

# **Fifty Years of Legislative Practice and Code Making in the State of Washington: A Retrospective**

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## **Making Codes**

Bismarck once said, “There are two things you probably don’t want to know how they are made: sausages and laws.” Sausage manufacture may not bear close scrutiny but law making certainly does. Herein we hope to outline a few observations that are probably out of the mainstream of popular knowledge.

To understand the genesis of contemporary bill drafting, code revision, and legislative procedure, we should take a snapshot of the landscape as it existed prior to 1951, the year that the Washington State Statute Law Committee and the Office of the Code Reviser were created.

The Legislature met only once every two years in a session limited by the Constitution to sixty days, but already the rapid growth of the state’s population and economy were straining against this limitation.

The legal codes which had exclusively been privately published [*Remington’s Revised Statutes* published by Bancroft Whitney Co. and *Pierce’s Perpetual Code* published by Frank Pierce] were both mere compilations of statutes rather than true codes and had become extremely difficult to use. They suffered from awkward short-sighted numbering systems which were not designed for unlimited expansion and from the condition of the body of statute law as it then existed. In construing statutes, the ascertainment of legislative intent is at best fraught with uncertainty, and this difficulty had been compounded over the years by the exclusive use of general repealers. A general repealer is a section tacked on at the end of a statute proclaiming that: “All laws and parts of laws in conflict herewith are hereby repealed.” A question then immediately arises as to the efficacy of former statutes dealing with the same subject matter, a question that could have and should have been averted by expressly amending or repealing the laws sought to be superceded.

The implied repeals resulting from such general repealers were a matter of particular difficulty to the code compiler who would probably duck the question by publishing both the old and the new statutes and thus shifting the burden of ascertaining legislative intent to the poor reader.

The Legislature took cognizance of the need for reform and so in the early 1940s they created a code revision committee charged with the duty to reconcile doubts as to which laws had currency and to produce a true revised code that could thereafter be maintained. The code which they produced was enacted by the 1949 Legislature over the strong objection of an organized group of influential private practitioners who vigorously contended that the revisers, in their zeal to simplify language, had done violence to some

prior language which had previously been construed by the Supreme Court. They succeeded in influencing Governor Langlie to veto the bill by which the code would have been enacted.

In 1951 the code was again introduced, but only as a *prima facie* expression of the law, which meant that if its provisions could be proven to have done violence to the statute which it purported to revise, the language of the original statute would prevail. The result was that he who relied on the language, relied at his peril.

Concomitant with the adoption of the new code, the Legislature created two committees: the Temporary Code Committee, charged with the duty of preparing the new code for publication, and the Permanent Statute Law Committee [chapter 1.08 RCW] as a permanent state agency to publish and maintain the new code, and, recognizing that code revision and bill drafting are complementary functions, to be the official bill drafting agency for the Legislature.

In deference to the traditional privatization of code publication, the committee was authorized to choose any lawyer or law publisher to publish the code. The committee chose to hire its own reviser as a state employee. Prior codes had always been annotated, that is, the various sections were followed by brief notes citing and summarizing law cases which construed the section. The Revised Code of Washington [RCW] was to be published in un-annotated format, with a companion set of annotations prepared and distributed by a private company. West Publishing Company of St. Paul, Minnesota made a vigorous effort to be authorized to publish an official annotated version. They were not authorized to engage in codification but only to use materials as codified by the state code reviser. Their product, RCWA, is not an official code, but it is widely used by lawyers.

RCW was initially published in loose leaf format, which was ultimately abandoned as totally unworkable. Maintenance was a headache for the user. It was time consuming and, even with the benefit of elaborate instructions, the user could not feel certain that he had done the job correctly. It was a problem for the reviser's office to regulate inventory. Page-by-page replacement gave way to cumulative title-by-title supplements to be placed in binders following each title. While an improvement, it was still not ideal.

Soon after his appointment, the reviser visited other states having similar, though not identical, agencies. Code personnel in Minnesota, Illinois, Colorado and California were extremely helpful with their advice. In the early years the duties of the office were threefold:

1. During the legislative sessions, as the sole authorized drafting agency, to prepare all bills and amendments for submission to the body.
2. Following a session, to publish the session laws, to codify the new laws and prepare and publish a code supplement.
3. In the remainder of the interim, to perfect the code, with the objective of making it primary law, rather than merely *prima facie* evidence of the law.

