

# Legislative History in Washington

## I. INTRODUCTION

Federal<sup>1</sup> and state<sup>2</sup> courts increasingly use legislative history<sup>3</sup> as an aid in construing statutes to determine the intent or

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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 Statistical 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-*

purpose<sup>4</sup> 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,<sup>5</sup> state legislative history remains largely untapped by lawyers.<sup>6</sup>

While legislative history may have been largely unavailable in many states in the past,<sup>7</sup> 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,<sup>8</sup> 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

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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.<sup>9</sup> 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.<sup>10</sup> In 1903, the court directly addressed the issue of "to what extent the courts may examine into the history of legislation or resort to

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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."<sup>11</sup> The court concluded that it was appropriate to consider "the history of the statute in question in order to determine the legislative intent,"<sup>12</sup> and decided that the omission of a word in the statute was due to a clerical error at the time the bill was enrolled.<sup>13</sup>

In subsequent decisions, courts consistently followed this rule.<sup>14</sup> 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.<sup>15</sup> The language of the statute is the starting point for consideration,<sup>16</sup> 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.<sup>17</sup> When faced with ambiguity, the court relies heavily on the history of the statute as the "most compelling indication of the legislature's intent."<sup>18</sup> The court has even found that "resort to legislative history is not only permissible but necessary"<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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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.<sup>22</sup> 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.<sup>23</sup>

Courts distinguish between questions based on procedural history and questions of intent based on the history of the substantive content of an act.<sup>24</sup> 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,<sup>25</sup> 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.<sup>26</sup>

The initial inquiry is whether legislative history should be considered at all and whether it should be scrutinized liberally or restrictively.<sup>27</sup> 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 courts<sup>28</sup> 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.<sup>29</sup>

The recent decision in *State v. Turner*<sup>30</sup> implies that Washington courts may consider almost any aspect of legislative history as potentially relevant. In a unanimous decision<sup>31</sup> 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.<sup>32</sup> It also contrasted the ultimately passed House bill to its companion Senate bill<sup>33</sup> and to other bills on the same subject.<sup>34</sup> 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,<sup>35</sup> two committee staff analyses of the bill as enacted (prepared after final passage by the legislature),<sup>36</sup> and tape-recorded testimony at a committee hearing both from committee staff and from four outside witnesses.<sup>37</sup> *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-

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

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.<sup>52</sup> 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.<sup>53</sup> Lawyers may have failed to provide the court with appropriate documents of legislative history.<sup>54</sup> 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,<sup>55</sup> bill introductions and comments by the authors or proponents of a bill,<sup>56</sup> committee work,<sup>57</sup> floor action,<sup>58</sup> events and testimony

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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,<sup>59</sup> and the legislature's failure to act.<sup>60</sup>

### 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 courts<sup>61</sup> 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.<sup>62</sup> This applies to substitute bills as well as to amendments by either house.<sup>63</sup> In appropriate circumstances, courts draw inferences from sequential drafts of a bill on the presumption that legislators were aware of prior drafts.<sup>64</sup> 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."<sup>65</sup> Consideration of sequential drafts has been rejected or criticized in a few cases. In *Hama Hama Co. v. Shorelines Hearing Board*,<sup>66</sup> 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.<sup>67</sup>

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

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.<sup>69</sup> They may also consider related bills in the same session of the legislature.<sup>70</sup>

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

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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,<sup>71</sup> or vice versa;<sup>72</sup> where an entire bill is stripped and replaced with entirely new language and unrelated concepts;<sup>73</sup> or where new language is adopted for procedural<sup>74</sup> or purely political reasons.<sup>75</sup>

### 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.<sup>76</sup> In one

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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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> This argument was not discussed in either of the court's other

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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.<sup>80</sup>

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.<sup>81</sup> They have also cited a Governor's inaugural address urging the legislature to pass a bill.<sup>82</sup> The courts have also referred to officially published comments to a section taken from a uniform act<sup>83</sup> or patterned after a model act.<sup>84</sup>

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.<sup>85</sup> 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

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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.<sup>86</sup> Washington courts have recognized a variety of committee materials, but surprisingly few cases cite actual committee reports.<sup>87</sup>

From a functional standpoint, the "Bill Report"<sup>88</sup> 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.<sup>89</sup>

