Examining the Rules Divining Legislative Intent

and Finding Statutory Meaning

By Robert A. Olson
&
Sheila A. Wirkus

The Legislature has a penchant for enacting statutes. That is its role. But the Legislature is not always clear as to the meaning of those statutes and application to particular circumstances. Sometimes that is because of inartful drafting. Sometimes it is because the Legislature has consciously or unconsciously sidestepped hard decisions and important details. In either event, it is left to courts – with the assistance of counsel – to figure out how a statute should be applied. The result is that courts and counsel are often faced with having to interpret and construe statutes.

The fundamental principle of such interpretation and construction is to effectuate the Legislature's intent (which in itself, at times, can be something of a legal fiction). This article examines some of the basic rules for divining legislative intent and, in particular, the relevance of various items of supposed legislative history. The latter topic has been highlighted by an important recent California Court of Appeal decision focusing on both the admissibility of such materials and the procedure for bringing them to the attention of courts.

This article addresses construction of California statutes in California courts. Similar approaches apply to construing federal statutes and those of other states but are beyond the scope of this article. The leading national treatise in the area of statutory construction is Singer, Sutherland Statutes and Statutory Construction (6th ed. 2000). Singer, Sutherland is a valuable resource, both outside California courts and in them. (See generally *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1118; *People v. Jones* (1995) 11 Cal.4th 118, 132, fn. 5.

Legislative Intent Governs

In construing a statute, 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; accord, *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487; *In re Marriage of Harris* (2004) 34 Cal.4th 210, 221.)

Sometimes that is easier said than done. There are a number of interpretative aids to help discover the Legislature's intent. These aids fall generally into two categories: (1) Intrinsic interpretative guides, which rely on the language and structure of the statute itself, and (2) extrinsic evidence of legislative intent, e.g., legislative history.

Intrinsic Guides

The usual starting point in interpreting any statute, not surprisingly, is the plain language of the statute itself. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000.) Words are given their usual and ordinary meaning and read in the context of the statutory scheme. (*Ibid.*) For example, "[g]enerally, for purposes of statutory interpretation, 'shall' is mandatory and 'may' is permissive." (*In re Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750, 758.) The same word is presumed to mean the same thing in different portions of a statute and the Legislature's use of different words in different portions of a statute is presumed to evidence an intent for different meaning. (E.g., *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 979 ["words or phrases given a particular meaning in one part of a statute must be given the same meaning in other parts of the statute"]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117 ["Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning," citation omitted].) If the language is unambiguous, the Legislature is presumed to have meant what it said and the plain meaning of the statute governs. (*Hunt, supra,* 21 Cal.4th at p. 1000.)

But even ostensibly plain language can sometimes not be plain. (See *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 613, fn. 7; cf. *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37 ["The rest of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible"]; but see *Monette-Shaw v. San Francisco Bd. Of Supervisors* (2006) 139 Cal.App.4th 1210, 1219 [decrying "circular" use of extrinsic evidence of statutory intent to both create and resolve ambiguity].)

And, even plain meaning is not always controlling. "The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole." (*Silver v. Brown* (1966) 63 Cal.2d 841, 845; accord, *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849, fn. 6.) "'The courts resist blind obedience to the putative "plain meaning" of a statutory phrase where literal interpretation would defeat the Legislature's central objective.'" (*Kramer v. Intuit Inc.* (2004) 121 Cal.App.4th 574, 579, quoting *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 614; *People ex rel. Flournoy v. Yellow Cab Co.* (1973) 31 Cal.App.3d 41-45.) In the words of one Court of Appeal Justice, "[w]e must not . . . be slaves to the tyranny of literalness so that we construe a statute in a way that yields 'a grotesque caricature of the Legislature's purpose.'" (*Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1703 (dis. opn. of Gilbert, J., quoting Frank, Words and Music, Some Remarks on Statutory Interpretation (1947) 47 Colum.L.Rev. 1259, 1262).) Thus, for example, there are times when "may" can mean "must." (*Plumbing etc. Employers Council v. Quillin* (1976) 64 Cal.App.3d 215, 224-225.)