This was accomplished by comparing the revised language of each code section with the language of its session law parent, documenting changes and recommending either acceptance of the code language or the restoration to the language of the parent section. Each reviser's recommendation, accompanied by a detailed explanation, was presented to a subcommittee of the Statute Law Committee convened together with invited experts in the substantive field of law. Upon approval, each code title so examined resulted in the preparation and filing of a Restoration Order pursuant to RCW 1.08.016.

In other instances, revised titles were presented to the Legislature in the form of Reviser's bills, which, upon passage, became primary law. Such bills were All ninety-one titles were perfected by either restoration or reenactment. This forbidden as vehicles for substantive amendment. took ten years.

## **Bill Drafting**

The year 1953 was the first session the code reviser's office went into action. There were many obstacles to overcome:

1. Our office was located in the basement of the Temple of Justice rather than in the Legislative Building, an inconvenient location.
2. Formerly, each house had its own bill drafting staff located just off chambers. We were to have a consolidated bureau. In 1953, or possibly 1955, we were compelled to split staff between houses.
3. We were the new kid on the block. To recognize our services meant a loss of patronage employees. The initial resentment went deep and we had a few luaus with leadership. I was the pig! After we obtained permanent quarters in the basement of the Legislative Building we finally won our spurs by making ourselves available late at nights and on weekends, taking care of urgent matters [aren't all legislative matters urgent?] when no committee counsel or other attorneys or staff were available.

## **Washington Administrative Code [WAC]**

In 1967, the Legislature adopted the Uniform Administrative Procedures Act, which authorized the creation of a code of administrative regulations and a register for the dissemination of the notices of public hearings and emergency rules which the act required. Prior to this, there was little to no restraint on the promulgation of administrative rules and agencies could play fast and loose to change rules even while they may be under attack by some member of the public. The code reviser's office was given jurisdiction to codify and publish rules as well as the register. The act mandated all agencies to file whatever rules they wished to retain with the reviser and declared the demise of any rule not so filed. As a result, agencies filed a multitude of regulations in a short period of time before the deadline. The filings arrived in every possible shape and form, and the burden to create a code structure and publish them with some uniformity was added to our regular duties. Worst of all, we were firing at a moving target in that their amendments and repeals kept coming in before we could complete the initial

codification. We published the code in-house using the loose leaf system which plagued us with the same problems we had experienced with RCW.

### **The Physical Process of Preparing Bills**

Initially bills were typed on electric typewriters on sets of six carbons. Erasures were not tolerated. Any error required the entire page to be retyped. Typists' nerves quickly became frayed and there were carbon smudges everywhere.

### **The Physical Process of Preparing Code Materials for Publication**

Cut-and-paste dummies were sent to the state printer who set the copy in hot lead. Staff spent countless hours reading proof. The loose leaf format compounded the problem.

### **There Had to be a Better Way!**

In the Sixties we were invited, as one of three persons from the west coast, to the University of Pittsburgh to view a primitive demonstration of a law search by computer conducted by Professor John Horty. Through the use of IBM punch cards, he had captured all of Pennsylvania's health laws in machine readable form. The data was transferred to tape and was retrievable only in sequential mode, which meant that in order to retrieve any tiny bit of information, it was necessary to run the whole tape until you found that bit. Of course the computer that ran the system was filled with vacuum tubes and was the size of a large semi-truck. But through the use of Boolean logic he could refine his search. For instance, he could request all occurrences of "cat" which might retrieve a plethora of references. He could be more specific by requesting "cat" and "yellow" in the same sentence, or "cat" and "yellow" with x number of words between them. The Horty experiment, though crude in execution, has revolutionized law search, and, through continued sophistication of hardware and software, has become the norm.

The seed that was sown during that visit came home to Washington when it was discovered that the inmates at the women's prison were being given occupational training in the use of key punch machines. Guess what they trained on? Why, punching in the entire text of RCW. This was motherhood and apple pie!

