

Interpreting Statutes

While the roots of the American legal system remain in the common law, the 1930s saw the beginning of “an orgy of statute-making”.¹ Today, most legal issues are controlled or significantly affected by statutes. Thus, your skills of statutory analysis will be crucial to your success as a lawyer. The skills basic to statutory analysis are (1) reading the statute, (2) identifying the issues, and (3) interpreting the statute’s language.

I. READING STATUTES

The starting point for reading a statute is understanding the legislature’s relationship to the courts. As we saw in Chapter 2, an applicable statute binds the courts of that jurisdiction, but a court has the authority to interpret the statute’s language. Once a court has interpreted the statute, the doctrine of *stare decisis* applies, and the court’s interpretation binds all other courts for whom the opinion is mandatory authority. If the legislature disagrees with the court’s interpretation, the legislature is free to amend the statute to clarify its intended meaning. The court is then bound once again, this time by the newly amended statute.

Also, as we saw in Chapter 2, a court has the authority to rule on the constitutionality of the statute. On the question of constitutionality, the court has the last word. The legislature can amend the statute to cure the constitutional infirmity the court identified, but the legislature cannot enact another statute declaring the original statute constitutional. A statute that has been held unconstitutional will not be enforced within the jurisdiction of the court that issued the opinion.

Within the boundaries set by these interlocking roles, courts must read statutory language and tell litigants whether the statute applies to their situation, and if so, what that language means. To advise clients and represent litigants, therefore, lawyers must read statutes precisely, accurately, and

1. Grant Gilmore, *The Ages of American Law* 95 (Yale U. Press 1979).

sometimes creatively. You can think of the questions critical to this inquiry as similar to the famous five Ws that guide a journalist:²

THE FIVE Ws OF READING A STATUTE

Who?	Whose actions are covered?
What?	What kinds of actions are required, prohibited, or permitted?
When?	When was the statute effective?
Where?	Where must the actions have taken place to be covered?
What then?	What consequences follow?

Often, the scope of the material you must read closely is larger than the specific statutory provision you first identify. If you are dealing with an act containing individual separately numbered provisions, you must read carefully at least the following parts of the act:

READ THESE PARTS OF A STATUTE

1. The language of the individual provisions that appear to deal directly with the legal issue;
 2. The language of any other individual provisions expressly cross-referenced by the directly applicable provisions;
 3. The titles of these individual provisions and of the entire act;
 4. Any set of definitions applying to the individual provisions or to the act as a whole;
 5. Any statement of purpose and any preamble to the individual provisions or the act as a whole;
 6. If length is not prohibitive, read the entire act;
 7. If the entire act is too long to read, at least read carefully the titles of all other individual provisions to identify any that might relate to the issue at hand;
 8. The dates on which the act as a whole and the individual provisions were enacted and on which they became effective;
 9. All of the same information for any amendments to important provisions;
 10. If available, read the same information for any prior versions of important provisions (to understand what changes the legislature intended to make when it enacted the current version).
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Read each of these parts of the statute word by word and phrase by phrase, paying attention to every detail. Reading a statute is more like reading an algebraic formula than it is like reading standard prose. Each word and punctuation mark is important. Even the internal tabulation (numbering or lettering) can be significant. Pay particular attention to words that signal structural information.

2. A journalist asks "five Ws and an H": who, what, when, where, why, and how.

SOME WORDS THAT SIGNAL STRUCTURAL INFORMATION

and
or
either

include
limited to
except

unless
outweighs
all

other
shall
May

Also, notice whether any list set out in the statute is meant to be exclusive. The statute might tell you expressly that the list is not exclusive, using such language as the phrase "and any other factors relevant to the child's best interests." Or the statute might merely imply whether the list is exclusive, for instance, by introducing the list with a word like "including."

EXERCISE 4-1

Read this statute, and answer the questions that follow it. If you would need more information to answer the question, identify the information you would need.

