

Aspen Coursebook Series

The Mindful Legal Writer

Mastering Predictive and Persuasive Writing



Heidi K. Brown

 Wolters Kluwer



Chapter 5

Learning How to Read Statutes

If you are starting to tackle your first legal writing assignment in law school, your professor may have given you a case file and a “closed universe” of legal sources—perhaps a **statute**, **regulation**, and/or a handful of **cases**. Alternatively, you may be experimenting with finding the research on your own. This chapter focuses on one of the “raw materials” attorneys use in conducting a legal analysis: **statutes**.

I. Deciphering Statutes

Remember from Chapter 4 that the legislative branch of government enacts laws, which are called statutes. Before learning how to decode statutes, it will help to recall how statutes are drafted and become law in the first place. After all, we are dealing with interpreting written words, so let’s see how a writer’s words transform into an enforceable law.

A. How Federal Statutes Are Enacted

In the U.S. federal legislative system, law making begins with a document called a **bill** that is introduced to Congress. A bill can range from one or two pages to more than a thousand, depending on the complexity of the proposed law (and the verbosity of its drafters). An original bill might be drafted by members of

Congress or their staff, citizens, lobbyists, and/or advocacy groups.¹ A member of Congress becomes the sponsor of the bill and then submits it for consideration by the House of Representatives or the Senate. Committees and subcommittees review the bill and conduct hearings to analyze its language and legal effect. The relevant policy committee votes to approve the bill. If it is not approved, the bill does not progress. If it is approved, the House of Representatives or the Senate places the bill on its calendar for consideration. Debate over the bill ensues, and eventually either the House or the Senate votes to approve the bill. A bill must pass both the House and the Senate before it is sent to the president for consideration. Interestingly, the wording of versions of the same bill coming from the House and from the Senate might vary:

Though the Constitution requires that the two bills have the exact same wording, this rarely happens in practice. To bring the bills into alignment, a Conference Committee is convened, consisting of members from both chambers. The members of the committee produce a conference report, intended as the final version of the bill. Each chamber then votes again to approve the conference report. Depending on where the bill originated, the final text is then enrolled by either the Clerk of the House or the Secretary of the Senate, and presented to the Speaker of the House and the President of the Senate for their signatures. The bill is then sent to the President.²

When presented with a bill, the president may either sign it into law or veto it. You might have seen the president signing bills on television, using special pens often given as commemorative souvenirs to key players in the law's creation. If the president vetoes a bill, Congress has the power to override a presidential veto with a two-thirds vote of the House and the Senate.

If the president signs the bill into law or Congress overrides a presidential veto, the bill is printed in the Statutes at Large. The Government Printing Office (GPO) has authority to publish and print statutes under the direction of the Office of the Federal Register. When first printed, new statutes are called public laws and given a number.

Public laws frequently are written as amendments to the *United States Code*, which is a compilation of federal statutes organized by subject matter to enable lawyers to research and find law on particular legal issues. The *United States Code* has 51 subject matter titles, such as Agriculture, Bankruptcy, Copyrights, Education, Intoxicating Liquors, Labor, Patents, and Transportation. The Office of the Law Revision Counsel of the U.S. House of Representatives prepares and publishes the *United States Code*.³

¹ *Legislative Process: How a Senate Bill Becomes a Law*, United States Senate, <http://www.senate.gov/reference/resources/pdf/legprocessflowchart.pdf> (last visited January 27, 2016).

² *The Legislative Branch*, The White House, <http://www.whitehouse.gov/our-government/legislative-branch> (last visited January 27, 2016).

³ *About the Office and the United States Code*, Office of the Law Revision Counsel, United States Code, <http://usc.house.gov/about/info.shtml> (last visited January 27, 2016).

B. How State Statutes Are Enacted

State statutes follow similar procedures. Once state statutes are passed by the state legislature and approved by the governor, they become a public law, or a public act, and are assigned a number. Each state has procedures under which these consecutively numbered public laws are organized into subject matter areas and incorporated into the state statutory codes. Statutes might be organized by chapters or titles, and have a table of contents, a list of definitions, and/or an index.

C. Techniques for Parsing and Deciphering Statutes

Merriam-Webster defines the word “parse” as “to resolve (as a sentence) into component parts of speech and describe them grammatically.” The dictionary defines the word “decipher” as “to make out the meaning of, despite indistinctness or obscurity.” When analyzing statutes, lawyers do both: (1) “parse” or break down statutory sentences into understandable parts, and (2) use analytical techniques to decipher convoluted legal concepts into clear workable terms. Lawyers approach statutes grammatically—looking for key “indicator” words, phrasing, transitions, and punctuation—to extract clarity from sometimes murky or complex writing. At a basic level, statutes fall into four different categories:

- (1) Statutes authorizing or permitting an action
- (2) Statutes mandating or requiring an action
- (3) Statutes barring or prohibiting an action
- (4) Statutes affording a decision maker discretion in handling an action

An example of a law *authorizing or permitting* an action is a section of Maine’s Medical Use of Marijuana Act.

