Statutory Interpretation Is Everywhere

Thursday, May 4, 2023

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MCLE: **1 Hour of MCLE including 1 Hour of Legal Specialization in Appellate Law**

Conference Reference Materials

CALIFORNIA LEGISLATIVE HISTORY CHEAT SHEET
May 4, 2022

1. What is Cognizable as Legislative History?

- Legislative history is only cognizable if it sheds light "on the collegial view of the Legislature *as a whole*." *(Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30 *(Kaufman),* emphasis added.)

- Thus, only documents that were "communicated to the Legislature as a whole" constitute cognizable legislative history. *(Kaufman, supra,* 133 Cal.App.4th at p. 39.)

- EXCEPTION: Enrolled bill reports

  Enrolled bill reports are "prepared by a department or agency in the executive branch that would be affected by the legislation" and "are typically forwarded to the Governor's office before the Governor decides whether to sign the enrolled bill"—which has already passed both houses of the Legislature *(Kaufman, supra,* 133 Cal.App.4th at p. 40.)

  Although enrolled bill reports may not be read by the Legislature, the California Supreme Court still finds the reports "instructive on matters of legislative intent" because " '[t]he contemporaneous construction of a new enactment by the administrative agency charged with its enforcement, is entitled to great weight' " and is therefore "likely to reflect the understanding of the Legislature that enacted the statute . . . ." (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1218, fn. 3.)

2. What is NOT Cognizable as Legislative History?

- Absent some showing that the document "was communicated to the Legislature as a whole, it does not constitute cognizable legislative history." *(Kaufman, supra,* 133 Cal.App.4th at p. 39.)

- Statements of individual legislators are typically irrelevant. (See *People v. Wade* (2016) 63 Cal.4th 137, 143.)

- The mere fact that "the document was located in the file of a legislative committee" is not enough. *(Kaufman, supra,* 133 Cal.App.4th at p. 39.)

3. List of Documents Cognizable and Not Cognizable as Legislative History

- *Kaufman* provides a detailed description of materials that are cognizable or not cognizable as legislative history.

4. Other Rules Relating to the Use of Legislative History in California

- Judicial notice of cognizable legislative history is not necessary. "Citation to the material is sufficient." *(Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45, fn. 9.) Courts may treat a request for judicial notice of cognizable legislative history "as a citation to those materials." *(Ibid.)*

- "[T]he evolution of the legislative language *after the bill's introduction"* "can offer 'considerable enlightenment as to legislative intent . . . .' " *People v. Tokash* (2000) 79 Cal.App.4th 1373, 1378, emphasis added.)

- The legislative history of a different statute is generally irrelevant. *(Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 532.)

- A legislative expression of the intent behind an earlier legislative act is relevant but not binding. *(Eu v. Chacon* (1976) 16 Cal.3d 465,470; see also *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232,244 ["the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them"].) BUT California courts may give that expression little weight. (See *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52 [holding that declaration of later Legislature has little weight in determining intent of the enacting Legislature].)

- Proposed bills that would have amended the statute but were not adopted have "limited probative value regarding the Legislature's original intent." *(The Pines v. City of Santa Monica* (1981) 29 Cal.3d 656, 663.) Thus, "[u]npassed bills, as evidences of legislative intent, have little value." *(Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1396.) "The same is true of unpassed constitutional amendments." *(Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 238.) This is because "the Legislature's failure to enact a proposed statutory amendment may indicate many things other than approval of a statute's judicial construction, including the pressure of other business, political considerations, or a tendency to trust the courts to correct its own errors." *(People v. Mendoza* (2000) 23 Cal.4th 896, 921.) Thus, "[w]e can rarely determine from the failure of the Legislature to pass a particular bill what the intent of the Legislature is with respect to existing law." *(Ingersol v. Palmer* (1987) 43 Cal.3d 1321, 1349.)

EXCEPTION: Courts may rely on the "legislative history of a predecessor bill that had been vetoed by the Governor and was 'virtually identical to the legislation at issue.' " *(Doe v. Becerra* (2018) 20 Cal.App.5th 330, 342 *(Doe),* quoting *City of Richmond v. Com. on State Mandates* (1998) 64 Cal.App.4th 1190, 1199; but see *Medical Bd. v. Superior Court* (2003) 111 Cal.App.4th 163, 182 [refusing to consider unpassed predecessor bill that was not identical to statute and was not passed by both legislative houses].)

EXCEPTION: "[A]n *expressed* relationship between the predecessor bills and the statute to be interpreted [is] sufficient to make the legislative history surrounding the unpassed predecessor bills instructive." *(Doe, supra,* 20 Cal.App.5th at p. 342, emphasis added and citing *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 188 [finding unpassed predecessor bill instructive "because the Assembly Committee on Judiciary acknowledged the relationship between Assembly Bill 1 and its predecessor bills, stating that Assembly Bill 1 'incorporates the concepts or language of the following assembly bills introduced during the regular or special session' reference [predecessor bills]' "].)

EXCEPTION: History of unpassed predecessor bill may have "some value" where the legislative committee "was considering a proposed amendment that added language identical to the" language "eventually enacted . . . ." *(Doe, supra,* 20 Cal.App.5th at p. 343.)

- Omissions in a detailed description of changes in the law made by a bill in its legislative history are significant and signal the Legislature's intent *not* to change what was omitted. (See *Brodie v. WCAB* (2007) 40 Cal.4th 1313, 1329 [failure to mention Plaintiff's suggested interpretation in exhaustive list of changes in the law made by the bill indicated that the Legislature did not intend to adopt that interpretation].)