Second, the statute and the statutory scheme must be construed as a whole. The structure of the statute and its various parts must be considered. "The meaning of a statute may not be determined from a single word or sentence . . . ." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 659.) "[T]he words of a statute [must be construed] in context, . . . harmoniz[ing] the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole." (*Cummins, Inc. v. Superior Court, supra,* 36 Cal.4th at p. 87.) The statute's various components should be read together to achieve the overriding purpose of the legislation. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 933). Effect should be given to the entire statute. (Code Civ. Proc., § 1858.) Even here, though, if a statute contains a general provision inconsistent with a more specific provision, the specific provision will control the general one. (Code Civ. Proc., § 1859.) (It is not always easy to determine which provision is "specific" and which is "general," however.)

Not surprisingly, courts will avoid, if possible, a construction that renders any part of the statute meaningless or extraneous (*Woosley v. State of California* (1992) 3 Cal.4th 758, 775-776), unconstitutional (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548), or suggests that the Legislature "'engaged in an idle act'" (*Elsner v. Uveges, supra,* 34 Cal.4th at p. 935, quoting *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 634).

Third, grammar and certain grammatical presumptions play a role. (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663.)

"[W]hen a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope." (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1011-1012.) This is known as *ejusdem generis.* Under that doctrine, "'the general term or category is "restricted to those things that are similar to those which are enumerated specifically."' [Citation.] The canon presumes that if the Legislature intends a general word to be used in its unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would be surplusage." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141.)

Under the maxim *expressio unis est exclusio alterius:* "The expression of some things in a stature necessarily means the exclusion of other things not expressed." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) For example, the legislative affording of one remedy, may exclude an implication that other remedies are available. (E.g., *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1390-1391 [Legislature's authorization of board to impose corrective remedies impliedly excluded punitive damage remedy]; see *In re Christopher T.* (1998) 60 Cal. App.4th 1282, 1290; *Dean v. Superior Court* (1998) 62 Cal.App.4th 638, 641-642.)

Under the last antecedent rule, qualifying words or phrases should be applied to those immediately preceding them unless separated by a comma. (See *Garcetti v. Superior Court* (2000) 85 Cal.App.4th 1113, 1120; *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680.)

As with the other interpretative rules, these rules of grammar are helpful, but not determinative. (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 747-748 ["We agree generally that the presence or absence of commas is a factor to be considered in interprering a statute [citations], but find this principle not to be dispositive in the present case"].) "The rules of grammar and canons of construction are but tools, 'guides to help courts determine likely

legislative intent.'" (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1017, quoting *J.E.M. AG Supply v. Pioneer Hi-Bred* (2001) 534 U.S. 124, 156 [122 S.Ct. 593, 611, 151 L.Ed.2d 508] (dis. opn. of Breyer, J.).)

If the operative language does not solve the issue, statutory findings or express intent, e.g., in a codified preamble, can be of great guidance. (*People v. Canty* (2004) 32 Cal.4th 1266, 1280.) Even so, "[a] statute's preamble . . . does not override its plain operative language." (*Chambers v. Miller* (2006) 140 Cal.App.4th 821, 825-826.)

When, despite these various intrinsic guides, the language of a statute "is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including . . . the legislative history" of the measure, to ascertain its meaning. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.) It is to such extrinsic evidence that we now turn.

Extrinsic Evidence – the new lights shed by Kaufman & Broad

In addition to the above intrinsic guides, extrinsic evidence of the Legislature's intent may aid statutory interpretation of arguably ambiguous language. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055.) The supposed ambiguity may not have to be initially apparent; just as with a contract, the extrinsic evidence of the Legislature's intent can be used to determine whether the statute is ambiguous in the first place. (*Kulshrestha v. First Union Commercial Corp., supra,* 33 Cal.4th at p. 613, fn. 7; cf. *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co., supra,* 69 Cal.2d at p. 37.) Courts, however, are sometimes reluctant to allow extrinsic evidence to be used discover an ambiguity when statutory language initially appears on its face to be plain. (See *Monette-Shaw v. San Francisco Bd. of Supervisors, supra,* 139 Cal.App.4th at p. 1219 [decrying "circular" use of extrinsic evidence to both create and resolve ambiguity in statute].)