Me. Rev. Stat. Ann. tit. 22, § 2423-C (2011)

A person *may* provide a qualifying patient or a primary caregiver with marijuana paraphernalia for purposes of the qualifying patient’s medical use of marijuana in accordance with this chapter and be in the presence or vicinity of the medical use of marijuana as allowed under this chapter. [Emphasis added.]

An example of a law *mandating or requiring* an action is New Jersey’s law requiring physicians to report gunshot wounds to the police, under its statutory framework entitled “Licensing and Other Provisions Relating to Firearms.”

N.J. Stat. Ann. § 2C:58-8 (West 2011)

Every case of a wound, burn or any other injury arising from or caused by a firearm, destructive device, explosive or weapon *shall* be reported at once

to the law enforcement agency of the municipality where the person reporting is located and to the Division of State Police by the physician consulted, attending or treating the case or the administrator or administrator's designee, whenever such case is presented for treatment or treated in a general hospital. . . . [Emphasis added.]

An example of a statute *prohibiting* or *barring* an action is Iowa's Alcoholic Beverage Control statute forbidding the sale of alcohol to minors.

Iowa Code Ann. § 123.47 (West 2014)

A person *shall not* sell, give, or otherwise supply alcoholic liquor, wine, or beer to any person knowing or having reasonable cause to believe that person to be under legal age. [Emphasis added.]

An example of a statute giving a decision maker discretion is Alabama's rule governing penalties and remedies against a property owner who allows a drug-related nuisance to affect a neighbor. In Ala. Code § 6-5-156.3 (1996), if a court determines that a property owner has created a drug-related nuisance, the court has discretion to (1) assess damages against the property owner; (2) require the property owner to cover the attorneys' fees accrued in the nuisance lawsuit or prosecution; (3) impose a fine; (4) order the owner to clean up the property and make repairs; (5) suspend or revoke any business, housing, operational, or liquor license; and (6) mandate the owner to install secure locks on doors, hire private security personnel, increase lighting in common areas, and use videotaped surveillance of the property and adjacent alleyways, sidewalks, and parking lots, and so on.

When reading statutes to determine whether they authorize, mandate, or prohibit behavior, lawyers look for "indicator verbs" like "may," "must," "shall," "must not," or "shall not." To identify discretionary statutes, attorneys hunt for phrases like "shall have power to," "shall exercise discretion," and "shall consider."

II. Understanding the Difference Between Statutory Elements and Factors

After determining the basic function of a statute—to authorize, mandate, prohibit, or allow discretion—lawyers assess whether the rule includes an inventory of required "elements" that must be satisfied or itemizes a list of "factors" that the evaluator must weigh and measure to determine whether the law has been satisfied or violated. Nonlawyers often use the terms "element" and "factor" interchangeably. However, in the context of statutory rules, these words mean different things. An analogy to help understand how elements work is the operation of a vehicle. To start a Volkswagen beetle and drive it off a parking lot, the driver must have (a) a key, (b) fuel, (c) a working battery, and (d) four inflated

tires. Without one of these elements, the driver cannot drive the car off the lot. All the elements are required.

In contrast, factors are typically a list of items considered, balanced, and/or weighed, but not all are necessary for a law to apply. The end result can still be achieved even when one or more factors is lacking. A helpful analogy for comprehending how factors work is a house or apartment hunt. When deciding where to live, a renter might consider (a) neighborhood; (b) price; (c) size of the dwelling; and (d) amenities such as new appliances, closet space, gym access, storage space, and so on. The renter weighs the presence or absence of certain factors in each option and ultimately may compromise on some; not all the factors are required for the renter to make a decision so long as most of them are satisfied.

A. Examples of Statutes with Required Elements

An example of a statute with required elements is New York's "right of privacy" statute; this law states that it is a misdemeanor for an individual or a company to use another living person's name, portrait, or picture for advertising purposes without written consent.

N.Y. Civ. Rights Law § 50 (McKinney 2014)

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

The required elements of this statute are

- the use of a *living person's name, portrait or picture*
- for purposes of *advertising or trade*
- without that person's *written consent*

If any one of these elements is missing, there is no violation. For example, if the person is no longer living, there is no violation of this statute. If the person's initials are used instead of his or her name, there is likely no violation. If the person's portrait was used for artistic purposes, instead of advertising or trade, there is no violation. If the person gave written consent, there is no violation.

