

Best Practices in Legislative Drafting

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What is good legislation?



- Complies with drafting conventions
- Meets the policy needs of legislators and constituents

Roadmap



- Bills
- Amendments
- Joint Resolutions

Organization of the Draft

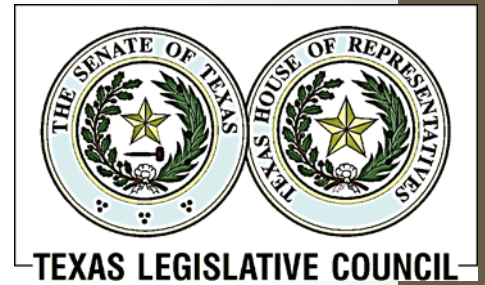


- External organization
- Internal organization
- Use Models
- Reevaluate throughout the process
- Make flow charts



Pay Special Attention to Definitions.

Don't define if:



- The term is commonly understood.
- The context makes the meaning clear.
- An applicable definition is already in law.

Do define if:



- The term is not commonly understood.
- The context does not make the meaning clear.
- The boundaries of the term's meaning need to be clarified or reasonably expanded or narrowed.
- An undesirable definition would otherwise apply.
- It is in the best interest of drafting economy.

Decide on the applicability of the definition.



- In this section, ...

- In this chapter, ...

- In this subtitle, ...

Determine whether you need an exclusive definition, nonexclusive definition, limiting definition, or some hybrid of all three.



❑ Exclusive Definition

- Use “means”
- Example: “Person” means an individual or corporation.

❑ Nonexclusive Definition

- Use “includes”
- Example: "Person" includes a corporation.

❑ Limiting Definition

- Use “does not include”
- Example: “Person” does not include a government or governmental subdivision or agency.

Consider defining by cross-reference.



- ❑ Section 51.002, Human Resources Code:
 - (1) “Family” has the meaning assigned by Section 71.003, Family Code.

- ❑ When defining by cross-reference:
 - Consider the possibility of future amendments.
 - Use closely related operative laws.
 - Don't use pinpoint cites.

Avoid substantive definitions.



Substantive definitions place operative provisions of law in a segment of law that purports to define the meaning of a word, asking a definition provision to carry weight that it is not designed for and making the statutes less accessible.

Avoid substantive definitions.



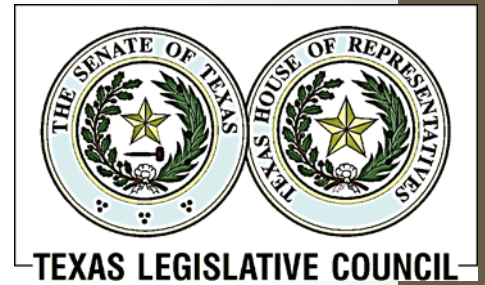
- ❑ Don't say: “‘Contract’ means a contract that does not contain an automatic renewal clause.”
- ❑ Better: “A contract may not contain an automatic renewal clause.”

Avoid artificial definitions.



Artificial definitions provide meanings that are so far from what any ordinary meaning of a term would suggest that confusion may arise.

Avoid artificial definitions.



- ❑ Don't say: "In this chapter, 'dog' means a dog or a cat."
- ❑ Better: "This chapter applies to cats and dogs."

Don't define a term that
isn't used in law.



... and leave no unused definition
behind.

Be consistent.



Be consistent.



- ❑ If courts are to presume the legislature has “weighed well” the words it has chosen,
- ❑ should courts assume that different words refer to different things?

See Murray v. State, 21 Tex. Ct. App. 620 (1886) for “weighed well” language.

Be consistent.



- ❑ Save the use of synonyms for creative writing.

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- Save the use of synonyms for creative writing.
 - “A motor vehicle operator shall use a horn to provide audible warning only when necessary to insure safe operation of the automobile.”

Be consistent.



- Save the use of synonyms for creative writing.
 - “A *motor vehicle* operator shall use a horn to provide audible warning only when necessary to insure safe operation of the *automobile*.”
 - Is there a difference between motor vehicles and automobiles?

Be consistent.



- ❑ Save the use of synonyms for creative writing.
- ❑ Use words in a bill in a manner that is consistent with the law being amended.

Be consistent.



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- ❑ Use words in a bill in a manner that is consistent with the law being amended.
 - Be aware of the defined terms used in the amended chapter, title, and code.

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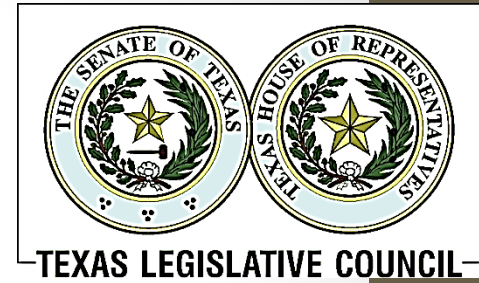
- ❑ Save the use of synonyms for creative writing.

- ❑ Use words in a bill in a manner that is consistent with the law being amended.
 - Be aware of the defined terms used in the amended chapter, title, and code,
 - as well as commonly used terms in that chapter, title, and code.



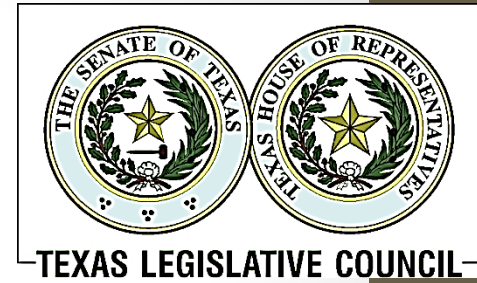
Other laws may apply.

- Penal laws
- Bond laws
- Election laws
- Ethics laws
- Administrative procedure laws
- Constitutional provisions
- Other general laws



Keep in Mind the Code
Construction Act (Chapter 311,
Texas Government Code).

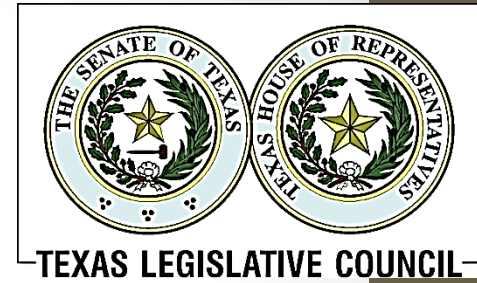
Section 311.005. Definitions.



(2) “Person” includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.

(3) “Population” means the population shown by the most recent federal decennial census.

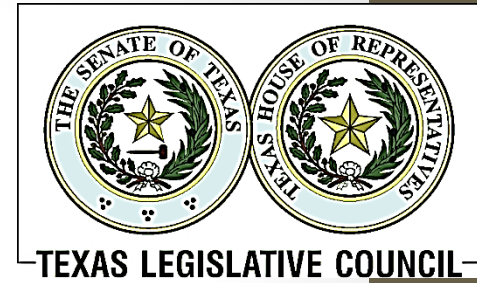
Section 311.005. Definitions.



(4) “Property” means real and personal property.

(13) “Includes” and “including” are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.

Section 311.012. Tense, Number, and Gender.



(a) Words in the present tense include the future tense.

(b) The singular includes the plural and the plural includes the singular.

(c) Words of one gender include the other genders.



Section 311.016. “May,” “Shall,” “Must,” “May Not.”

(1) “May” creates discretionary authority or grants permission or a power.

- *Example: The commissioner may inspect records.*

(2) “Shall” imposes a duty.

- *Example: The commissioner shall issue a license.*



Section 311.016. “May,” “Shall,” “Must,” “May Not.”

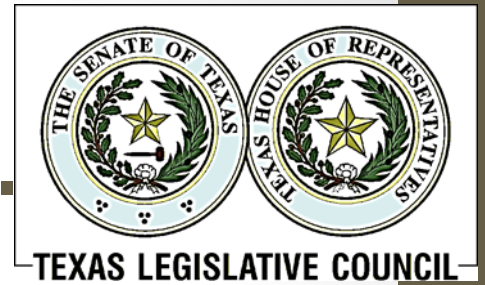
(3) “Must” creates or recognizes a condition precedent.

- *Example: To be eligible for appointment, a person must be at least 18 years of age.*

(5) “May not” imposes a prohibition and is synonymous with “shall not.”

- *Example: The clerk may not release the report.*

Section 311.024. Headings.



“The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute.”

Section 311.031. Saving Clause.



- ❑ Section 311.031 is a general saving clause applicable to statutes.

- ❑ What is a saving clause?
 - A saving clause “saves” from the application of a law certain conduct or legal relationships that occurred before or existed on the effective date of the law.

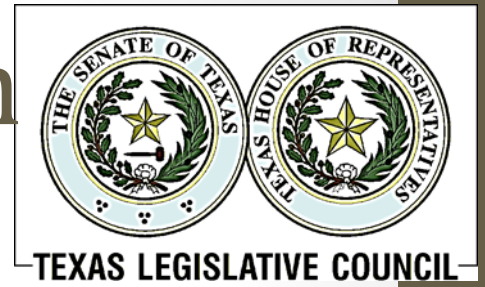
Section 311.032. Severability.



- ❑ Section 311.032 provides for the severability of statutes.

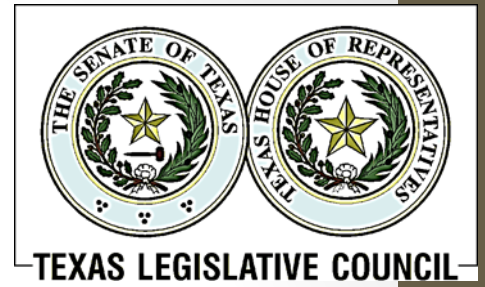
- ❑ What is severability?
 - When a court holds that part of a statute is invalid, the remainder of the statute is not affected if:
 - (1) the remainder of the statute is “severable” or capable of being given effect without the invalid part; and
 - (2) the legislature would have enacted the remainder of the statute *even if* the invalid part had not been included in the first place.

Section 311.034. Sovereign Immunity.



“[A] statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.”

Enforcement



Enforcement



- You've drafted the law to do what it needs to do. Now what?
- What if someone doesn't follow the law?

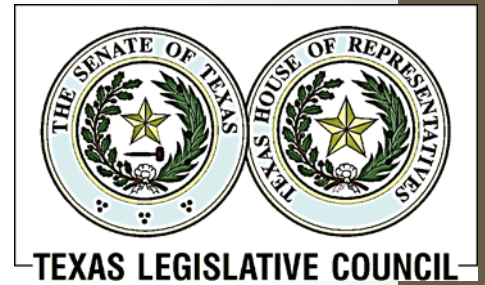


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 - Should there be administrative, civil, or criminal penalties?
 - May someone aggrieved by a violation of the law sue the violator?
 - How do we know if the law is being followed?
 - Who enforces the law, and who pays for enforcement?

Enforcement



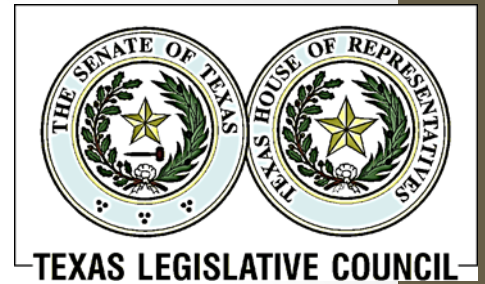
- ❑ The drafting solution may be to amend an existing law that already has a regulatory framework.
- ❑ In that case, be aware of the existing penalties.



Transitions

- ❑ How to get from the old law to the new
- ❑ Saving and grandfather clauses
- ❑ Who is responsible?
- ❑ Caught in the middle--what to do with pending cases or applications on the effective date of the act
- ❑ Boards

Effective Dates



❑ No longer need an emergency clause.

❑ Usually either:

- September 1, following the legislative session:

SECTION 3. This Act takes effect September 1, 2019.

- Immediate effect:

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2019.

❑ Contingent on other events, such as another bill passing or constitutional amendment gaining approval by the voters.

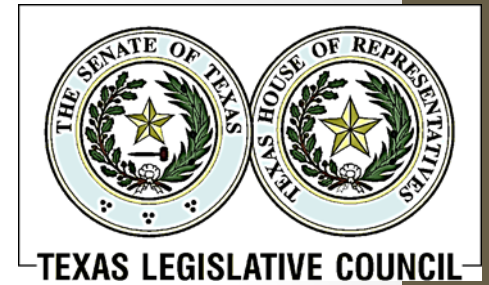
Captions



Captions

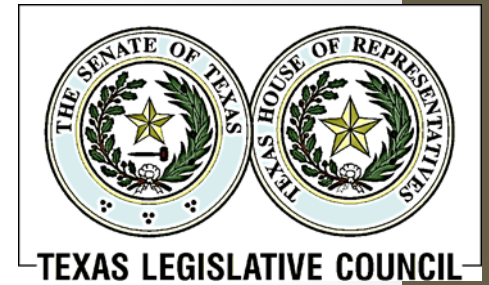


- Draft the caption *last*.



Captions

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- What does the caption need?



Captions

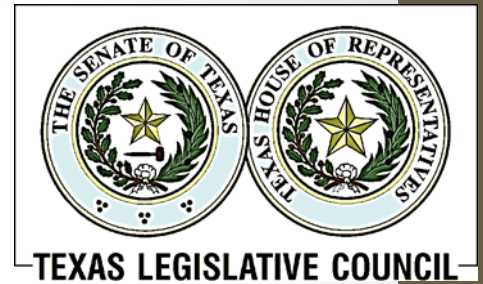
- ❑ Draft the caption *last*.
- ❑ What does the caption need?
 - to provide the legislature and public reasonable notice of the subject of a bill
 - *see* §35(b), Art. III, Texas Constitution



Captions

- Draft the caption *last*.
- What does the caption need?
 - to provide the legislature and public reasonable notice of the subject of a bill
 - *see* §35(b), Art. III, Texas Constitution
- Other provisions to mention in a caption:
 - the imposition of penalties
 - the making of appropriations, granting of eminent domain authority, or authorization of the issuance of bonds or creation of public debt

Captions



House Rule 8, Sections 1(b), (c), and (d), as adopted for the 85th Legislature, require a house bill to “include a short statement at the end of its title or caption indicating the general effect of the bill” if the bill contains specified provisions relating to:

- ❑ a “tax, assessment, surcharge, or fee” (House Rule 8, Section 1(b))
- ❑ a criminal offense, punishment for an existing criminal offense, or “the eligibility of a person for community supervision, parole, or mandatory supervision” (House Rule 8, Section 1(c))
- ❑ a “license, certificate, registration, permit, or other authorization” necessary for an individual or entity to engage in “a particular occupation or profession” (House Rule 8, Section 1(d))

Amendments



- Germaneness
- Substitutes
- One subject rule

Amendments: Read the **entire** bill.

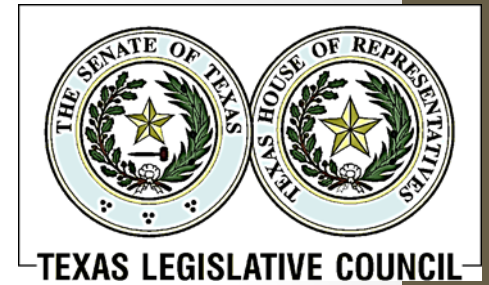


- “Just changing one word” may affect other provisions of the bill.

Sec. 3208.051. BOARD. The district is governed by a board of six directors.

- Amend C.S.H.B. No. 1000 on page 2, line 27, by striking “six” and substituting “four”.

Amendments: Read the **entire** bill.



Sec. 3208.051. BOARD. The district is governed by a board of four directors.

- What about this provision on the next page?

Sec. 3208.057. QUORUM. Four directors constitute a quorum.

- Do all the directors need to be present to conduct business?

Joint Resolutions



Use a joint resolution to amend the Texas Constitution.

Joint Resolutions



Section 1, Article XVII, Texas Constitution

- ❑ The legislature “by a vote of two-thirds of all the members elected to each House” can propose amendments to the state constitution.
- ❑ Amendments may be proposed “at any regular session, or at any special session when the matter is included within the purposes for which the session is convened.”

Joint Resolutions



A joint resolution is always used to propose a constitutional amendment.

S.J.R. No. 14
(Heading)

SENATE JOINT RESOLUTION

proposing a constitutional amendment authorizing the legislature to provide for an exemption from ad valorem taxation of all or part of the market value of the residence homestead of the surviving spouse of a 100 percent or totally disabled veteran. *(Caption)*

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF TEXAS:

(Resolving Clause)

Joint Resolutions: Amendatory Section



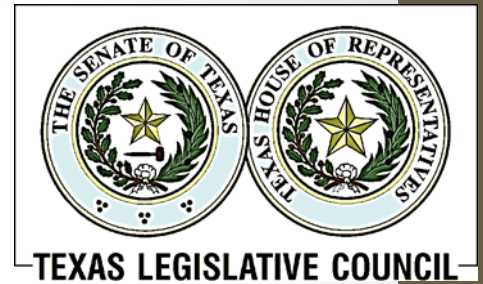
SECTION 1. Article VI, Texas Constitution, is amended by adding Section 1a to read as follows:

Sec. 1a. The legislature by general law may provide for voting in a primary election by a person who:

(1) will be 18 years of age or older on the date of the subsequent general election for state and county officers; and

(2) satisfies the other applicable requirements for eligibility to vote.

Joint Resolutions: Amendatory Section



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Joint Resolutions: Amendatory Section



SECTION 1. Article VI, Texas Constitution, is amended by adding Section 7 to read as follows:

Sec. 7. During the period beginning on the general primary election day and ending on the following general election day, a county or any political subdivision of this state whose officers are selected from candidates nominated at a primary election may not, unless ordered to by a court:

(1) abolish an office of the county or other political subdivision; or

(2) change the boundaries of a district from which an officer of the county or other political subdivision is elected.

Joint Resolutions: Temporary Provision



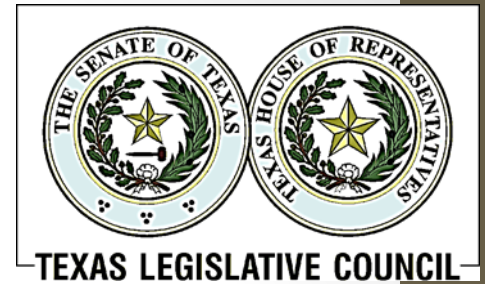
SECTION 2. The following temporary provision is added to the Texas Constitution:

TEMPORARY PROVISION. (a) This temporary provision applies to the constitutional amendment proposed by the 85th Legislature, Regular Session, 2017, authorizing the legislature to provide for an exemption from ad valorem taxation of all or part of the market value of the residence homestead of the surviving spouse of a 100 percent or totally disabled veteran.

(b) Sections 1-b(j) and (k), Article VIII, of this constitution take effect January 1, 2018, and apply only to a tax year beginning on or after that date.

(c) This temporary provision expires January 1, 2019.

Joint Resolutions: Temporary Provisions



- Should specify any transition language related to and the effective date of the amendment to which the temporary provision refers.

- Should be placed within the Constitution.

- Should not be put in a particular place in the Constitution.

- Should contain an expiration date.

Joint Resolutions: Submission Clause



SECTION 3. This proposed constitutional amendment shall be submitted to the voters at an election to be held November 5, 2019. The ballot shall be printed to permit voting for or against the proposition: “The constitutional amendment authorizing the legislature to permit professional sports team charitable foundations to conduct charitable raffles.”

Joint Resolutions: Submission Clause



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Joint Resolutions: Submission Clauses



- ❑ Section 1, Article XVII, Texas Constitution: “The date of the elections shall be specified by the Legislature.”
- ❑ Standard submission date: uniform election date in November (for 86R, November 5, 2019)
- ❑ Advantage of November date in odd-numbered years: timely submission of amendment to voters
- ❑ Disadvantage of November date in odd-numbered years: statewide election on a different date than general election for state and county officers

Joint Resolutions: Submission Clause



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Joint Resolutions: Submission Clauses



Ballot proposition:

- Your audience is the voters of Texas.
- Use plain, descriptive language.
- Run the readability statistics in Word.

When in doubt, RTDM
(read the Drafting Manual)

www.tlc.texas.gov > Publications > General
Reference