of Representatives* and *Journal of the Senate* for the relevant session or sessions should then be consulted to obtain transcriptions of any colloquies¹⁴⁹ and the text of any amendments, irrespective of their adoption. The *Journal* also identifies proponents and opponents who addressed the bill during the floor debate,¹⁵⁰ but does not include a transcript of the debate. It also includes details of procedural legislative history summarized in the *Legislative Digest and History of Bills*. It does not include the text of bills as introduced.

The legislative *Journal* can be an important tool in researching legislative history. Washington courts frequently cite the *Journal*,¹⁵¹ nevertheless, it has important limitations and has been criticized by the courts.¹⁵² It functions as an official

ble almost immediately after the end of the session. The final edition includes corrections and the final disposition of enacted bills after action by the Governor.

148. See *Johnson v. Continental West, Inc.*, 99 Wash. 2d 555, 561-62, 663 P.2d 482, 486 (1983); *Harris v. Groth*, 99 Wash. 2d 438, 447 n.4, 663 P.2d 113, 118 n.4 (1983).

149. See *supra* text accompanying notes 104-08.

150. See *supra* text accompanying notes 109-10.

151. See, e.g., *State v. Turner*, 98 Wash. 2d 731, 736, 658 P.2d 658, 661 (1983) (procedural history of bill); *Human Rights Comm'n v. Cheney School Dist. No. 30*, 97 Wash. 2d 118, 121-23, 641 P.2d 163, 165 (1982) (colloquy); *State v. Frampton*, 95 Wash. 2d 469, 477, 627 P.2d 922, 925-26 (1981) (amendments and procedural history); *Id.* at 521-24, 627 P.2d at 948-49 (Dore, J., dissenting) (procedural history erroneously cited, amendments, and absence of colloquy); *International Paper Co. v. Department of Revenue*, 92 Wash. 2d 277, 283-84, 595 P.2d 1310, 1313 (1979) (Rosellini, J., dissenting) (colloquy); *State v. Zuanich*, 92 Wash. 2d 61, 80-82, 593 P.2d 1314, 1324-25 (1979) (Stafford, J., dissenting) (colloquy); *State v. Herrmann*, 89 Wash. 2d 349, 353, 572 P.2d 713, 715 (1977) (substitute bill); *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wash. 2d 283, 290, 494 P.2d 216, 220-21 (1972) (colloquy); *Ayers v. City of Tacoma*, 6 Wash. 2d 545, 557-58, 108 P.2d 348, 353 (1940) (procedural history); *State ex rel. Fair v. Hamilton*, 92 Wash. 347, 352, 159 P. 379, 381 (1916) (amendments); *State v. Brasel*, 28 Wash. App. 303, 307-08, 623 P.2d 696, 699 (1981) (amendment); *State v. Edmonds Mun. Ct.*, 27 Wash. App. 762, 765, 621 P.2d 171, 173 (1980) (rejected amendment); *Prante v. Kent School Dist. No. 415*, 27 Wash. App. 375, 381-83, 618 P.2d 521, 525 (1980) (colloquy); *Kucher v. County of Pierce*, 24 Wash. App. 281, 285-86, 600 P.2d 683, 686 (1979) (colloquy). See also *supra* note 68.

152. See *Weyerhaeuser Co. v. King County*, 91 Wash. 2d 721, 737, 592 P.2d 1108, 1117 (1979) (Dolliver, J., dissenting) ("Except to those persons familiar with the legislation being considered, the journals of the House and Senate rarely reveal the political

procedural diary of each house and accordingly includes much material irrelevant to the researcher while also omitting potentially important floor debate. Although each bill is indexed, it is time consuming to check each procedural step as it appears in the *Journal*. The only committee report that is currently published in the *Journal* is the procedural recommendation regarding passage rather than the substantive Bill Report.¹⁵³ Floor colloquies are recorded in the *Journal*, but these do not take place for most bills. Even when they do take place, colloquies are often irrelevant or may provide inaccurate information or interpretations.¹⁵⁴ There also is no clear standard for the accuracy of the transcript of the colloquy. The transcript typically is not given to the colloquy participants to verify accuracy.¹⁵⁵ To do so, however, might invite second thoughts on the part of the participants and encourage editorial changes.