- Cannot rely on actions by one house of the Legislature that were rejected by the other house. (See *Mooney v. Pickett* (1971) 4 Cal.3d 669, 678 ["we cannot derive the legislative purpose from actions of one house of the Legislature which were rejected by the other house"].)

Statutory Interpretation Framework

- **Purpose of statutory interpretation**

    - *In California courts*, the "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute." *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.

    - *Compare to federal courts*, where "[w]e're all textualists now," and the task is to ascertain what law Congress enacted, without reference to legislative intent. Justice Elena Kagan, Harvard Law School, *The Antonin Scalia Lecture Series* (Nov. 25, 2015).

- **Text of statute**

    - Ordinary or plain meaning, unless the term is defined or has a specialized meaning. *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000.

    - Must be read in the context of the rest of the statute and statutory scheme. *Ibid*.

- **Canons of construction – common ones to consider**

    - *Word choice*, e.g.:
        - and v. or – conjunctive v. disjunctive, *People v. Pool* (1865) 27 Cal. 572, 580–581; *Houge v. Ford* (1955) 44 Cal.2d 706, 712.
        - may v. shall – mandatory v. discretionary (sometimes), *Tarrant Bell Prop., LLC v. Superior Court* (2011) 51 Cal.4th 538, 542.

    - *Ejusdem generis*: a general term that follows an enumerated list of more specific terms should be interpreted to cover only matters similar to those specified. *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141.

    - *Expresio unius est exclusio alterius*: The expression of one thing implies the exclusion of others not expressed. *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.

    - Statutory language must be harmonized both internally and with related statutes. *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192–193.

    - *General/Specific Canon*: where two laws conflict, the specific governs the general. *Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 634.

- *Titles, headings, and preambles*: can be used to indicate meaning, but not dispositive. Warning*:* Lexis and Westlaw often use their own titles or headings, so make sure the title is part of the enacted law. *People v. Romanowski* (2017) 2 Cal.5th 903, 912.

- *Presumption of Consistent Usage*: The same words used in different parts of the same statute are presumed to have the same meaning, and a variation in terms suggests a variation in meaning. *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 979.

- *Presumption of Nonexclusive "Including"*: the use of the term "including" or "includes" in a statute connotes an illustrative list, not an exhaustive one. *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 717.

- *Rule Against Surplusage*: courts will avoid a reading of the statute that renders any words or phrases in the statute meaningless or extraneous. *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 234.

- Change or deletion in statutory language creates presumption that Legislature intended to change the law. *People v. Mendoza* (2000) 23 Cal.4th 896, 916.

- **Legislative history in California courts**

  - Evidence of legislative intent helps resolve ambiguity. Also, it can be used to determine that a statute is ambiguous and to then resolve that ambiguity. See *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 613, fn.7.

  - *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, provides a robust discussion of what materials are considered cognizable legislative history.

- **Additional canons to consider**

  - *Presumption of Legislative Acquiescence*:

    - Legislative inaction may indicate approval of existing decisions interpreting the statute, but it "is a slim reed upon which to lean." *Quinn v. State of California* (1975) 15 Cal.3d 162, 175. "The Legislature's failure to act may indicate many things other than approval of a judicial construction of a statute," such as "the sheer pressure of other and more important business, political

considerations, or a tendency to trust to the courts to correct their own errors . . . ." *People v. Whitmer* (2014) 59 Cal.4th 733, 741 [internal quotation marks and citations omitted].

- However, if the Legislature revisits the statute and does not change it in response to case law, this "strongly suggests that the Legislature approved of" the prior interpretations. *People v. Williams* (2001) 26 Cal.4th 779, 788–789.

- *Canon of Constitutional Avoidance*: "a statute will be interpreted to avoid serious constitutional questions if such an interpretation is fairly possible." *People v. Buza* (2018) 4 Cal.5th 658, 682.

- *Rule of Lenity*: Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor. *People v. Avery* (2002) 27 Cal.4th 49, 58.

Resources for finding California Legislative History

- Lexis and Westlaw include legislative history for some statutes

- California Legislative Information website:
  - 1999 onward: https://leginfo.legislature.ca.gov/faces//billSearchClient.xhtml
  - 1993–2016: http://www.leginfo.ca.gov/index.html

- Legislative Intent Service, Inc. (state and federal research, for a fee):
  - http://www.legintent.com/

- Law school libraries

Judicial Notice of Legislative Materials

- See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26 for a list of what materials are considered cognizable legislative history.

- Courts can take judicial notice of proper legislative history materials.

- However, citing to the material "is sufficient," and judicial notice is not required, *Quelimane Company, Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 46 n. 9.

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Statutory Construction Guidelines for Bill Drafting in California

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I. INTRODUCTION

As the fifth largest economy in the world, California laws affect both the natural and international economy.[1] In California, and nationally, the legislative branch enacts laws, the judicial branch of government interprets laws, and the executive branch enforces laws. California's Legislature is a full-time, professional legislature with a nonpartisan staff of legislative drafters.

Statutory interpretation is, in essence, the method used by American judges to ascertain what a statute means, to whom it applies, and how it interacts with other statutes. The general rule of statutory interpretation is to effectuate the legislature's intent.

