UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 56 | Number 6 Article 2

9-1-1978

The Broad Brush and Beyond -- Improving Legislative Titles in North Carolina

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POSTSCRIPT

THE BROAD BRUSH AND BEYOND—IMPROVING LEGISLATIVE TITLES IN NORTH CAROLINA

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In North Carolina legislative titles offer the draftsman strategic possibilities unavailable in most states. For, unlike those of all but a handful of other states, North Carolina's constitution says nothing about titles.[1] There is no requirement that bill and title be limited to a single subject[2] and no requirement that the bill's subject be stated clearly in its title.[3] Indeed, North Carolina's Supreme Court has quite plainly indicated that a title's failure to reflect fully an act's contents has no effect on the act's validity.[4]

Despite this freedom from constitutional inhibition, North Carolina draftsmen have been sadly unimaginative with legislative titles. The typical title faithfully but woodenly summarizes the contents of the bill. In all probability the draftsmen have been influenced by the usual advice of the drafting manuals, which urge clarity and conciseness and denigrate creativity.[5] These manuals, of course, seek a national market and thus must work within the usual context of constitutional restriction. They look to the bright

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1. Only seven state constitutions—North Carolina's and those of the six New England states—are without a provision limiting bills and their titles to a single subject. H. READ, J. MACDONALD, & J. FORDHAM, CASES AND OTHER MATERIALS ON LEGISLATION 135 (2d ed. 1959). While North Carolina's grouping with New England would seem unusual on the surface, to the historian it is but further evidence of the pervasive effect of the Outer Banks on North Carolina institutions. During colonial times, the shallow and shifting channels through the banks effectively prevented direct commerce to England. Rather, most of the colony's maritime trade was with Virginia and, even more, New England. C. CAMP, THE INFLUENCE OF GEOGRAPHY UPON EARLY NORTH CAROLINA 11-12 (1963). It is obvious our lives are still affected by that early trade.

2. For an example of a state constitution with this requirement, see, *e.g.*, GA. CONST. art. 3, § 7, para. 4.

3. For an example of a state constitution with this requirement, see, *e.g.*, MO. CONST. art. 3, § 23.

4. Town of Blowing Rock v. Gregorie, 243 N.C. 364, 90 S.E.2d 898 (1956). The Act in question set out a procedure for closing roads that was available to both counties and cities, although the title referred only to counties. Law of Apr. 23, 1949, ch. 1208, 1949 N.C. Sess. Laws 1541. During the 1969 and 1971 sessions of the North Carolina legislature, the rules of the House forbade amending the title of a House Bill once introduced, no matter what happened to the bill's contents. Rule 33(b), H. JOURNAL 1971 Sess. 185.

5. *See, e.g.*, A. COIGNE, STATUTE MAKING 159-60 (2d ed. 1965); Manson, *The Drafting of Statute Titles*, 10 IND. L.J. 155, 163-67 (1934).

side and work hard to see the positive in these restrictions. As a result, they ignore the possibilities in states like North Carolina that are free of these technical traps.[6] It is therefore the purpose of this article to bring those possibilities forward—to suggest, working from five practices that have seen occasional use in the state, what might be.

I. THE BROAD BRUSH

The Broad Brush approach permits the draftsman to maintain that his title is accurate without concern that someone may thereby learn what the bill is about. Used several times each session, the approach can be illustrated by this example from 1975:

> AN ACT TO AMEND CHAPTER 96 OF THE GENERAL STATUTES, KNOWN AS THE EMPLOYMENT SECURITY LAW.[7]

Besides keeping the bill in the shadows (Chapter 96 occupies over eighty pages in the General Statutes[8]), the Broad Brush approach saves mental labor. A draftsman with several bills, each amending the same General Statutes chapter, may use the same title for each bill, saving his mental resources for the bills themselves.