The lawyer researching legislation may also need to consult *Printed Bills of the Legislature*¹⁵⁶ to obtain copies of any relevant bills. These volumes are compilations of all bills printed or reprinted in the legislature. They are a source for comparing the text of a substitute bill to an original bill or for comparing an amendment reprinted in the *Journal*. Washington courts regularly cite the text of bills and occasionally do so by explicit reference to the volumes of *Printed Bills*.¹⁵⁷

In most cases, consulting the session laws, *Legislative Digest and History of Bills*, *Legislative Report*, *Journal*, and *Printed Bills* will be sufficient research. In practical terms, these items represent the limits of materials readily available in libraries and accessible to most Washington lawyers. Yet much addi-

struggle or the balancing of interests which accompanies the enactment of most major legislation."); *State v. Herrmann*, 89 Wash. 2d 349, 364, 572 P.2d 713, 720 (1977) (Rosellini, J., dissenting) ("spotty reporting of proceedings found in the Senate Journal").

153. See *supra* notes 87-88.

154. See *supra* notes 105-06.

155. Interview with Dean Foster, Chief Clerk of the Washington House of Representatives, in Olympia (Jan. 26, 1984).

156. *Printed Bills of the Legislature* is a multi-volume set published for each two-year Legislature and simply contains copies of all separate bills in either house in a bound format. It includes all bills that are separately printed, *i.e.*, bills as originally introduced, substitute bills, and engrossed bills. It may not contain bills amended in either house if the bill was not reprinted to incorporate the amendment. The text of amendments, however, is published in the *Journal*.

157. See *Clallam County Deputy Sheriff's Guild v. Board of Clallam County Comm'rs*, 92 Wash. 2d 844, 851, 601 P.2d 943, 946 (1979). See also *supra* note 68 for Justice Dore's criticism of the majority for resorting to *Printed Bills*, even though the majority did not specifically cite this source.

tional information is available for the lawyer who is willing to expend extra effort.

Readily available but unpublished information includes the Bill Reports¹⁵⁸ prepared by committee staff of each house immediately after a bill has been voted on in committee, and any available Fiscal Notes¹⁵⁹ prepared by an administrative agency. The Chief Clerk of the House of Representatives or the Secretary of the Senate¹⁶⁰ can provide copies of these documents and can also refer researchers to the names and telephone numbers of committee staff or legislative sponsors.¹⁶¹

Once the researcher has identified that the change in the language of a statute or bill was made in a specific committee,¹⁶² the researcher can contact committee staff members to obtain any relevant documents for a specified bill number in a specified legislative session.¹⁶³ In most cases, documents are likely to be available only since the mid-1970s.¹⁶⁴ Documents may include attempted committee amendments which were rejected in committee and never raised again on the floor of either house,¹⁶⁵ a

158. See *supra* note 88 and text accompanying notes 88-94.

159. Fiscal Notes contain an analysis of the proposed legislation and its fiscal impact by one or more administrative agencies which might be affected by the bill. If the bill is amended, Fiscal Notes are sometimes revised to reflect the changes. The Office of Financial Management coordinates Fiscal Notes regarding state government and assigns them to individual state agencies for preparation; the Planning and Community Affairs Agency coordinates Local Government Fiscal Notes for bills impacting local units of government.

Although Fiscal Notes are prepared by the executive branch of government, they are presented to the legislature and are usually on the desk of each legislator at the time a vote is taken on the measure. See *supra* note 88. Although Fiscal Notes have not specifically been discussed by Washington courts, they could provide valuable evidence of information and assumptions before the legislature for purposes of demonstrating legislative intent. They could also establish the administrative construction placed on a statute and document legislative awareness of this construction.

160. The telephone number for the Chief Clerk of the House of Representatives is (206) 753-7750, and for the Secretary of the Senate is (206) 753-7550.

161. The relevant committees can be identified from the *Legislative Digest and History of Bills*. See *supra* text accompanying notes 144-46. Committees can also be contacted more directly through the House Office of Program Research and the Senate Research Center.

162. See *supra* text accompanying note 86. The researcher should first determine at what point in the legislative process the change in the language arose. For example, in most cases, it would be meaningless to seek information from committees in the house of origin if the issue never arose until the bill reached the floor of the second house. However, it is also possible that the issue was considered in committee, but no action was taken or that a proposed committee amendment was rejected in committee.