Yet, some legal scholars see the principles of statutory interpretation as

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1. Bohn., et al., *California's Future: Economy*, PUB. POL'Y INST. OF CAL. (Jan. 2020), https://www.ppic.org/wp-content/uploads/californias-future-economy-january-2020.pdf.

having no place in the legislative drafting process.[2] Others have argued legislative intent is irrelevant because an interpreter's job is to discern what a statute means, not what the Legislature intended it to mean.[3]

Perhaps, though, that is the ultimate measure of success of legislative drafting: a drafter's job is to capture the legislator's, or legislature's, intent and turn it into a statute with meaning. Using statutory interpretation principles when drafting a bill enables a legislative lawyer to do that by adding clarity to statutes and drafts in a predictable way.

By doing so, are legislative drafters drafting statutes with meaning or are the courts interpreting statutes to further the legislative intent? We would argue both. When drafters and the courts use the same tools, statutes have the potential to be interpreted consistently, and that shared meaning is the ultimate goal.

This Article provides an overview of bill drafting in California, including key statutory construction principles for purposes of bill and amendment drafting in the state.

II. LEGISLATION IN CALIFORNIA

In California, when we use the term "legislation," it does not just refer to bills. Legislation also includes resolutions and constitutional amendments. While only bills create statutes, the Legislature can adopt internal rules and express its views by way of resolution and can place before the voters proposed amendments to the state constitution.[4]

The following chart provides a brief comparison of the different forms of legislation in the state:

2. *See, e.g.*, David Marcello, *Legislative Drafting: Teaching and Training Strategies in the U.S.*, 65 J. LEGAL EDUC. 83, 97 (2017). *But see* William N. Eskridge Jr., *Dynamic Statutory Interpretation* 135 U. PA. L. REV. 1479, 1481 (1987); Chai R. Feldblum, *The Joy of Teaching Legislation*, 7 N.Y.U.J. LEGIS. & PUB. POL'Y 31, 35 (2003).

3. Oliver Homes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 417–19 (1899).

4. CAL. CONST., art. IV, § 8 (declaring that the "Legislature may make no law except by statute and may enact no statute except by bill."). The full rules of each house of the California Legislature, and their joint rules, are passed each year as concurrent resolutions. *See, e.g.*, H.R. 1, 2018 Leg., Reg. Sess. (Cal. 2018); S.R. 4, 2018 Leg., Reg. Sess. (Cal. 2018); S. Con. R. 21, 2019 Leg., Reg. Sess. (Cal. 2019).

Comparing Forms of California Legislation

Type of Legislation	Passage Required by	Presented to the Governor	Result
Bill	Assembly and Senate	Yes	Statute
Joint Resolution	Assembly and Senate	No	Expression of intent to Congress; not law.
Concurrent Resolution	Assembly and Senate	No	Internal Legislative rules binding on both houses, or an expression of Legislative intent; not law.
House Resolution	Single house	No	Internal Legislative rules binding on the house that passed it; not law.
Constitutional Amendment	Assembly and Senate	No	Amendment to Constitution, if adopted by the state's voters.

Each of these types of legislation follows a specified format used by attorneys in the Office of Legislative Counsel who are charged with drafting all bills and amendments in the California Legislature. The following is the general format followed for legislation:

Date introduced or amended

Number __ (AB, SB, ACA, SCA, AJR, SJR, ACR, SCR, HR, and SR)

Author(s) and co-author(s)

An act to __ (for bills to add, amend and/or repeal sections of law) or **Relative to __** (for resolutions)

Legislative Counsel's Digest (existing law explained, followed by what the measure would do)

Substantive provisions (including any intent language, or findings and declarations)

The substantive provisions are made up of a series of sections. Each bill section enacts new substantive law.

When the Legislature passes a bill, and the Governor signs it or allows it to become law without a signature, a statute is enacted. There are more than 150,000 statutes "on the books" in California. These "books" are called codes, and there are twenty-nine codes arranged by subject ranging from the Business & Professions Code to the Welfare & Institutions Code, with twenty-seven other codes in between.

Just as a bill has a format or hierarchy, so does each code. Each code has its own hierarchy of provisions and organization, but generally the format is:

Code
Title
Division
Part
Chapter
Article
Section

Each code section is additionally organized into various subdivisions:

Section __.
(a) Subdivision[5]
(1) Paragraph
(A) Subparagraph
(i) Clause
(I) Subclause

In California, attorneys in the Office of Legislative Counsel (also known as the Legislative Counsel Bureau) (OLC) are required to draft legislation. However, initial drafts can and often do come from committees, staff, lobbyists, and other groups. The state Senate and Assembly share the nonpartisan OLC.

Comparatively, committees, staff, lobbyists, nonprofits, and the federal Office of Legislative Counsel draft legislation in Congress. At the federal level, it is optional to use the U.S. House and U.S. Senate Offices of Legislative Counsel. Again, in California, use of the OLC is *mandatory* for final versions of bills and amendments. In other words, bills cannot be introduced and amendments to bills cannot be accepted unless they are in "Legislative Counsel form."

There are obvious pros and cons of using attorneys for the legislative branch of government to draft legislation instead of outside attorneys. For example, having people with different goals or views of the statute can contribute to its development, but ethical challenges may arise if a drafter has a personal position on legislation.[6] On the other hand, ordinary people may write in ordinary language.

5. In United States federal law, this is called a "subsection," but in California it is a "subdivision."

6. *See e.g.*, David Marcello, *The Ethics and Politics of Legislative Drafting*, 70 TULANE L. REV. 2437, 2440 (1996).

III. USING STATUTORY INTERPRETATION PRINCIPLES TO DRAFT STATUTES IN CALIFORNIA

This Part provides an overview of California statutory interpretation principles as they relate to drafting statutes and provides additional drafting principles used in the state. It is not our intent to dig into the judicial nuances of statutory interpretation or to debate when or how a court should apply those principles. Rather, this Part presents a practical take on some of the statutory interpretation principles that can be useful when drafting or reading legislation and statutes in California.

A. Statutory Interpretation Principles

The canons, or principles, of statutory interpretation are presumptions used by American judges to assist them when interpreting statutes. Primarily, judges use the canons to:

- Uncover the Legislature's intent.
- Interpret the plain meaning of the statute.
- Resolve ambiguity within the statute.

While courts are not required to follow these rules of statutory construction in every instance, they are intended to guide the courts in determining what the Legislature's intent was in enacting the particular statute.[7] Each state differs in how it interprets statutes, but most follow the federal principles.

Kaufman & Broad Communities v. Performance Plastering is a critical statutory interpretation case in California.[8] The appellate court opinion essentially: (a) clarifies that a determination of the existence of an ambiguity occurs not at the time of a motion for judicial notice, but by the panel of judges hearing the appeal; (b) lists cognizable and non-cognizable legislative history for interpreting laws; and (c) acknowledges the propriety of taking judicial notice of enrolled bill reports from a governor's file.

In addition, the *Kaufman* case lists sources of legislative history that will be considered by courts in California when trying to ascertain legislative intent. The court sets forth the form by which it will consider "properly cognizable legislative history": A motion for judicial notice must be made "with the understanding that the panel ultimately adjudicating the case may determine that the subject statute is ambiguous"; the motion is to identify each separate document for which judicial notice is sought as a separate exhibit; points and authorities are to be submitted citing authority for each exhibit being "cognizable legislative history."

7. California Redevelopment Ass'n v. Matosantos, 267 P.3d 580, 606 (Cal. 2011).
8. Kaufman & Broad Cmtys. v. Performance Plastering, 34 Cal. Rptr. 3d 520, 523 (Cal. Ct. App. 2005).

1. Ordinary Meaning

This Section discusses the "ordinary meaning" rule.[9] This rule typically requires courts to give the statutory language its usual and ordinary meaning.[10] Essentially, this canon means that we presume the Legislature uses words in their ordinary sense. So, we ask, "What would these words convey to an ordinary or reasonable reader?"

Of course, that also leads to a discussion of, "What is the ordinary meaning?" For example, is it:

- colloquial meaning or conversational meaning;
- dictionary meaning;
- specific or technical meaning;
- prototypical meaning (i.e., the best example); or
- extensive meaning (i.e., all examples)?

As you might imagine, there are several challenges with the use of the colloquial meaning. The first problem is, "From whose perspective do we view this meaning?" A majority of judges on the courts are white men, and most members of the California Legislature are also white men. But legislative staffers, committee staff, and advocates proposing or drafting statutes are more diverse. That context matters.

Judges are using dictionary definitions more frequently to determine ordinary meaning. A commonly used dictionary, such as *Webster's*, is often a good starting place for a broad definition. Naturally, there are also challenges with using dictionaries to determine a word's plain meaning. Because there are multiple dictionaries, each with slightly different word meanings, which one should be relied on? Moreover, this assumes that bill drafters are using dictionaries. Is this accurate? Are the same dictionaries even being used? And dictionaries change over time. As a result, should a judge rely on a dictionary in print when the law was written or a dictionary published today?

In addition, dictionaries often do not reflect different cultural meanings. They do not provide context to interpreting the statute or provide guidance on what to do if the statute contains words with a technical or specialized meaning that is not reflected in a dictionary definition.

There are limits to a statute's plain meaning. The presumption of ordinary

9. This is sometimes referred to as the "plain meaning", "plain English", and "literal meaning" rule. The California courts, and federal courts, have long wrestled with where to start the statutory interpretation analysis: legislative history or plain meaning. For an interesting discussion of the rise of plain meaning in the California courts, we recommend Russel Holder, *Say What You Mean and Mean What You Say: The Resurrection of Plain Meaning in California Courts*, 30 U.C. DAVIS L. REV. 569, 572 (1997). For an interesting discussion on the challenges with legislative drafting and the Plain English rule, see ROBERT J. MARTINEAU & ROBERT J. MARTINEAU, JR., PLAIN ENGLISH FOR DRAFTING STATUTES AND RULES 3–11 (2012).

10. *See, e.g.*, Sierra Club v. Superior Court, 302 P.3d 1026, 1031 (Cal. 2013); Klein v. United States, 235 P.3d 42, 48 (Cal. 2010); Ailanto Props., Inc. v. City of Half Moon Bay, 48 Cal. Rptr. 4th 340, 348 (2006).

meaning may be rebutted when a statute is directed at a specific technical audience, such as doctors or lawyers.[11] Additionally, the courts will not follow plain meaning if that meaning leads to an absurd result. If a court looks at the plain meaning and determines it would lead to an illogical result, the absurdity doctrine requires the court to pick a meaning as close as possible to the literal meaning. As former U.S. Supreme Court Justice Antonin Scalia opined, you have to pick the new meaning that "does the least violence to the text."[12]

2. Ambiguity

When ambiguity exists in the statutory language and courts cannot determine the Legislature's intent by the plain meaning of the statute's words, courts will use statutory interpretation canons to uncover the Legislature's intent.[13] The most common definition of "ambiguity" for statutory interpretation purposes is anytime two or more reasonable minds may disagree on what the statutory language says.[14] In other words, there are two equally plausible interpretations of the same language. California courts do not assign a percentage to this. Is it still ambiguous if there is a 60/40 split? 90/10 split? 50/50 split?

When courts attempt to interpret a statute, they do so because there is ambiguity in the statute, and this ambiguity creates interpretation problems for how the law should be applied or interpreted. There are three categories of interpretive problems: lexical, syntactic, and extra-linguistic.

The first, lexical, deals with what words mean, such as, "What is a 'sandwich'?" Is the term "sandwich" defined in the law?

The second, syntactic, deals with the way words are combined or arranged, such as, "The man hit the boy with the telescope." Did the man hit a boy who was holding a telescope? Or did the man use a telescope to hit a boy?

The third, extra-linguistic, deals with concerns specific to the law, such as constitutional concerns.

Practically, there are several types of ambiguities found in statutes:

- It is unclear what a word modifies. For example, the modifier follows a series of nouns so it is unclear if the word modifies all the nouns.
- The word has more than one meaning.
- The statute, word, or phrase is fuzzy or vague. For example, there is a broad meaning, or it could apply to a variety of things.
- The statute, word, or phrase is too general. For example, there are nouns that apply to more than one thing.[15]

11. *See, e.g.*, Nix v. Hedden, 149 U.S. 304, 306 (1893).
12. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 529 (1989).
13. *See, e.g.*, Heckart v. A-1 Self Storage, Inc.,415 P.3d 286, 291 (Cal. 2018).
14. *See, e.g.*, People v. Dieck, 209 P.3d 623, 625 (Cal. 2009).
15. *See also* Robert J. Martineau & Robert J. Martineau, Jr., Plain English for Drafting Statutes and

As you can imagine, sometimes generality or vagueness is intentional. A common example is when the legislature delegates authority to a state agency, and the drafter wants the power to be broad.[16] Another example may be when the statute recognizes there will be advancements or technological change forthcoming, and so the law provides general, rather than specific, requirements.

3. Canons of Statutory Construction

For purposes of statutory construction, the courts and bill drafters use a series of "canons" to guide them. These include textual canons (intrinsic aids), linguistic presumptions and grammatical conventions, substantive canons, and extrinsic aids.[17] It is impossible to list them all, but this Section discusses the most common canons and those most useful for legislative drafting.

We start with the presumption that the Legislature drafts its bills carefully and intentionally.[18] Because of this presumption, the usual approach of the judicial branch is to narrow statutes rather than expand them, and the courts are less activist in their interpretation.

Noscitur a Sociis guides us to interpret words or phrases in light of the other words around it in the statute.[19] Namely, we should interpret an ambiguous word or phrase by taking into account its use in its textual context. Some commentators have opined that words are defined by the company they keep.

The following is an example: Each classroom shall be provided paper, binder paper, printer paper, cardstock, and colored paper. In this case, what is the first "paper" referring to? Under this canon, the first "paper" would be something related to binder paper, printer paper, cardstock, and colored paper. This could be writing paper but likely would not be receipt paper, which would have little use in the classroom and would stand out given the context provided by the other words in the sentence.

Ejusdem Generis guides us to interpret catch-all phrases as limited by the specific words around them.[20] Former U.S. Supreme Court Justice Antonin Scalia asked, "What category would come to a reasonable person's mind?"[21] His opinion was that the canon narrows the statute, or the catch-all, by the surrounding words.

Expressio Unius provides that a list of words with no catch-all means that the

Rules 97–100 (2012).

16. It is, however, a violation of the separation of powers doctrine in the California Constitution if the Legislature delegates too much of its lawmaking authority. *See, e.g.*, Dougherty v. Austin, 29 P. 1092, 1093 (Cal. 1892).

17. *See, e.g.*, People v. Cornett, 274 P.3d 456, 458 (Cal. 2012).

18. *See, e.g.*, Mendoza v. Nordstom, Inc., 393 P.3d 375, 383 (Cal. 2017).

19. *See, e.g.*, People v. Prunty, 355 P.3d 480, 487 (Cal. 2015).

20. *See, e.g.*, Cal. Cannabis Coal. v. City of Upland, 401 P.3d 49, 59 (Cal. 2017).

21. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 199–213 (2012).

inclusion of specific words suggests the exclusion of other words.[22]

The Rule Against Surplusage explains that different words in the same statute cannot have the same meaning.[23] In other words, one word is not duplicative or redundant of another word found in the statute.

The Whole Act Rule provides that statutory provisions should be interpreted so they have a whole, coherent meaning.[24] Identical words in the same or related statutes should have the same meaning. The basis for this rule is that it assumes the Legislature drafts purposefully and is consistent in its word use.

The Rule of the Last Antecedent provides that a modifier set off from a series of antecedents by a comma should be interpreted to apply to all of the antecedents.[25] Put another way, any qualifying words are to be applied to the words or phrases immediately preceding the qualifying word or words and are not interpreted as extending to other words. Relatedly, the Serial Comma Rule specifies that in a series of three items where each is set off by a comma, each item should be viewed as independent of each other. Here is an example: My favorite ice cream is coffee, mint chocolate chip, and vanilla with chocolate sauce. Compare that sentence to the following: My favorite ice cream is coffee, mint chocolate chip, and vanilla, with chocolate sauce.

In regards to interpreting general versus specific statutes, if a specific statute is deemed inconsistent with a general statute that covers the same subject matter, then the specific statute is usually deemed an exception to the rule provided by the general statute.[26] In addition, as a general rule of statutory construction, courts must narrowly construe an exemption in a statute.[27]

Similarly, a recently enacted statute is generally given more weight than an earlier enacted statute.[28] In other words, if two statutes cannot be reconciled and appear to be in conflict, the recently enacted statute will take precedence over the earlier enacted statute. Statutes are presumed to operate prospectively, rather than retroactively, unless there is evidence the Legislature intended the statute to be applied retroactively.[29]

Finally, courts generally give deference to the interpretation of a statute given by an administrative agency that has expertise and is charged with interpreting and enforcing the statute.[30] While not necessarily a rule of statutory

22. *See, e.g.*, Lopez v. Sony Elecs., Inc., 420 P.3d 767, 772 (Cal. 2018).

23. *See, e.g.*, Mendoza v. Nordstrom, Inc., 393 P.3d 375, 383 (Cal. 2017).

24. *See, e.g.*, United States v. Fisher, 6 U.S. 358, 386 (1805); United Riggers & Erectors, Inc. v. Coast Iron & Steel Co. 416 P.3d 792, 796 (Cal. 2018).

25. *See, e.g.*, Shine v. Williams-Sonoma, Inc., 233 Cal. Rptr. 3d 676, 684 (Cal. Ct. App. 2018).

26. *See, e.g.*, Lopez v. Sony Elecs., Inc., 420 P.3d 767, 771–72 (Cal. 2018).

27. *See, e.g.*, Stoetzl v. State, 222 Cal. Rptr. 3d 728, 736–37 (Cal. Ct. App. 2017).

28. *See, e.g.*, People v. Adelmann, 416 P.3d 786, 790 (Cal. 2018); Lopez v. Sony Elecs., Inc., 420 P.3d 767, 771–72 (Cal. 2018).

29. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 245 (1994); Quarry v. Doe I, 272 P.3d 977, 981 (Cal. 2012).

30. *See, e.g.*, Heckart v. A-1 Self Storage, Inc., 415 P.3d 286, 299 (Cal. 2018).

construction, it is important to take this point into consideration when there is an agency determination regarding a statute's meaning.

Substantive canons are presumptions judges have drawn from policy and constitutional values. In general, these canons reflect normative beliefs of how the law should be. There are essentially three types of substantive canons:

- tie-breaker canons;
- presumptions; and
- clear statement rules.

Tie-breaker canons are used when there is a 50/50 split on a statute's interpretation. An example is the Rule of Lenity, in which penal statutes whose purpose is to punish must be construed strictly or narrowly.[31] The purpose of this narrow interpretation is to provide adequate notice, due process, and fairness. It is usually not used in a way that decides the case: "all evidence is in the defendant's favor, plus the rule of lenity."

Presumptions are the default interpretation principles that the court reads into a statute. In these cases, the opposing party must rebut, or overcome, the presumption. An example is the presumption the Legislature does not intend for statutes to apply retroactively.[32] As a result, a court will interpret a statute to apply prospectively. Therefore, those arguing the statute applies retroactively must provide legislative intent to overcome that presumption.

Clear statement rules are canons the U.S. Supreme Court developed as an expression of "quasi-constitutional" values. For example, under the Constitutional Avoidance Canon, statutes will be construed, if possible, to avoid questions about their constitutionality. In such cases, the court does not have to find that the statute is unconstitutional but only that it could raise a constitutional issue.[33]

Extrinsic aids are conventions that use sources outside the legislative process, including legislative history, *stare decisis*, or common law. The courts adhere to the doctrine of *stare decisis*—a Latin term that essentially means a judicial precedent should not be overruled by a later court absent some overriding consideration. This is important so society knows how laws will be interpreted and applied, and the doctrine creates consistency in court decisions.

4. Additional Principles of Statutory Construction

Many common words or phrases also present drafting challenges. For example, the words "and" and "or" may be construed as interchangeable when

31. *See, e.g.*, McBoyle v. United States, 283 U.S. 25, 27 (1931); People v. White, 386 P.3d 1172, 1178 (Cal. 2017).

32. *See, e.g.*, People v. Buycks, 422 P.3d 531, 541 (Cal. 2018).

33. *See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 336–37 (1936).

necessary to effectuate legislative intent.[34] The word "and" can result in ambiguity, such as whether the members of a group are to be considered together. Here is an example: "Wild dogs and cats should be kept inside." Does this mean wild dogs and all cats? Or does it mean wild dogs and wild cats?

The word "or" can also lead to ambiguity. It is inclusive or exclusive? Here is an example: "You shouldn't run long distances if you are injured or out of shape." What if you are both injured and out of shape? Consider another example: "Do you want the soup or the salad?" Does this mean that you may not have both soup and salad?

Additionally, what is the proper use of singular versus plural forms of words? An example of this by the U.S. House of Representatives OLC is "drivers may not run a red light" versus "a driver may not run a red light." In the first instance, one interpretation is that a violation only occurs if multiple drivers run a red light. That ambiguity is eliminated if the singular term is used instead of the plural term.

Courts generally interpret the word "may" as being permissive, while the word "shall" is mandatory.[35] Federally, according to the U.S. House of Representatives OLC, the term "shall" means that it specifies a required action, while the term "may" means that a permissible action is specified, but it is not required. On the other hand, "may not" is also mandatory and is often used for denying a right or power.

There is also a difference between the terms "means" and "includes." According to the U.S. House of Representatives OLC, the term "means" is exclusive, while the term "includes" is not. For example, if the statute says, "the term . . . means . . .," then it cannot include anything else. On the other hand, if the statute says, "the term . . . includes . . .," then it could include something else.

5. Legislative History

The primary purpose of statutory interpretation principles is to uncover the legislature's intent and the public policy behind the statute.[36] In other words, why did the California Legislature do what it did? Legislative history can provide critical insight into that intent.