Extrinsic evidence is essentially the history of how the statute came about. Otto von Bismark once quipped that "[l]aws are like sausages, it is better not to see them being made." (http://www.quotationspage.com/quote/27759.html.) Extrinsic evidence is the record of the sausage-making process. It includes evidence that reflects the Legislature's contemporaneous intent or understanding of what it was accomplishing in enacting a statute. Later expressions by the Legislature as to what it intended in a prior statute may also be considered (see Hunt v. Superior Court, supra, 21 Cal.4th at pp. 1007-1008) as may contemporaneous adminisrrative interpretations (see *Kelly v. Methodist Hospital* (2000) 22 Cal.4th 1108, 1118 & fn. 4).

Recently, in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, the Third District Court of Appeal extensively surveyed cognizable extrinsic evidence and how it must be brought to a court's attention. Significantly, the Third District which decided *Kaufman & Broad* is based in Sacramento, the repository of much statutory history and the locale of many statutory construction disputes. *Kaufman & Broad* was obviously written for a much wider audience than just the parties before it. Its procedural posture – a published opinion issued on a routine motion for judicial notice – suggests that the Court was attempting to send a message to litigants and counsel in general. *Kaufman & Broad* purports to set out rules for courts in the Third District. But, under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, it is binding on trial courts statewide and persuasive in all other appellate courts.

Kaufman & Broad addressed two aspects of extrinsic statutory interpretation evidence: (1) What properly qualifies as such evidence and (2) how properly qualified evidence should be presented to the court?

Cognizable legislative history materials

In the present information age – or perhaps information-overload age – it is possible to obtain (often through commercial services) volumes and volumes of information, some pertinent, some tangential, on how a statute came about. Not all, however, is relevant extrinsic evidence that a court may consider.

Kaufman & Broad set out the basic rule that to be properly admissible and considered, legislative history must both reflect an intent or understanding contemporaneous with the statute's enactment and illuminate "the collegial view of the Legislature as a whole." (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., supra,* 133 Cal.App.4th at p. 30, emphasis in original.) *Kaufman & Broad* surveyed a detailed list of such potential extrinsic evidence of legislative history categorizing some as admissible and others as irrelevant and inadmissible.

In the generally admissible and relevant list of documents, *Kaufman & Broad, supra,* 133 Cal.App.4th at pp. 31-37, placed the following categories of documents (with extensive citations):

Documents detailing the evolution of the statutory language: different versions of the bill (see *Kelly v. Methodist Hospital of So. California, supra,* 22 Cal.4th at p. 1116 [Legislature had rejected language encompassing interpretation one party advocated]); predecessor bills; and house journals and final histories.

Official and quasi-official reports, analyses and summaries of the legislation made available to the Legislature as a whole: ballot pamphlets; conference committee reports; reports of the legislative analyst; legislative committee reports and analyses; legislative counsel's digests; legislative counsel's opinions/ supplementary reports; and official commission reports and commentaries.

Statements communicated to the Legislature as a whole: legislative party floor commentaries; legislative party caucus analyses; floor statements; statements by sponsors, proponents and opponents communicated to the Legislature as a whole; and transcripts of committee hearings.

Enrolled bill reports: enrolled bill reports are prepared by an executive branch department or agency after the bill has passed both houses of the Legislature to provide the Governor with background and a recommendation as to whether to sign the enrolled bill. *Kaufman & Broad* was reluctant to recognize these reports as admissible, but was compelled to do so under *Elsner v. Uveges, supra,* 34 Cal.4th at p. 934, fn. 19. If not so constrained, it would have followed *McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1161-1162, fn. 3, and held them inadmissible.

The Court of Appeal emphasized that the critical factor was that the document had to reflect the *collective* intent or understanding of the Legislature (or, in the case of ballot initiatives, the electorate).

At the same time, *Kaufman & Broad* emphasized that a number of items typically contained in bill history files and in commercially prepared legislatively histories *are not* admissible or relevant. Mere inclusion in a bill history file, alone, does not make a document admissible extrinsic evidence of legislative intent. Again, *Kaufman & Broad* contains a laundry list – with specific citations – of documents that are *not* admissible. These include:

Proposed legislation which was withdrawn, including by the author of the legislation at issue.