163. See *supra* text accompanying notes 142-43.

164. See *supra* note 7.

165. Committee amendments which were adopted by committee and either adopted

series of amendments which were later consolidated as a single striking amendment or substitute bill,¹⁶⁶ and staff memoranda,¹⁶⁷ including bill analyses. They may also include minutes of committee meetings, transcripts or tape recordings¹⁶⁸ of debate or oral testimony at committee meetings, written testimony submitted to the committee, and other background material.¹⁶⁹ In many cases, committees will already have transmitted their files to the State Archives under the administration of the Secretary of State, but the requested materials should be retrievable.

In addition to committee materials, the researcher can obtain transcripts or duplicate cassette tape recordings of floor debate from both legislative houses. To do so, the Journal Clerk of each house can be contacted to request these materials.¹⁷⁰ A more sophisticated recording system is used for floor debate than for committee meetings, and, therefore, transcripts prepared by the Journal Clerks are likely to be more accurate than committee transcripts. Although there is no formal policy, the Journal Clerks traditionally have edited the transcripts for grammatical corrections, but have not made substantive changes

or rejected on the floor are recorded in the *Journal*. See *supra* text accompanying note 149.

166. Individual amendments may be developed in committee, using as a base the original bill or a revised unofficial draft, then consolidated at the time the bill is voted out of committee.

167. See *supra* text accompanying notes 97-99.

168. Transcripts of testimony and debate are not routinely prepared for committee meetings, but can be specially requested. There are no formal policies for responding to such requests and no established charges for costs. Interview with Dean Foster, Chief Clerk of the Washington House of Representatives, in Olympia (Jan. 26, 1984). In many cases, it may be easier to have a committee member make the request.

The legislature began tape recording committee meetings in the mid-1970s and has gradually improved its recording system. Nevertheless, the quality of the recording system is inconsistent and, in some cases, is very primitive, particularly where legislators meet outside Olympia or in committee rooms lacking microphones and amplifiers. Rather than obtaining rough transcripts prepared by committee staff from these cassette tapes, a researcher may obtain copies of the tape itself and any committee minutes, and then listen to the tape for any relevant passages. When there is background noise, it may even behoove the researcher to electronically enhance the tapes to obtain a more accurate transcript.

169. See *supra* text accompanying notes 100-03.

170. The Journal Clerk for the House of Representatives is currently Eljo Sutherland, (206) 753-7790. The Journal Clerk for the Senate is Mary Wiley, (206) 753-7590. There is currently no formal policy for charging for transcripts; small amounts are typically prepared at no cost. Nonlegislators are charged \$15.00 to obtain copies of tapes. Interviews with Dean Foster, Chief Clerk of the Washington House of Representatives, and Sid Snyder, Secretary of the Washington State Senate, in Olympia (Jan. 26, 1984).

in transcribing floor debate. Until recently, the policy of the House of Representatives and Senate had been to submit transcripts to the legislative member for approval before they could be released to the public or to a court. This policy has now been abandoned.¹⁷¹

Although committees have the primary responsibility for collecting legislative materials on a bill, committee staff does not necessarily see all relevant documents, particularly before a bill is referred to the committee or after the bill leaves the committee. For example, lobbyists or partisan caucus staff may also have prepared memoranda for legislators on certain issues. Therefore, in at least a few cases, it may also be worthwhile to contact individual sponsors of a measure for any additional material that might be available.¹⁷² The prime sponsor of a bill is the person most likely to have such material.¹⁷³ In addition, it is possible that a legislative or executive agency has compiled and documented the legislative history of the act.¹⁷⁴

When the key action in the enactment of a law involved a partial veto or even a decision whether to sign the bill, it may also be worthwhile for a researcher to contact the Governor's office for documents.

171. Interviews with Dean Foster, Chief Clerk of the Washington House of Representatives, and Sid Snyder, Secretary of the Washington State Senate, in Olympia (Jan. 26, 1984).

172. The courts may question the relevance of evidence of legislative history which was presented only to individual members of the legislature and never to either house or even to a committee as a whole. However, in at least one case involving committee staff memoranda to individual legislators, courts have approved the use of such documents. See *supra* text accompanying note 99.

173. The prime sponsor is the first person listed as sponsor of a bill. Usually, the prime sponsor is responsible for carrying the bill, although sometimes he or she is largely a figurehead.

The committee chairpersons may also have information about the bill, although this is likely to be the same as the materials more easily accessible from staff in committee files.

If the prime sponsors or committee chairpersons are no longer in office, the likelihood of obtaining useful documents may diminish significantly.