Statutory history is usually defined as changes to the language of the bill through the legislative process. Legislative history is usually defined as statements of purpose or intent behind the bill. Most often, individuals will use the phrase legislative history, but actually mean both statutory and legislative

34. *See, e.g.*, In re C.H., 264 P.3d 357, 362 (Cal. 2011).

35. *See, e.g.*, Escondido Mut. Water Co. v. La Jolla Indians, 466 U.S. 765, 772 (1984); Tarrant Bell Prop., LLC v. Superior Court, 247 P.3d 542, 544 (Cal. 2011); *see also* ROBERT J. MARTINEAU & ROBERT J. MARTINEAU, JR., PLAIN ENGLISH FOR DRAFTING STATUTES AND RULES 112–13 (2012).

36. For one of the most famous legislative intent cases, see Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892) ("a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.").

history.

Examples of legislative history:

- Committee reports.
- Statements of support or opposition from interested parties.
- Press releases, media articles, and interviews.
- Presidential signing or veto messages.
- Bill analyses by committees, sponsors or opposition, and advocacy groups or lobbyists.

Examples of statutory history:

- Legislative intent statements in the act itself.
- Drafting history (i.e., was the statute amended prior to enactment).

For courts, who the speaker is matters for consideration of legislative history. Was the speaker an interest group? A member of the legislature? A committee member? In terms of the most persuasive legislative history, many courts and legal commentators disagree. Courts consider the best legislative history to be that which represents a large body of legislators, not just the bill's author or one side of the public policy debate. Generally, the following is a list in order of most to least persuasive legislative materials:

- Conference committee reports.
- Committee reports.
- Statements made during debates.
- Statements from the sponsor of the bill.

Legislative history is challenging and, consequently, controversial. While a statute is the law, legislative history is not. It also does not necessarily represent everyone's view because there is no collective intent; not all legislators may have the same idea in mind when they pass a statute.[37] Also, we know that lobbyists and advocacy groups influence a statute's legislative history. To make matters worse, the legislative history can easily be general, vague, or unclear.

Some legal commentators also believe the use of legislative history results in judicial activism because some judges only use legislative history when a statute is ambiguous after looking at its ordinary meaning. As a practical matter, researching legislative history is expensive because parties to litigation will have to dig through history instead of just applying common meaning to a statute.

B. Operation of Statutes in California

This Section presents several statutory rules on the operation of statutes in California. The preliminary provisions of the different codes contain the general

37. WILLIAM N. ESKRIDGE, JR. ET AL., STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 303, 314–18 (2014).

rules for the construction of statutes.[38]

A statute enacted at a regular session goes into effect on the following January 1, which follows a 90-day period from the date of enactment of the statute. On the other hand, a statute enacted at a special session goes into effect on the 91st day after adjournment of the special session at which the bill was passed. Statutes calling elections, statutes providing for tax levies or appropriations for the usual current expenses of the state, and urgency statutes go into effect immediately upon their enactment.[39]

When the provisions of one statute are carried into another statute under circumstances in which they are required to be construed as restatements and continuations and not as new enactments, any reference made by any statute, charter, or ordinance to such provisions must, unless a contrary intent appears, be deemed a reference to the restatements and continuations.[40]

When the same section or part of a statute is amended by two or more acts enacted at the same session, any portion of an earlier one of those successive acts that is omitted from a subsequent act is deemed to have been omitted deliberately. Further, any portion of a statute omitted by an earlier act that is restored in a subsequent act is deemed to have been restored deliberately.[41]

In the absence of any express provision to the contrary in the last statute enacted, it is conclusively presumed that the statute enacted last is intended to prevail over statutes enacted earlier at the same session. And in the absence of any express provision to the contrary in the statute with a higher chapter number, it is presumed that a statute with a higher chapter number was intended by the Legislature to prevail over a statute enacted at the same session but has a lower chapter number.[42]

Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal.[43] No statute or part of a statute that has been repealed by another statute can be revived by the repeal of the repealing statute. It can only be revived with express words that revive the repealed statute or part of the repealed statute. If a later enacted statute that deletes or extends the date of termination or repeal of a previously enacted law is chaptered before the date of termination or repeal, the terminated or repealed law is revived when the later enacted statute becomes operative.[44]

Finally, neither house of the California Legislature may bind its own hands

38. CAL. GOV'T CODE § 9603 (West 2020).

39. CAL. GOV'T CODE § 9600 (West 2020). Federally, in Congress, the ordinary effective date is the day the President signs the bill, unless the bill states otherwise. Among the states, the effective date doctrine varies. In some jurisdictions, it is the date the governor signs the bill. In others, it is the following day.

40. CAL. GOV'T CODE § 9604 (West 2020).

41. CAL. GOV'T CODE § 9605 (West 2020).

42. *Id.*

43. CAL. GOV'T CODE § 9606 (West 2020).

44. CAL. GOV'T CODE § 9607 (West 2020).

or those of future Legislatures by adopting rules not capable of change. "It is the general rule that one legislative body cannot limit or restrict its own power or that of subsequent Legislatures and that the act of one Legislature does not bind its successors."[45]

IV. TIPS AND BEST PRACTICES WHEN DRAFTING CALIFORNIA STATUTES

Each drafter follows their own unique drafting process, but most agree the goal is to further the requestor's intent. One of the first questions to ask is, "What is the issue being addressed?" Other commentators sometimes frame it as, "What is the problem to be solved?" Regardless of approach, the purpose of this question is to set the stage for the bill drafter to understand what is desired to be accomplished with the bill and the goal of the legislation.