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following: the time and labor required; the novelty and difficulty of the questions involved; and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer or lawyers performing the services; and whether the fee is fixed or contingent.³

1. Client *A* asks a lawyer to handle a car accident case. The opposing party is insured by Security Insurance. The lawyer has been hoping to be placed on the list of lawyers approved to represent Security Insurance clients. In setting her fee, can the lawyer consider the fact that acceptance of the client's case might prevent Security Insurance from approving her to represent Security Insurance clients?
2. Client *B* has come to a lawyer to handle a car accident case. In setting her fee, can the lawyer consider the fact that she is certified as a Family Law Mediator?
3. In setting her fee, can the lawyer consider the fact that she is leaving for her vacation at the end of the week and therefore must finish the client's work in only two days?

3. Based on Model R. Prof. Conduct 1.5(a) (2013).

EXERCISE 4-2

Read this statute and answer the questions that follow it. If you would need more information to answer the question, identify the information you would need.

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; or (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; (6) to comply with other law or a court order; or (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.⁴

1. If the lawyer is suing the client for payment of the lawyer's fee, can the lawyer reveal information relating to the representation of the client?
2. If the lawyer has been charged by the bar association with unethical conduct in the representation of client *A*, can the lawyer reveal information relating to the representation of client *B*?
3. Assume that a lawyer is representing the husband in a divorce proceeding and she noticed that her client became angry when describing his reasons for seeking a divorce from his wife. She knows that her client owns several guns, and she fears that her client might try to shoot his wife. Can the lawyer reveal information relating to the representation of the client?

EXERCISE 4-3

Read this statute and answer the questions that follow it. If you would need more information to answer the question, identify the information you would need.

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.⁵

1. Assume that Lawyer Smith previously represented Client Jones. Prospective Client Harris has asked Lawyer Smith to represent him in a matter involv-

4. Model R. Prof. Conduct 1.6(b) (2013).

5. Model R. Prof. Conduct 1.9(a) (2013).

ing Client Jones. In your own words, make a list of what Client Jones would have to prove to show that Lawyer Smith could not accept representation of Client Harris.

2. On the facts of Question 1, make a list of Lawyer Smith's possible defenses to Client Jones's attempt to preclude the new representation.
3. Assume that last year Lawyer Cole represented client A in a car accident case. That case is now closed. Today A's wife asked Lawyer Cole to represent her in a divorce proceeding against A. Must Lawyer Cole seek A's consent to the representation? If A refuses to consent, can Lawyer Cole ethically accept the case anyway?

II. IDENTIFYING ISSUES

Recall that when you brief cases, you should read the whole case through once before you begin to prepare your brief. Similarly, when you are ready to identify statutory issues, read through all the material identified on page 46 to establish the context for your analysis and to identify the key provisions of the statute. When you have identified the provisions that will govern your issue, return to those provisions for another and even more careful reading. Read with a pen or pencil in your hand. Read the text of the statute word for word, looking for key terms that tell you what conduct the statute covers.

One way to find the key terms is to focus on the answers to the 5 Ws set out on page 46. Another way is to ask yourself what someone would have to prove to show that the requirements of the statute were or were not met. If you can mark on the actual text of the statute, underline each word that tells you something about the answers to those questions. Then circle all the terms that tell you something about the relationships among the key terms (words like "and," or "or"). If you are working from hard copy library materials, write these words on a sheet of paper instead of underlining them. Here is an example:

The statute:

No cemetery shall be hereafter established within the corporate limits of any city or town; nor shall any cemetery be established within two hundred and fifty yards of any residence without the consent of the owner of the legal and equitable title of such residence.⁶

Key terms:

Cemetery	hereafter	established	corporate limits
city	town	250 yards	residence
consent	owner	legal title	equitable title

Relational terms:

Or	nor	and
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6. Va. Code, § 56 (Michie 1942), construed in *Temple v. Petersburg*, 29 S.E.2d 357 (Sup. Ct. App. Va. 1944).

Notice that each of the key terms raises an issue. Something other than a cemetery would not be covered by this statute, so to know whether this statute would apply to your client's facts, you must find out what the term "cemetery" means in this context. There might be a definition section in this same act, or there might be cases in which prior courts have defined the term. Either way, the term "cemetery" raises an issue you must resolve.

The same is true with the word "hereafter." The statute does not prohibit all cemeteries; it prohibits only those established "hereafter." After what? The date of the statute's passage? Or the date on which the statute became effective? What are those dates? Another issue to resolve. And what does the term "established" mean? Is a cemetery "established" when construction begins? Ends? When the cemetery first opens for business? Each key term identified above raises an issue the lawyer must resolve before the lawyer can know whether and how the statute might apply to her client's facts.

Are you surprised to find so many issues raised in one statutory sentence? Statutes are packed tightly with key terms, each of which sets out an important component of the statute and each of which raises an issue. If you were analyzing whether and how this statute applies to your client's facts, you would have at least twelve issues to consider.

One word of caution about identifying key terms: You might be tempted to treat a phrase as a single key term. For example, consider a statute providing that a donor must transfer possession of the gifted item with "a manifested intent" to part with ownership. You might first think of the words "manifested intent" as a single key term. However, that phrase would require the party seeking to establish the gift to prove two things, not one: (1) that the donor actually intended to part with ownership and (2) that this intent was sufficiently "manifested" to others. This phrase raises two issues, not one. Your list of key terms should treat these words separately.

One more strategy is helpful for reading statutes and identifying issues: rewriting the statute in your own words. Restating the rule in your own words is an effective tool of analysis, and you often can state the rule more simply and clearly than its original writer did. Do not, however, rephrase the *key terms* of the statute. Those terms will be defined and explained by the authorities; thus, they will have developed their own meaning, and as we saw above, that meaning is the critical question of the analysis.

EXERCISE 4-4

The Fair Housing Act, 42 U.S.C. §§ 3601-3619, prohibits housing discrimination. Underline the words or phrases that raise potential legal issues in the following portion of the Act:

[I]t shall be unlawful . . . to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

III. INTERPRETING THE STATUTE'S LANGUAGE

Statutes are interpreted by case opinions. If case authority has already told you what the statute means, you can rely on that case law to the extent of its precedential value. But if no binding case law has answered your particular question, you must use other tools of interpretation. The most important of these tools are (1) the text itself, (2) the intent of the legislature, (3) the policies implicated by the possible interpretations, (4) the interpretation of any governmental agencies charged with enforcement of the statute, and (5) the opinions of other courts and of respected commentators.

The Text Itself. The most important inquiry is the "plain meaning" of the text itself. When the plain meaning is unambiguous, a court generally will give effect to the plain meaning unless the result would be absurd. Look first at the plain meaning of the statute's text. Also look for other parts of the statute or act that might tell you more about the language you are concerned with, such as the section explaining the act's purpose. Many acts contain separate definition sections. Even when your term is not defined, other parts of the statute could give you clues about what the term means.

The Legislature's Intent. Often, the text of the statute will be unclear. In such a case, many courts will try to decide what the legislature intended by the text's language. This search for the legislature's intent is problematic at best. The statute was probably enacted by a large group of elected officials who were serving in that office some years ago. The particular language you are concerned with could have been the result of political compromise, and various factions of the legislature might have had vastly different intentions surrounding that language. Quite possibly, your question never occurred to them at all. How can one decide the intent of the legislature as if the legislature were an entity with one mind? Yet, when a statute's language is unclear, a court applying the statute will have to have some basis for a decision. In such a circumstance, the court often will try to discern the legislature's intent.

Many courts are willing to consider the legislative history of the statute as evidence of legislative intent. Legislative history consists primarily of the documents or other records generated by the legislative body during its deliberations about the bill that ultimately became the statute. Legislative history comes in many forms, such as committee reports, speeches, witness testimony, or studies introduced into the record. Your research text will tell you more about legislative history and how to find it.

Policy. The fourth tool for statutory interpretation is analysis of the policy concerns implicated by a particular construction of the statute. Some implicated policies probably were part of the legislature's intent, but the legislature might not have foreseen all the policy concerns. Issues of interpretation implicating these other policies may arise. If the legislature has not spoken on the issue, the court is free to consider its own view of which possible interpretation of the statute would produce the best overall results for society.

In addition to the policies specifically applicable to a statute, some *kinds* of statutes carry a general policy leaning applicable to all statutes of that particular kind. These policies call for either a strict or a liberal construction of that kind of statute. The most common of these policies are:

- Statutes that change long-standing case law (statutes “in derogation of the common law”) should be strictly construed. (A statute is strictly construed when it is read narrowly, so that it changes the legal environment as little as possible.)
- Statutes intended to remedy a problem (“remedial statutes”) should be liberally construed to accomplish their remedial purpose. (A statute is liberally construed when it is read broadly to include more kinds of situations than a narrow reading would allow.)
- Statutes making certain conduct a crime (“penal statutes”) should be narrowly construed, out of concern for the rights of the citizen-accused.

Finally, courts are guided by the general policy that, if possible, the meaning of a statute should be construed in a way that will render the statute constitutional.

Agency Interpretation. When enforcement of a statute is assigned to a particular agency, that agency must decide what the statute means to enforce it. Courts often look to this agency as the entity with the most expertise in the relevant issues and thus might give deference to the agency’s interpretation. The court also may consider the interpretation of an agency that has no authority to enforce the statute but nonetheless works with the statute routinely. Look for agency interpretations in the agency’s regulations, in the agency’s decisions, and in case law.

Commentators and Other Courts. Finally, courts may recognize persuasive value attaching to the opinions of other courts and of respected commentators. The persuasive value of another court’s opinion depends on the factors identified in Chapter 2. The persuasive value of a commentator’s opinion depends on the reputation of the commentator and on the commentator’s well-reasoned reliance on the other tools of construction.

IV. CANONS OF CONSTRUCTION

To decide how to construe a statute, a court also may consider commonly accepted maxims of interpretation known as “canons of construction.” Here are some of the most generally applicable:

- Read the statute as a whole.
- Give effect to rules of grammar and punctuation.
- Construe technical terms technically and ordinary terms in their ordinary sense.
- When the same language is used in various parts of an act, the language is presumed to have the same meaning throughout.

- Where general words (such as "and any other") follow a list, the general words should be construed to refer to things similar to the items in the list. This principle is sometimes called the principle of "ejusdem generis," meaning literally "of the same genus."
- Modifying words or phrases refer to the possible referent immediately prior to the modifier.
- Where a statute from state X is adopted in state Y, the construction given the statute by the courts of state X should be followed in state Y.
- If the statute does not contain an exception for a particular situation, the courts should apply the statute to that situation.
- Absent clear indication, the court should presume that the legislature did not intend to enact a statute that impairs fundamental and commonly held societal values.
- Specific description of one or more situations in the text of a statute implies the exclusion of other kinds of situations not mentioned.
- Different statutes on the same legal issue (statutes "in pari materia") should be read consistently, especially where the legislature intended to create a consistent statutory scheme.
- Sometimes the courts of state X will have interpreted a particular word or phrase in a certain way. If, subsequently, the legislature of state X enacts a different statute using that word or phrase, the language in the new statute should be interpreted as having the meaning previously given it by the courts.
- Although not technically part of the statute's text, such items as titles, preambles, and section headings are persuasive evidence of legislative intent.
- Sometimes courts will have construed the language of a statute in a particular way. Subsequently the legislature may amend the statute in ways that change or clarify other issues but do not address the issue the courts have interpreted. A later court might conclude that the legislature's lack of action to change the judicial construction is evidence of the legislature's approval of the court's construction.

Where courts have relied on these maxims, they are treated as legal principles in and of themselves. Therefore, when you rely on one of them as part of the analysis of a rule, cite to a persuasive case opinion that adopts that maxim if you can. Even if you cannot find case authority adopting the maxim, however, a court still will be willing to consider the maxim's logic.

None of these guidelines for interpreting statutes will provide a certain answer. As a matter of fact, when you apply several, they might support contradictory results.⁷ However, courts generally will consider these guidelines, so they will help you to predict what a court might decide or to persuade a court to interpret a statute favorably for your client.

7. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1950).