### **In the Broader Legislative Picture**

A renaissance was occurring. The State Constitution mandated a sixty day legislative session in every odd numbered year. This was in accord with the Jeffersonian concept of a part-time citizen legislature. But the times, they had changed. The world was moving too swiftly for this. The problems of government were becoming too numerous and too complex to cope with in a mere sixty days every two years. As a consequence, extraordinary sessions, often in quick succession, became necessary. Our Legislature realized that broad reform would be necessary in order for it to function as it should for the greater public good. Members awoke to the reality that there was a great disparity in the resources and facilities long enjoyed by the executive branch, when compared with

self-imposed paucity endured by the Legislature, and they began to respond to the reality that they are truly a separate and equal branch of government. No longer were they willing to play second fiddle. If the Executive had sufficient staff support, why should they not? If the Executive had access to economic, scientific and technological expertise, they also should have. Enter here Speaker of the House Pro Tempore Tom Copeland, to be in the forefront of the movement to assert this equality. Whereas formerly, legislators had no offices or staff, now each member would be provided with a private office and the personnel assistance which he and constituents were and are entitled to.

It was within this context and with the benefit of Tom's progressive thinking that the Legislative Information System was born. Tom was very effective in seeing to it that sufficient funds were appropriated to acquire a comprehensive computer and peripherals and to provide for the hiring of an outstanding technical staff to create the various programs needed to bring the legislative process into the Twenty-first century. Suddenly, we had the following capabilities:

1. Computerized law search with keyboard access to random disk storage.
2. Significant reduction of key strokes and proof reading. The language of the original bill needed only massaging to incorporate amendments, create substitute bills and carry on through the processes of engrossing and enrolling, and, subsequent to enactment, the same keystrokes are carried over through session law and codification process.
3. A daily status sheet indicating the progress and status of each legislative measure. Of particular interest to members is the individualized "trap-line" which informs him daily as to the status of all bills carrying his sponsorship, as well as any other bills he has requested to be included.
4. A weekly digest of legislative measures summarizing the contents of each.

### **The Effect of Automation on Statute and Code Publication**

This effect was revolutionary. It enabled us to close the door on the loose leaf format, which was touted to offer advantages which it did not deliver. We are now able to economically republish the entire code every two years with a single volume supplement in each intervening year. The publication of Administrative Code is similarly enabled. The format adopted is a set of soft bound volumes similar to telephone directories. They are both inexpensive and disposable, and the user need never wonder whether his code is up to date. The Administrative Code publications share the same benefits.

### **In Summary**

The Statute Law Committee has endured for over half a century, due to the dedication of its members and its diverse composition. It consists of twelve members: five legislators, including the House and Senate Judiciary chairpersons and another legislator as near as possible on a bipartisan basis; a lawyer appointed by the governor; a Justice of the Supreme Court or a lawyer appointed by the Chief Justice; and five practicing lawyers appointed by the Board of Governors of the State Bar Association. The committee's

stability is reflected in the fact that there have only been two persons serving as code reviser: Richard O. White from 1951 until retirement in 1978, and Dennis W. Cooper, formerly an assistant reviser, from 1978 until the present.

The committee chair has been held randomly by both legislators and non-legislators. All chairmen have been outstanding in their devotion to the objects and functions of the committee. The diverse nature of the committee has shielded the reviser's office from much of the rough and tumble of partisan politics. The relationship it maintains with legislators scrupulously follows the mandate of RCW 1.08.027 to the effect that such services as bill drafting shall be confidential and nonpartisan, and no member of the drafting staff shall advocate for or against any legislative measure.

It was this pervasive element of nonpartisanship, real or perceived, that placed jurisdiction for the Legislative Information System within the aegis of the reviser's office and subsequently, the duty to review initiative measures for form and style, prior to filing with the Secretary of State. In recent years, automation has proved an invaluable adjunct to partisan activities and subjects far beyond the original scope of the Legislative Information System, which has been abolished.

Technology moves relentlessly onward. It is my understanding that among other innovations, senators and representatives now even have individual laptop computers on their desks in Chambers. There are among the fruits of the legislative renaissance which was so perceptively recognized and acted upon by Tom Copeland and a handful of other savvy legislative leaders.