Another example of a statute with elements is the California rule governing vehicle theft.

Cal. Veh. Code § 10851 (West 2011)

Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or

temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . is guilty of a public offense. . . .

To identify the elements of this statute, lawyers look for connector punctuation (like commas) and words like “and,” “either,” and “or.”

So the elements of the crime of vehicle theft are (1) driving or taking, (2) a vehicle, (3) that is not one’s own, (4) without consent of the owner, (5) with the intent to permanently or temporarily deprive the owner of title to or possession of the vehicle. All of these items are required.

Diagramming the Vehicle Code Statute

Any person who:

- drives OR
- takes
 - a vehicle
 - not his or her own,
 - without the consent of the owner thereof, AND
 - with intent EITHER to
 - permanently OR
 - temporarily deprive the owner thereof of his or her title to or possession of the vehicle,
- whether with or without intent to steal the vehicle . . .

B. Examples of Statutes with Factors

An example of a statute that includes factors (instead of elements) is Arizona’s law governing the criteria under which an individual may obtain a license to sell lottery tickets.

Ariz. Rev. Stat. Ann. § 5-562 (West 2012)

Before issuing a license as a lottery sales agent to any person, the director shall consider factors such as the financial responsibility and security of the person and the nature of the person’s business activity, the person’s background and reputation in the community, the accessibility of the person’s place of business or activity to the public, the accessibility of existing licensees to serve the public convenience and the volume of expected sales.

⁴Haw. Rev

So, the director of the state lottery shall consider the following factors.

- The applicant's financial responsibility and security
- The nature of the person's business activity
- The person's background and reputation in the community
- The accessibility of the place of business to the public
- Whether existing licensees serve the public's convenience
- Volume of expected sales

Each of these factors are weighed and balanced.

Similarly, in Hawaii's Crime Victim Compensation statute, the court considers several factors when deciding what type of fee to impose on a convicted defendant to compensate a crime victim, including (1) the seriousness of the offense; (2) the circumstances surrounding the commission of the offense; (3) the economic gain, if any, realized by the defendant; (4) the number of victims; and (5) the defendant's earning capacity, including future earning capacity.⁴

III. Looking for Indicator or Connector Words and Punctuation

Rules of law are not always models of clarity; lawyers refer to some statutes as "inartfully drafted." To make sense of complex or intricate statutes, attorneys hunt for "indicator" or "connector" words, phrases, and punctuation to help outline or diagram the rule and identify lists of elements or factors.

- Assess whether the law is authorizing, mandating, or prohibiting action, or affording discretion.
 - Authorizing indicator words: "may," "can"
 - Mandating indicator words: "must," "shall," "will"
 - Prohibiting indicator words: "must not," "shall not," "will not," "violation," "guilty of"
 - Discretionary indicator words: "shall have power to," "shall exercise discretion," "may consider" "shall consider"
- Look for key connector words like "and," "or," "either," "both," and commas and semicolons to identify required elements or lists of factors to weigh.

⁴ Haw. Rev. Stat. § 351-62.6 (West 2005).



EXERCISE: IDENTIFYING REQUIRED ELEMENTS IN A STATUTE

Read the following statutes. Look for—and underline, circle, or highlight—indicator words to determine whether this statute is authorizing, mandating, or prohibiting action. Then outline the required *elements* of the statute (look for connector words and punctuation).

1. Haw. Rev. Stat. § 142-63 (1975)

If any cattle, horse, mule, ass, swine, sheep, or goat, trespasses on any properly fenced cultivated ground, the owner thereof shall pay upon proof, the full amount of the damage or loss to the landowners, or to any person in possession of the land, whoever suffers the damage or loss.

Outline:

2. Mich. Penal Code § 750.529a (West 2004)

A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.

Outline:

3. Fla. Stat. Ann. § 837.055 (West 2012)

Whoever knowingly and willfully gives false information to a law enforcement officer who is conducting a missing person investigation or a felony criminal investigation with the intent to mislead the officer or impede the investigation commits a misdemeanor of the first degree.

Outline:

4. Cal. Health & Safety Code § 11362.795 (West 2004)

Any person who is to be released on parole from a jail, state prison, school, road camp, or other state or local institution of confinement and who is eligible to use medical marijuana . . . may request that he or she be allowed to use medical marijuana during the period he or she is released on parole. A parolee's written conditions of parole shall reflect whether or not a request for a modification of the conditions of his or her parole to use medical marijuana was made, and whether the request was granted or denied.

Outline: