Published September 2014 in *The Hennepin Lawyer*, membership publication of the Hennepin County Bar Association. Used with permission.
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How a Bill Becomes a Law: What You Did Not Learn in Civics Class

The back story behind a six-year initiative to protect design professionals from uninsurable indemnity obligations.

While Senator Jack Davies imparted both knowledge and enthusiasm to our 1L Legal Process class at William Mitchell College of Law, little did I realize how much more than that knowledge and enthusiasm it takes to move a bill through the Minnesota Legislature. Yes, it takes a working knowledge of the legislative rules and considerable energy and zeal. But it also takes a skilled lobbyist, knowledge of the case law, understanding of legislative history, identification of all stakeholders, appreciation for each stakeholder's objectives, and strong bill authors. Most of all, it takes a team of people who have the patience and trust to know that a good idea can be successful if they utilize all the preceding attributes.

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In 1983, the Minnesota legislature enacted Minn. Stat. Chapter 337, commonly called the construction anti-indemnification law. The intent of the law was and is to make parties to a construction project liable only for their own respective fault and not to unfairly impose liability for another party's fault. The well-known and oft-invoked saving exception to the law provides that a party may indemnify another party for that other party's fault if the contract requires the indemnifying party to procure insurance to cover the indemnified party. The law withstood major challenge in *Holmes v. Watson-Forsberg, Inc.*, 488 N.W.2d 473 (Minn. 1992), wherein the supreme court applied the above exception.

Litigation continued over issues in contact terminology in particular cases, but the fundamental theme of insurability of indemnity agreements remained paramount. As long as a solvent and financially strong entity (i.e., an insurance company) ultimately would bear the risk, contracts to indemnify were considered good public policy and therefore enforceable. But members of one segment of the construction industry—design professionals—were disserved by this public policy because design professionals cannot procure insurance to cover their contractual indemnity obligations.[1] The insurance simply is not available in the market place. Generally speaking, a commercial general liability insurer will add a general contractor as an additional insured to a building subcontractor's insurance policy, but a professional liability insurer will not do so. So the saving exception was not saving the design professional community from unfair and uninsured liability.

The design professional community gradually became more and more vocal about this deficiency in the law. While the law indeed protected most construction industry members, it had the unintended consequence of placing design professionals into situations where major risks were going uninsured. All construction industry groups generally understood the law had a bad policy effect: it favors no one to impose liability without a source of collection. Parties to construction contracts, in obtaining indemnity commitments from design professionals, were obtaining a false sense of security that they would be compensated for a loss. In fact the loss would not be compensated because the design professionals often had insufficient assets to cover the obligations and their insurers had no legal obligation to do so.

The problem with the law was easy to identify but the fix was not so easy, despite that all that was required was a simple piece of legislation to which no one had a fundamental objection. Six years later, we all now understand that what appears simple in concept is complex in its execution. On May

16, 2014, Governor Dayton signed into law Chapter 257, Laws of 2014, finally freeing design professionals from the burden of uninsured contractual indemnity, (codified at Minn. Stat. § 604.19). The journey that the lobbying team undertook, navigating the rough seas of the Legislature for six years, is worth sharing.

The Six-Year Legislative Voyage

It is a good idea to approach a project with the confidence that it can be completed readily without undue exertion. Without that false sense of confidence, perhaps the legislative team would never have embarked on this voyage.

I, for one, gained my false sense of confidence long ago when I participated in the Legislative Clinic, a William Mitchell elective course. The course goal, which I achieved, was to draft a non-controversial bill and to get it passed into law. With the help of skilled lobbyist Kevin Snell and the legendary, late Senator Alan Spear, the bill passed and I received an "A" in the course. So, many years later, when I joined the legislative team to amend the construction indemnity law, I could not have been more confident of success.

The individual members of the legislative team, which included engineers, lawyers and insurance industry professionals, changed somewhat over the years. But American Council of Engineering Companies of Minnesota[2] (ACEC/MN) and their lobbyist Randy Morris led the charge the entire way. I joined the legislative experts in 2008 to assist in drafting a bill that I thought would be as uncontroversial as my law school clinic assignment—elimination of uninsurable indemnity obligations. Also central in the drafting process were Holly Newman and Eric Heiberg, both attorneys in private practice volunteering their time for the cause. Led by Randy Morris, we enlisted two respected and effective legislators, Representative Melissa Hortman and Senator Ann Rest. The legislative authors can have an enormous impact on the success of legislation. We had our bill ready and the authors were in place to introduce it and shepherd it through the committee process. What we failed to appreciate, however, were the interests of potential stakeholders who might object to our presumably non-controversial bill.

Our work started in earnest in late 2008, in preparation for the 2009–2010 Legislative Session. The Minnesota Legislature meets in two-year terms, traditionally handling the state budget in the five-month session in odd-numbered years, and the bonding bill in the three-month session in the even-numbered years. This two-year cycle provides two years for a bill introduced in the odd-numbered year to work its way through the process to become law. If you do not pass your bill in the first year of the term, it still remains alive into the second year without having to start over.

Creating the Bill

The process started with a voluntary team of engineers and attorneys who identified the problem and drafted straightforward language to solve the indemnification issue. Because the anti-indemnity law is contained primarily in Minn. Stat. § 337.02, the team felt it made sense to amend that statute and related statutes. The concept was to work within the confines of the statute and to create a separate definition of "design professional services contract" as distinguished from a "building construction contract." With that distinction established, we included limited and specialized language applicable only to design professional services contracts, while retaining the overall structure of Chapter 337 and its applicability to both building construction and design professional services contracts.

Enlisting Bill Authors

With the proposed language in hand we sought out our bill authors. As a general rule, members in the majority party have much more control when moving legislation, and in 2009 the DFL controlled both the House and Senate. We received welcome receptions from Representative Melissa Hortman and Senator Ann Rest when we approached them to author our bill; both were familiar with the construction industry and the nuances in construction contracts and they were eager to help. They were approached not only for their expertise but because both sat on the Commerce committees in the House and Senate, the committees where our legislation would be heard. The bills received their first readings upon introduction in the Senate and House and were referred, as expected, to the respective committees upon which Senator Rest and Representative Hortman sat. Our bill numbers for this Session were HF 578 and Senate companion SF 56.

The 2009-10 Legislative Term: The Education Process

A wave over the bow struck us at the very first committee meeting. While we had informally spoken with some anticipated stakeholders, namely the Minnesota Chapter of the Associated General Contractors (AGC), we had not fully considered the concerns of government agencies, such as the Minnesota Department of Administration (DOA). The DOA raised concerns about the bill in the first hearing.

The DOA is tasked with overseeing and drafting the building contracts for all state agencies; as such, the DOA and its staff have a keen interest in all contractual matters. While our legislative task force did not believe the legislation would impact construction contracts between the private sector and the state, we had not met with DOA before introduction of the legislation to share our interpretations and the aim of our legislation. In hindsight, it seems no surprise that the DOA voiced its objections to the bill at the committee hearing, but it took us by surprise at the time.

After hearing the DOA's concerns and objections, the committee nonetheless voted in favor of the bill so that it could pass out of committee. The bill was referred by the Commerce Committee to the Labor and Consumer Protection Committee so that concerns from the DOA would be fully aired and addressed.

Legislative committees give great deference to state agencies when considering legislation. When the state agency charged with overseeing state contracts voiced concern

over contract-related legislation, the committee was loath to approve it. The legislative team understood the clear signal: without the DOA's approval, the bill had little chance of passing into law. We also understood that if an agency as sophisticated as the DOA could either misinterpret or question the legislation, then there could be other unanticipated opposition. The group caucused to determine who the broader universe of stakeholders might be. We initiated an extended education and discussion program which took more than a year, carrying us past the 2010 session. It would be no use to push a bill in the second year of the session if it would remain a lightning rod.

During that time period, discussions were held with members of the DOA. The group also approached the League of Minnesota Cities Insurance Trust, realizing that Minnesota municipalities may have similar concerns to the DOA. Through that process it became clear that the legislation ultimately would not adversely affect the municipal or state entities because the goal was simply to prevent the creation and enforceability of contracts for which insurance was not available. The governmental entities would not be served by indemnity contracts for which were there was no professional liability insurance and thus no financial backing.

The 2011-12 Legislative Term: Assessing the Impact on Stake Holders

With DOA concerns addressed, we set out with new vigor in the 2011-12 legislative session with the same language in hand. Elections in 2010 had changed the partisan control at the Capitol; Republicans now held the majority in both the House and Senate. Following common lobbying wisdom, we sought out majority party authors, Joe Hoppe in the House and David Brown in the Senate—both were important members of the committees we expected our bill to be referred to: Commerce in the House and Judiciary in the Senate. We also asked Representative Hortman and Senator Rest to remain on the bill as co-authors, acknowledging their contributions from the last session. Upon introduction, the bill was introduced in the Senate as SF 387 and was referred, as expected, to the Committee on Judiciary and Public Safety.

It was déjà vu all over again[3] when surprise opposition appeared at the first committee meeting. This time it is was the Minnesota Subcontractors Association (MSA). Our group did not perceive the MSA was a potential opponent because the design professionals, like the MSA, generally sought the protection of the anti-indemnity law. Like subcontractors, design professionals often were required to provide contractual indemnity. The bill's language did not directly affect subcontractors and, we believed, furthered the statute's public policy of protecting potential indemnitors.

But the MSA's perception of the bill's impact was quite different. The MSA had its own issues and objections with the statute's then-current language and was leery of any change to the statute that did not also address the MSA's concerns vis-à-vis its

members' contractual relationships with general contractors. In hindsight, the MSA's position can be understood, but it was not anticipated at the time. Unlike the agency concerns, the MSA's opposition could not be overcome through mere discussion and education. The MSA, while not objecting to the intent of the design professionals' bill, requested additional language to further protect the MSA's members' interests. But to add that language risked opposition from the general contractor community, represented by the AGC. So the design professionals had unwittingly inserted themselves into a much larger dispute that was unlikely to be resolved in a single legislative session. Indeed, with the subcontractors' amendment, the bill was not even passed by the Senate Judiciary Committee. Instead it was withdrawn and re-referred to the Commerce Committee.

The design professionals were tasked not only with continuing to dialogue with all the stakeholders, but also preparing new statutory language which would be palatable to both AGC and MSA. Continued discussion with the stakeholders and internal discussions among team members continued through the end of the 2011-2012 session. So no action was taken in 2012 and the bill went dormant again.

The 2013-14 Legislative Session: Navigating Around the Shoals

The 2012 elections brought another change to the Legislature, returning control to the DFL in the House and Senate. Representative Hortman again agreed to be the chief author in the House and the bill was introduced as HF 446 and was referred to the Commerce Committee. But the AGC and MSA both had their respective concerns with the bill and the potential impact it might have on their memberships. So while the bill passed out of the Civil Law Committee, it was re-referred to the Commerce Committee rather than to the floor of the House.

The bill *did* pass out of the Commerce Committee in time to meet committee deadlines, but it was never scheduled for action on the floor, so at the end of the 2013 Session, the bill was returned to the Commerce Committee. The reason for the delay on the floor was the parallel discussion among the MSA and AGC. Ironically, a related bill (SF 561/HF 644) addressing contractual indemnity, eventually received the acquiescence of both AGC and MSA, proceeded to the floor, and was passed into law (Chapter 88, Laws of 2013). But, unfortunately for the design professional community, that compromise bill did not address the design professionals' need to protect themselves from uninsured indemnity obligations.

The team regrouped yet again between the 2013 and 2014 sessions. It was becoming apparent that the issues surrounding Minnesota Statutes Chapter 337 were taking the focus away from the design professionals' single goal—a goal to which no group had seriously objected. So it was decided to cast the bill not as a construction bill under Chapter 337, but to place it in Chapter 604, which addresses civil liability. While the chapter number and heading on a statute is not supposed to be legally significant (Minn. Stat. § 645.49), it can affect the reader's perception. By creating a new bill and requesting that the Revisor of Statutes place it into Chapter 604, the design professionals were able to refocus attention on the true intent of the bill: preventing uninsured liability. Although design professionals are members of the construction industry, that association should not detract from the essential purpose of the bill, a purpose that is unique from the issues being faced by the general contractors and subcontractors in Chapter 337. Whether by sheer luck, supreme insight or a combination of both, the strategy worked. The new bill (HF 2090/SF 1957), now codified in Chapter 604, was passed into law by the governor's signature on May 16, 2014 (Chapter 257, Laws of 2014). But it took more than simply recasting the heading to achieve the goal.

The legislative team knew there would be little margin for error or delay in the short 2014 session. Committee assignments were studied and deadlines determined, all in preparation for the rapid session. Taking advantage of the pre-filing option, the group got the bill jacketed[4] in both the House and Senate prior to the session commencing. This allowed the respective bills to go to the respective House and Senate committees (Civil Law and Judiciary) as quickly as possible. The hearings went so smoothly, it seemed too good to be true. In the House, the bill was referred to the Civil Law Committee, immediately passed out, received its second and third reading, and then passed on the House floor by a vote of 130–0 on April 7, 2014. This was still more than a month before the anticipated adjournment for the legislature, allowing plenty of time for the Senate to act on the bill. Receiving the bill from the House, the Senate acted on it only 15 days later, passing it by unanimous vote of 59–0 on April 24, 2014. However—and it turned into a big however—Senator Vicki Jensen moved a floor amendment to add language requested by the MSA. Senator Ron Latz, who was our chief author in the Senate for 2014, acceded to Senator Jensen's request, knowing that the matter would be referred to a conference committee.