Proponents' (and opponents') statements about the bill's purpose without evidence that they were communicated to the Legislature as a whole, including those by the bill's author or sponsor, by interest groups including the State Bar or bar committees, letters to the Governor urging signing or vetoing, and letters to various legislators, including the bill's author.

Contemporaneous press reports, including magazine articles, editorials, newsletters and memoranda to or by interest groups.

Documents contained in bill, legislator, committee, caucus, analyst or other files, including handwritten documents or notes with no attribution of author or distribution.

Individual legislators' (or others') expressions of their subjective intent. (See also *City of King City v. Community Bank of Central California* (2005) 131 Cal.App.4th 913, 942-43; *California Highway Patrol v. Superior Court* (2006) 135 Cal.App.4th 488, 501 ["Legislative history . . . reflects the understanding of the Legislature as a whole at the time it enacts a statute. The views of an individual legislator or staffer concerning the interpretation of legislation may not properly be considered part of a statute's legislative history, particularly when the views are offered after the statute has already been enacted"]; *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17 [legislative counsel's opinions].)

The bottom line is that without an indication that the material was considered by or at leasr made available to the Legislature *as a whole, Kaufman & Broad* holds that it is not properly considered as extrinsic evidence of legislative intent.

Arguably, much of *Kaufman & Broad's* extensive discussion of cognizable legislative history is dicta. But, if so, it is well considered and thought out dicta intended to set down clear rules on admissibility of extrinsic legislative history evidence. It is likely to be followed by other courts and can be ignored only at one's peril.

When faced with a legislative history argument it is critical that counsel examine just what extrinsic evidence is being proffered to determine whether it is properly admissible (and to object to such evidence offered by the other side which is not). *Kaufman & Broad* provides a handy check list as a starting point for that analysis.

Kaufman & Broad only addresses what materials are properly the subject of judicial notice; it says nothing about the persuasiveness of such material. That, is left for counsel's skill in teasing out from the legislative history, as well as the various intrinsic guides, the Legislature's true intent. But first, counsel has to make sure to get the materials that are, in fact, properly subject to judicial notice before the court. Again, *Kaufman & Broad* is instructive.

The Proper Procedure To Obtain Judicial Notice Of Legislative History

Kaufman & Broad established two procedural requirements for judicially noticing legislative history.

First, there must be a motion for judicial notice which "shall identify *each separate* document for which judicial notice is sought as a separate exhibit." (*Kaufman & Broad, supra,* 133 Cal. App.4th at p. 31, emphasis added.)

Second, "[t]he moving party shall submit a memorandum of poinrs and authorities citing authority why *each* such exhibit constitutes legislative history." (*Ibid.,* emphasis added.) *Kaufman & Broad's* laundry list of authorities for all the materials that it deems cognizable legislative history, as well as for the materials it rejects, is a convenient starting point for just such citations in either seeking or opposing such judicial notice.

Although *Kaufman & Broad* falls into the camp that extrinsic evidence may only be considered if first an ambiguity in statutory language is deemed to exist (see fn. 3, *supra*), a party moving for judicial notice of legislative history need not first demonstrate such ambiguity. Rather, once noticed, a court can decide whether to consider extrinsic legislative history when it determines the merits – i.e., whether an ambiguity exisrs and, if so, how to resolve it. (*Id.* at p. 30.)

A party disregards *Kaufman & Board's* procedural requirements at the party's own peril. At least one other appellate court has already deemed a party's motion for judicial notice deficient for deviating from the procedure set forth in *Kaufman & Broad*. (*Violante v. Communities Southwest Development and Const. Co.* (2006) 138 Cal.App.4th 972, 977.)

Conclusion

Statutory language is often open to a range of construction. Effective counsel will use all of the available tools – various intrinsic guides as well as extrinsic evidence of legislative history – to urge a desired construction. To use those tools effectively, however, counsel needs to pay attention to the details, including just what legislative history properly can be noticed (and what history proffered by the other side should be objected to) and the necessary procedure by which to obtain such notice.

Robert A. Olson is a partner with Greines, Martin, Stein & Richland. He and his firm specialize in appellate matters. Sheila A. Wirkus is a third year law student at Loyola Law School and a law clerk with Greines, Martin, Stein & Richland.