Some other questions for the bill drafter to pose before commencing drafting could include:

- To whom would the bill apply?
- Who is to be excluded?
- When does it take effect?
- Who is responsible for enforcement?
- What is the penalty for failure to comply?
- How does this law interact with existing law(s)?
- Do terms need to be defined?
- Are there existing definitions in current law?[46]

It may also be necessary to conduct research on the public policy issues being addressed by the legislation to better understand how to address the author's intent when you are drafting the legislation. After your research and review of current law has concluded, it is time to write an initial draft of the bill.

We generally begin drafting by keeping at the forefront the desire to fulfill the "plain meaning" rule. This means that the draft needs to use simplistic language, and technical or legal jargon should be limited, except where necessary. The language should be clear and brief and limit any unnecessary, confusing, or redundant words. Also, think about when and where it is appropriate to define terms used in your drafting.[47] While sometimes it is necessary or desirable to be vague, we try to avoid it as much as possible.

In terms of preliminary drafting, one suggestion is to begin by deciding how you would explain the proposed law to a friend using ordinary language. Thereafter, look at how the other statutes in that chapter are drafted, or how other

45. *In re* Collie, 240 P.2d 275 (Cal. 1952).

46. *See also* ROBERT J. MARTINEAU & ROBERT J. MARTINEAU, JR., PLAIN ENGLISH FOR DRAFTING STATUTES AND RULES 85–89 (2012).

47. For an interesting discussion on whether to define a term, see ROBERT J. MARTINEAU & ROBERT J. MARTINEAU, JR., PLAIN ENGLISH FOR DRAFTING STATUTES AND RULES 119–20 (2012).

states have drafted a similar statute. Are there terms defined for the entire chapter or article? If so, consider using those terms.

Based upon where to place the bill language in existing law (i.e., which code and which division or chapter within that code), determine how other statutes in this area of the code read and how this language is to be integrated into the existing statutory scheme. One example is whether you can use already defined terms?

When you revisit your draft, try to poke holes in the language. Did you now define or cross-reference terms? Are there any ambiguities in the language? Have you taken into account the general rules of statutory construction a court will utilize if it ultimately reviews the statute you drafted?

V. CONCLUSION

When drafting legislation in California, as well as other venues, it is valuable to keep in mind the key statutory interpretation principles to create consistency in the codes and to understand what the judicial branch will utilize when interpreting the statute that is at issue in litigation. These principles and canons will help guide the drafter to reduce ambiguity and better ensure the legislative intent is achieved.

* * *

The Honorable Danny Y. Chou was nominated by Governor Gavin Newsom on February 17, 2023 for appointment to the Court of Appeal, First Appellate District, Division Five. He is currently a judge with the San Mateo County Superior Court, where he is one of five judges assigned to handle all civil cases. Before his appointment to the bench, Judge Chou served as an Assistant County Counsel at the Santa Clara County Counsel's Office. At the County Counsel's Office, he was the lead public trial lawyer and lead appellate lawyer in *People v. ConAgra Grocery Products Co.*, which resulted in a $305 million settlement to be used to clean up residential lead paint. He also served as the Chief of Complex and Special Litigation and the Chief of Appellate Litigation at the San Francisco City Attorney's Office, where he was part of the trial and appellate teams that successfully challenged California's statutory and constitutional bans on same sex marriage. In addition, he has served as a supervising staff attorney for a Justice at the California Supreme Court, a staff attorney at the U.S. Court of Appeals for the Ninth Circuit, an associate at Howard, Rice, Nemerovski, Canady, Falk and Rabkin, and a law clerk for a judge at the U.S. District Court for the Northern District of California.

Chris Micheli is a Principal with the Sacramento governmental relations firm of Aprea & Micheli, Inc.

As a legislative advocate, Micheli regularly testifies before policy and fiscal committees of the California Legislature, as well as a number of administrative agencies, departments, boards, and commissions. He drafts legislative and regulatory language and is considered a leading authority on state tax law developments and California's legislative process.

Over the last twenty-five years, he has published hundreds of articles and editorials in professional journals, newspapers and trade magazines, whose diverse subjects range from tax incentives to transportation funding. He wrote a bi-monthly column on civil justice reform for five years for *The Daily Recorder*, Sacramento's daily legal newspaper, authoring over 100 columns.

Micheli has argued before the Supreme Court of California (just two years out of law school), as well as the Court of Appeal several times. He has filed more than fifteen *amicus curiae* briefs in California courts. He has published a number of peer-reviewed law journal articles and is the co-author of the books: "A Practitioner's Guide to Lobbying and Advocacy in California" and "Guide to Executive Branch Agency Rulemaking." In addition, he has published three textbooks: "Introduction to California State Government," "An Introduction to Drafting Legislation in California," and "Understanding the California Legislative Process." He is also the author of two recent casebooks: "The California Legislature and Its Legislative Process: Cases and Materials" (Carolina Academic Press) and "Cases and Materials on Direct Democracy in California" (Kendall-Hunt Publishing).

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Prior to starting her own practice in 2013, Leah worked for five years at the Ninth Circuit as a law clerk to Judge Consuelo Callahan and as head of the civil staff attorneys at the court. She has litigated numerous civil cases at the trial and appellate levels as an associate and contract attorney for Orrick, Herrington & Sutcliffe.

In addition, Leah is a member of the California Academy of Appellate Lawyers and has contributed to several professional committees: the California Lawyers Association's Committee on Appellate Courts, for which she is a past Chair; the CLA's Amicus Committee; the Appellate Lawyer Representatives to the Ninth Circuit; and the Bar Association of San Francisco's Appellate Section Executive Committee.

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