None of our legislative team, other than lobbyist Randy Morris, had ever been before a conference committee. None of us knew the applicable rules, if indeed there were rules for a conference committee. My assumption had always been that conference committees were convened to work out minor and insignificant differences between House and Senate bills and always resulted in a happy and acceptable solution to all stakeholders. But, here, the language of the amendment was clearly going to be unacceptable to the AGC membership, and they had sufficient time to express their opposition in the conference committee hearing, which they indeed did.

The number of members on a conference committee varies: large budget bills and other controversial legislation have five members from the House and five members from the Senate, but for our bill there were only three from each chamber. The chairs of the Conferees are the bill authors in the House and Senate, and the other committee members are appointed by the Speaker of the House and the President of the Senate. A member from the minority is usually included as a conferee in both chambers. In this instance, Senator Jensen was one of the Senate conferees because she had a strong interest in the bill, having proposed the amendment.

A conference committee hearing is unique because it is chaired by two legislators: the House and Senate bill authors, who share the gavel back and forth. Both chairs have the power and responsibility to solicit and hear testimony from interested persons and they trade off the ability to call meetings. In this instance, the interested persons were primarily parties either supporting or opposing the MSA-favorable amendment proposed by Senator Jensen. But the design professionals did not need, and chose not, to participate in discussion of the amendment. As a practical matter, if Senator Jensen's amendment was accepted by the conference committee, there was a risk that the bill would not pass a floor vote due to AGC's continued opposition. But that dispute was essentially out of the design professionals' control.

The rules require that the conference committee consider the issues in the bills and decide which language to accept when crafting a Conference Committee Report. A majority vote from both House and Senate Conferees must occur before the finalized Conference Committee Report can go back to the floors for a final vote. After debate, the Senate conferees made a motion for the Conference Committee to accept the Senate language of the bill, including the Jensen amendment. None of the House Conferees voted in favor of the motion, so it failed. (In a conference committee, in order for provisions to be included in a Conference Committee Report, a majority on *both* sides must vote in favor.) Then the House moved their language, which both sides supported. This language was redrafted as a Conference Committee Report, which is unique as a legislative vehicle in that it cannot be amended—it must be voted up or down as is. This Conference Committee report returned to the House and Senate floors, passing both with unanimous votes. Then the governor signed, so ending the odyssey.

Conclusion

The Minnesota Legislature works largely by consensus. Other than addressing necessary bills, like taxing and appropriations, or occasional hot button political topics, legislators do not want to pass legislation to which anyone has strong opposition. It can be politically damaging to a legislator and damaging to a segment of the population to pass a bill to which there is minority opposition. So passing a bill is much more than showing you have the better idea or convincing a majority of the Legislature to agree with your cause. You must address all opposition and win over all the stakeholders involved. Sometimes you can anticipate the opposition and sometimes you cannot. The devil is in the details when numerous stakeholders have an interest in your bill.

This ACEC-sponsored bill took three full biennial legislative sessions to accomplish. Given that the Minnesota Vikings' lobbyist and legislative team worked for more than ten years to secure legislative approval for their new stadium, perhaps it should not be surprising that this somewhat less controversial insurance legislation took "only" six years.

[1] A design professional is commonly understood to be a person licensed under Minn. Stat. §326.02, specifically: an engineer; architect, land surveyor, landscape architect, geoscientist; or interior designer.

[2] The American Council of Engineering Companies of Minnesota (ACEC/MN) is a professional association which is an advocate for consulting engineering firms in Minnesota. It is comprised of 150 member firms with over 6,000 employees. The member firms provide services to all segments of society, including federal, state and local governments, private industry and the general public. ACEC/MN's mission is to advocate for consulting engineering companies, to create educational and business opportunities for its members and to encourage individuals to pursue careers with consulting engineering companies. ACEC/MN is member of the American Council of Engineering Companies (ACEC), the largest national organization of consulting engineering companies. ACEC represents all 50 states and the District of Columbia. Its member firms employ over 300,000 people who are responsible for more than $100 billion of private and public works annually.

[3] Credit Yogi Berra with this turn of phrase.

[4] "Jacketing" occurs when legislative language has been finalized by legislative staff and proponents—the bill is attached to a yellow (Senate) or green (House) card stock "jacket," with vital information about the bill, a description, and space for authors to sign onto the bill. After authors and coauthors sign onto the jacket, it can be given to the Speaker of the House's office or the secretary of the Senate's office to be given a bill number and be scheduled for introduction when the legislature meets next. This process can only be authorized by a legislator.