Even so, the potential of this practice is at present unfulfilled. It is suggestive of further possibilities, especially for the legislator who comes to Raleigh without a firm program. To show how, consider a practice of the 1973 legislature. In that year the General Assembly was burdened with completing the executive reorganization directed by a 1971 constitutional amendment.[9] During the session it became clear that the bills would not be prepared in time to meet the introduction deadline set for bills prepared by state agencies. Therefore a series of six bills was introduced, with the following titles:[10]

> AN ACT TO FURTHER EFFECTUATE THE REORGANIZATION OF STATE GOVERNMENT#2.
>
> AN ACT TO FURTHER EFFECTUATE THE REORGANIZATION OF STATE GOVERNMENT#3.
>
> and so on through #7.

The titles were interesting, but it was the body of each bill that showed genius. Each bill read, in its entirety, as follows:

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6. Of constitutional rules about titles Ernst Freund once wrote: "They have given rise to an enormous amount of litigation; they have led to the nullification of beneficial statutes; they embarrass draftsmen, and through an excess of caution they induce undesirable practices, especially in the prolixity of titles, the latter again multiplying the risks of defect." E. FREUND, STANDARDS OF AMERICAN LEGISLATION 156 (1965).

7. Law of Jan. 29, 1975, ch. 2, 1975 N.C. Sess. Laws 1.

8. *See* N.C. GEN. STAT. §§ 96-1 to -29 (1975 & Cum. Supp. 1977).

9. N.C. CONST. art. 3, § 11.

10. The bills were introduced as H. 1127-1132, N.C. Gen. Assembly, 1973 Sess.

Section 1. This act shall become effective upon its ratification.[11]

The intention—and result—was simply to get a bill introduced and then have its substance first appear as a committee substitute for the original.

Now, imagine, if you will, the newly arrived legislator looking for a program. He wants to introduce something, to show the home folks that he's working, but he has no ideas of his own and no one else has asked him to introduce theirs. In most cases, then, there he sits. But what if we combine the blank bill idea used in the executive reorganization with the Broad Brush approach to titles? Now the legislator can immediately introduce three dozen bills, each containing only a ratification clause. He can have a number of bills sent to each committee, there to rest until he needs them. Their titles? Here is where the Broad Brush is suggestive; he can use a single all-purpose title:

AN ACT TO AMEND THE GENERAL STATUTES.

Of course this title covers only general laws; it will not do for local acts—bills that apply only to a single town or county. To allow for those, he might include a few bills with the ultimate Broad Brush title:

AN ACT TO CHANGE THE LAW.[12]

II. THE DUPLICATOR

At the other extreme from the Broad Brush lies the Duplicator approach. A perfect example was introduced in (but not passed by) the 1977 General Assembly. House bill 1450 was titled:

AN ACT TO PROVIDE THAT IN ALL CASES WHERE THE POWER OF EMINENT DOMAIN IS EXERCISED AND A JUDICIAL PROCEEDING OCCURS, WHETHER BY A DIRECT OR INVERSE CONDEMNATION PROCEEDING THE COURT SHALL DETERMINE WHETHER THE DEFENSE BY THE CONDEMNEE IN A DIRECT CONDEMNATION PROCEEDING OR THE INSTITUTION OF ACTION BY THE CONDEMNEE IN AN INVERSE CONDEMNATION PROCEEDING IS IN GOOD FAITH AND MERITORIOUS AND, UPON SO FINDING, THE COURT SHALL FIX AND DETERMINE A FAIR AND REASONABLE ATTORNEY'S FEE FOR THE ATTORNEY FOR THE CONDEMNEE AND ENTER JUDGMENT THAT SUCH FAIR AND REASONABLE FEE BE PAID BY THE CONDEMNOR AS A PART OF JUST COMPENSATION, IN ADDITION TO ANY OTHER AWARD THEREIN.[13]

11. *Id.*

12. It would be possible for every bill introduced in the General Assembly to bear this title. While such a practice might carry a small cost in confusion between bills, it would permit the paper on which bills are typed to have the title already printed and in place. The typing time saved might be significant.