174. For an outstanding and thorough compilation of legislative history, see WASH. STATE COMM'N ON ENVIRONMENTAL POLICY, TEN YEARS' EXPERIENCE WITH SEPA (1983). The final report of the legislative Commission reprints the key affirmative documents of legislative history in "a conscious effort to clarify legislative intent." *Id.* at 19. These include the sequential drafts of the bill, a legislative chronology and section-by-section summary of the bill, and pre- and post-enactment memoranda from the legislative chairman of the Commission and prime sponsor of the bill.

IV. LEGISLATIVE RESPONSE TO THE NEED FOR LEGISLATIVE HISTORY

Although legislative history is available and, once obtained, is likely to be considered by the courts, clearly the process is unnecessarily burdensome. Both houses of the legislature can and should take steps to improve the accessibility of legislative materials. Assuming that the courts are more likely to reflect legislative intent accurately if given direct evidence from the legislature, improving access to legislative history is in the legislature's own institutional interest.

While some steps can readily be taken to improve accessibility, many other improvements will have a cost impact on the legislature, either through the expenditure of direct resources, or through increased demands on staff. The cost and benefits of improvements should be carefully weighed by a Select Joint Committee appointed to study the issue during the interim and recommend improvements to the 49th Legislature in 1985. This committee should consider the following as possible improvements:

(1) Publish procedures on how to acquire legislative history. These should be regularly updated. The description of the process given in this Comment could become rapidly outdated. One possibility would be to issue formal regulations, published in the Washington State Register and Washington Administrative Code. Current rule-making authority exists,¹⁷⁵ at least for legislative records more than three years old which have been delivered to the State Archives. The authority has never been used.

(2) Publish Bill Reports (and possibly Fiscal Notes) as a supplement to the *Journal* of each house.

(3) Provide Legislative Information Service computer terminals in convenient locations around the state. Obvious possible sites would be the Washington State Law Library in Olympia and the law libraries of the three law schools—in Tacoma, Seattle, and Spokane.¹⁷⁶

(4) Develop a committee report for conference committees analogous to the Bill Report prepared by standing committees. The conference committee report is close to the top of the hierarchy of legislative materials in the congressional system. Under

175. WASH. REV. CODE § 40.14.160 (1981).

176. Washington law schools are located at the University of Puget Sound in Tacoma, the University of Washington in Seattle, and Gonzaga University in Spokane.

the current state system, the conference committee report is merely a procedural recommendation with the text of the bill attached. The conference committee report should be made substantive and should be published.

(5) Develop an attachment to the Bill Report for concurrences on amendments between houses.

(6) Develop guidelines for the editing of transcripts of floor remarks and colloquies. The existing procedure of authorizing the Journal Clerk to edit and correct grammar but not allowing substantive change should be set forth to establish the limits of transcript reliability.

(7) Designate in advance and record the names of members responsible for carrying a bill on the floor. While this could cause embarrassment at times or limit flexibility, it would make the job of floor leaders easier. More importantly, it would limit the possibility of a court being misled as to the proponents and opponents of a measure. The switching of votes, which occasionally occurs for the purpose of reconsideration or being named to a conference committee, could otherwise be highly misleading.

(8) Establish a repository under the direct control of the legislature for legislative history materials instead of relying on the State Archives.

(9) Develop a policy for low-cost or no-cost reproduction of limited amounts of legislative history. To minimize state costs and discourage frivolous requests, moderate charges might be required for major requests for legislative materials.

(10) Work with the National Conference of State Legislatures to develop and share a model with other states.

V. CONCLUSION

Legislative history is now available in Washington State. Washington courts have demonstrated an increasing willingness to consider many types of evidence of legislative history to prove legislative intent or purpose, but they have failed to adopt clear guidelines for the utilization of such history. At times, the courts have applied evidence of dubious value, while, at other times, they have refused to consider relevant legislative history.

Courts can respond to legislative history only when it is presented to them. Lawyers have a responsibility to present appropriate legislative materials to the courts. To do so, lawyers should use a systematic approach to identify appropriate legislative history. This should include researching published docu-

ments and, when necessary, consulting with legislative staff to obtain unpublished materials. The Washington Legislature has a similar responsibility to improve the accuracy and accessibility of its records. Although legislative history is available, access to unpublished materials is unnecessarily difficult. The legislature should lead the way in improving access to legislative history. This would be in the best interests of the law, of the public, and of the legislature itself.

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[EDITOR'S NOTE: Mr. Wang lends special expertise to this article by currently serving a second term in the Washington Legislature as the State Representative for the 27th District of Tacoma.]

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