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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.<sup>90</sup> 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.<sup>91</sup> In a subsequent case, the Washington Court of Appeals criticized the dissent's use of the Bill Report.<sup>92</sup> 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*.<sup>93</sup> 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."<sup>94</sup> 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.<sup>95</sup> They have also cited other materials issued officially by committees,

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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.<sup>96</sup> 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.<sup>97</sup> In one case, the court cited a staff memorandum to the entire committee.<sup>98</sup> 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.<sup>99</sup>

Courts have also been willing to take into account individual testimony at committee meetings. This includes the comments of legislators,<sup>100</sup> staff,<sup>101</sup> and other nonlegislators.<sup>102</sup> Even letters in the committee files from individual nonlegislators have been considered.<sup>103</sup> 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

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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. Colloquies<sup>104</sup> 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,<sup>105</sup> although they may use it for other purposes as well.<sup>106</sup> Although courts sometimes attempt to restrict their use of colloquies to speeches by proponents, sponsors, or committee

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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,<sup>107</sup> they may not know or identify the capacity in which the legislator is speaking.<sup>108</sup> This also applies to legislative debate outside of the colloquy process. General floor debate has been cited,<sup>109</sup> 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.<sup>110</sup> In addition to floor debate, even the actual floor vote has been considered.<sup>111</sup>

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,<sup>112</sup> 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.<sup>113</sup> Therefore, correspondence between the Governor and the Attorney General regarding legal advice in interpreting a bill prior to signing is relevant,<sup>114</sup> as is a Governor's veto message.<sup>115</sup> Courts will also take notice of a law which never took effect because of the failure of a proposed constitutional amendment.<sup>116</sup> 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.<sup>117</sup>

With rare and unexplained exceptions,<sup>118</sup> 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.<sup>119</sup> The classic case rejecting post-enactment statements of legislative intent is *City of Spokane v. State*,<sup>120</sup> 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.<sup>121</sup>

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.<sup>122</sup> 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.<sup>123</sup> 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."<sup>124</sup>

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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 staff<sup>125</sup> or other legislative sources, including the Legislative Report.<sup>126</sup> 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,<sup>127</sup> the rejection of a minority report urging statutory change,<sup>128</sup> the rejection of amendments to a bill,<sup>129</sup> the failure to repudiate administrative or judicial constructions,<sup>130</sup> the failure to correct

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

Court decisions based on the failure of a legislative body to act, however, have long been criticized.<sup>135</sup> 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,<sup>136</sup> and have at times found no significance in the failure to repudiate an administrative or judicial construction of a statute.<sup>137</sup> 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.<sup>138</sup> The first step is to compare the statute in question with prior or subsequent versions of the same statute. Language changes in sequential stat-

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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.<sup>139</sup> 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,<sup>140</sup> or because the bill amends other statutes by reference.<sup>141</sup> Consulting the session laws will also reveal the bill number<sup>142</sup> 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.<sup>143</sup>

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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*.<sup>144</sup> 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,<sup>145</sup> 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.<sup>146</sup>

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

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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,<sup>148</sup> 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 colloquies<sup>149</sup> 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,<sup>150</sup> 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*,<sup>151</sup> nevertheless, it has important limitations and has been criticized by the courts.<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup> 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*<sup>156</sup> 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*.<sup>157</sup>

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 Reports<sup>158</sup> prepared by committee staff of each house immediately after a bill has been voted on in committee, and any available Fiscal Notes<sup>159</sup> prepared by an administrative agency. The Chief Clerk of the House of Representatives or the Secretary of the Senate<sup>160</sup> can provide copies of these documents and can also refer researchers to the names and telephone numbers of committee staff or legislative sponsors.<sup>161</sup>

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

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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,<sup>166</sup> and staff memoranda,<sup>167</sup> including bill analyses. They may also include minutes of committee meetings, transcripts or tape recordings<sup>168</sup> of debate or oral testimony at committee meetings, written testimony submitted to the committee, and other background material.<sup>169</sup> 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.<sup>170</sup> 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.<sup>171</sup>

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.<sup>172</sup> The prime sponsor of a bill is the person most likely to have such material.<sup>173</sup> In addition, it is possible that a legislative or executive agency has compiled and documented the legislative history of the act.<sup>174</sup>

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.

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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,<sup>175</sup> 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.<sup>176</sup>

(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

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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.]