13. H. 1450, N.C. Gen. Assembly, 1977 Sess.

The body of the bill simply repeated the title, beginning with the words "in all cases." The draftsman cut off completely the charge that his title inadequately set out the subject of the bill. Indeed, this sort of title weakens one's commitment to the standard rule that the title is not part of the bill.[14] Were that rule to be eliminated, section one of the above bill—or of any Duplicator titled bill—could simply have read:

Section 1. As title indicates.

This approach may be practicable only for shorter acts.

III. THE BOND ATTORNEY

If absolute accuracy combined with a complete absence of communication is your aim, the Bond Attorney approach beckons. This approach is illustrated by two acts enacted in successive sessions of the North Carolina legislature and relating to the Raleigh-Durham Airport Authority.

The 1957 Act:

> AN ACT TO AMEND CHAPTER 168, PUBLIC-LOCAL LAWS OF 1939, AS AMENDED BY CHAPTER 292, PUBLIC-LOCAL LAWS OF 1941, AS AMENDED BY CHAPTER 79, SESSION LAWS OF 1945, AS AMENDED BY CHAPTER 1096, SESSION LAWS OF 1955, RELATING TO THE ACQUISITION, ESTABLISHMENT AND OPERATION OF THE RALEIGH-DURHAM AIRPORT.[15]

The 1959 Act:

> AN ACT TO AMEND CHAPTER 168, PUBLIC-LOCAL LAWS OF 1939, AS AMENDED BY CHAPTER 292, PUBLIC-LOCAL LAWS OF 1941, AS AMENDED BY CHAPTER 79, SESSION LAWS OF 1945, AS AMENDED BY CHAPTER 1096, SESSION LAWS OF 1955, AS AMENDED BY CHAPTER 455, SESSION LAWS OF 1957, RELATING TO THE RALEIGH-DURHAM AIRPORT.[16]

The titles are not perfect; they do reveal that each act concerns the Airport Authority. But it is quite unclear that the first clarifies the Authority's power to adopt ordinances, while the second extends the maximum length of Authority leases from fifteen to forty years and grants it continuing power to issue long term bonds.

This approach is always available. For example, in 1973 I drafted a bill that sought to protect persons who buy land that is the filled site of a sanitary landfill by inserting in the record chain of title a copy of the State Board of

14. *See* Town of Blowing Rock v. Gregorie, 243 N.C. 364, 371, 90 S.E.2d 898, 903 (1956).
15. Law of Apr. 24, 1957, ch. 455, 1957 N.C. Sess. Laws 434.
16. Law of June 4, 1959, ch. 755, 1959 N.C. Sess. Laws 738.

Health's order approving the landfill as a disposal facility. As drafted and enacted the bill bore a typical, unimaginative title:

> AN ACT TO REQUIRE THE RECORDATION OF THE ORDER OF APPROVAL OF SANITARY LANDFILL SITES, IN ORDER TO PROTECT SUBSEQUENT PURCHASERS OF THE SITE.[17]

But the title could have followed the Bond Attorney approach. The Act enacted a new section in an article of the Public Health Chapter of the North Carolina General Statutes. The article had been adopted in 1969, while the chapter itself had been recodified in 1957. Therefore, the title could have read:

> AN ACT TO AMEND CHAPTER 1357, SESSION LAWS OF 1957, AS AMENDED BY CHAPTER 899, SESSION LAWS OF 1969.

But what, you say, of the proposed act that does not amend any existing act or for which the place of codification is uncertain? Fortunately there is an answer. In 1943 the General Assembly enacted Chapter 33 of that year's Session Laws, which adopted the newly codified General Statutes.[18] In a sense, every general law passed since has amended Chapter 33. Therefore the draftsman wishing to use the Bond Attorney approach can always begin with the 1943 Act and then pick at random any number of subsequently enacted general laws. The possible combinations approach the infinite.[19]

IV. THE HIDDEN DRAWER

The Hidden Drawer rests a little higher in the draftsman's art. The

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17. Law of May 10, 1973, ch. 444, 1973 N.C. Sess. Laws 529.

18. Law of Feb. 4, 1943, ch. 33, 1943 N.C. Sess. Laws 33.

19. One of the more notorious uses of the Bond Attorney approach occurred near the end of the 1974 session. A House bill "RELATING TO ZONING IN MECKLENBURG COUNTY AND THE CITY OF CHARLOTTE" was before the Senate when one of the Mecklenburg senators proposed an amendment that began by adding the following language to the title:

> TO AUTHORIZE THE CITY OF CHARLOTTE TO ADOPT AND ENACT ORDINANCES REGULATING THE REMOVAL, REPLACEMENT AND PRESERVATION OF TREES, AND TO MAKE CERTAIN TECHNICAL AMENDMENTS AND REENACTMENTS TO CHAPTER 617 OF THE SESSION LAWS OF 1971.

H. 2125, N.C. Gen. Assembly, 1973 Sess., 2d Sess. (1974). One section of the amendment authorized tree ordinances, but the remainder dealt with the cited Chapter 617. Several amendments were made to that earlier Act, none of which gave any indication of its contents. In the customary manner of local bills, the amendment was adopted without comment or question. It was only late in the day, after the bill had been returned to the House (which concurred in the Senate amendments), that word slowly spread through the Legislative Building that the 1971 Act dealt with mixed drinks and that the effect of the amendment was to permit their sale in Mecklenburg County. An outraged House and Senate then proceeded to recall the bill and remove the amendment, but it had almost worked.

essence of this approach is to title a bill so that it seems less than it is, yet still accurately and fully states the bill's contents. The best example of this approach in North Carolina involves a constitutional amendment and requires some background.

The state's 1868 constitution imposed a limitation on the county tax rate, known as the "equation and limitation."[20] Difficult to understand and impossible to explain, the provision had the practical effect of limiting the county tax rate to not quite 44 1/2 cents per 100 dollars of property valuation. Mercifully, it was replaced in 1921 by the so-called "15-cent limitation," which limited taxes for "general purposes" of county government (as opposed to "special purposes"—the supreme court knew the difference) to fifteen cents.[21]

By the late 1940's a fifteen cent limit had become a trifle austere and efforts to increase it began. In 1947 a constitutional amendment was proposed, with the bill title (and ballot language) reading:

> AN ACT TO AMEND SECTION 6 OF ARTICLE V OF THE CONSTITUTION TO INCREASE THE AMOUNT OF TOTAL STATE AND COUNTY TAX WHICH MAY BE LEVIED ON PROPERTY, BY CHANGING THE LIMITATION ON SAID TAX FROM 15¢ ON THE $100.00 VALUATION TO 25¢ ON THE $100.00 VALUATION.[22]

Unhappily, the state's voters refused to raise the limitation. So, in 1951, supporters of the increase tried again. This time, however, the draftsman followed the Hidden Drawer approach. The bill's title (and, not so incidentally, the ballot proposition) read,

> AN ACT TO AMEND SECTION 6 OF ARTICLE V OF THE CONSTITUTION TO LIMIT THE AMOUNT OF TOTAL STATE AND COUNTY TAX WHICH MAY BE LEVIED ON PROPERTY TO TWENTY CENTS ON THE ONE HUNDRED DOLLARS VALUATION.[23]

In 1951 the voters were quite happy to limit county taxes.[24]

The Hidden Drawer approach seems uniquely well suited to bills that lead to referenda, at least if the ballot proposition reflects the title. For some years now one of the deeply troubling public problems in North Carolina has been whether, how and where to permit the sale of mixed drinks.[25] The

20. The "equation and limitation" resulted from the combination of N.C. CONST. art. V, § 1 (enacted 1868, amended 1920) and *id.* art. V, § 7 (enacted 1868, reenacted as § 7 in 1876, repealed 1970).

21. N.C. CONST. art. V, § 2 (4) (enacted 1921, amended 1952, 1973).

22. Law of Mar. 21, 1947, ch. 421, 1947 N.C. Sess. Laws 499.

23. Law of Mar. 1, 1951, ch. 142, 1951 N.C. Sess. Laws 121.

24. In 1973 a revised finance article of the state constitution became effective and removed all trace of the 20 cent limitation from the constitution. *See* N.C. CONST. art. V.

25. *See* note 19 *supra*.

response of the 1973 legislative session was to call a statewide referendum on the question. The bill bore a dully accurate title—"AN ACT TO AUTHORIZE A STATEWIDE REFERENDUM ON MIXED BEVERAGES"[26]—and the ballot proposition was straightforward. Not surprisingly, the proponents got clobbered. Second-guessing is always easy, but one must wonder whether the outcome might have been different had the draftsman used the Hidden Drawer approach. The detailed plan that accompanied the referendum would have limited sale of mixed drinks to social clubs, Grade A restaurants and other locations during special social occasions, such as conventions and balls. A skilled draftsman could have seized upon these details and titled his bill—and ballot—to read,

> AN ACT TO AUTHORIZE A STATEWIDE REFERENDUM ON WHETHER TO LIMIT THE SALE OF MIXED DRINKS TO SOCIAL ESTABLISHMENTS, GRADE A RESTAURANTS, AND SPECIAL OCCASIONS.

Perhaps even more effective would have been,

> AN ACT TO AUTHORIZE A STATEWIDE REFERENDUM ON WHETHER TO PROHIBIT THE SALE OF MIXED DRINKS EXCEPT IN SPECIFIED CIRCUMSTANCES.

V. THE PEALING BELL

The final approach uses the title as slogan, rallying the uncommitted by propagandistic force. To understand an example, once again some background is necessary.

The early Reconstruction period in North Carolina saw the establishment of a commission form of county government: each county was governed by a board of commissioners elected by the people. Like much else that began in those first years the commissioner system seemed tainted, and as soon as possible the Conservatives returned to the pre-war system under which counties were run by justices of the peace, who were appointed by the legislature. In 1894, however, the Fusionists swept the Conservatives from power and part of the victorious program was a return to popularly elected county commissioners.[27] When the 1895 legislature met, the Fusionists held control and enacted Chapter 135, entitled as follows:

> AN ACT TO AMEND CHAPTER SEVENTEEN (17) OF THE FIRST VOLUME OF THE CODE, AND RESTORE TO THE PEOPLE OF NORTH CAROLINA LOCAL SELF-GOVERNMENT.[28]

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26. May 4, 1973, ch. 316, 1973 N.C. Sess. Laws 346.

27. H. LEFLER & A. NEWSOME, NORTH CAROLINA, THE HISTORY OF A SOUTHERN STATE 540-50 (3d ed. 1973).

28. Law of Mar. 6, 1895, 1895 N.C. Pub. Laws 185.

Sadly, the Pealing Bell has fallen into disuse; the 1895 example stands almost forgotten. Perhaps it is the unique product of a simpler time, yet the possibilities of this approach, especially for bills of great public moment, remain tantalizing. Think, for example, of a bill that has been unsuccessfully proposed in several recent sessions of the North Carolina General Assembly: ratification of the Equal Rights Amendment. Think how much more difficult it would be to vote against ratification if the bill were titled something like this:

> AN ACT TO RATIFY THE EQUAL RIGHTS AMENDMENT AND FREE WOMEN FROM THE CHAINS OF DOMESTIC SLAVERY.

Of course, once this approach became known, an opponent might introduce the bill first, fastening on it a title of a different spirit:

> AN ACT TO RATIFY THE EQUAL RIGHTS AMENDMENT AND SEND OUR SOUTHERN WOMEN OFF TO WAR.

CONCLUSION

This article has sought only to be suggestive—to make known, by way of five rather simple examples, the potential inherent in imaginative titling. Should North Carolina's draftsmen prove receptive to these suggestions, there may be occasion for a second article, in which some of the more subtle approaches—such as the Gilded Bird, the Ticking Clock and the Dead Plant—are discussed. We have only to wait and watch.