Defining Legislative Intent
Subjective or Objective?

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The case law relating to using legislative documents to determine legislative intent is abundant, but often wildly inconsistent. For many different kinds of legislative documents one can find cases relying on that particular type of document and cases rejecting the particular type of document. The inconsistency is in part a reflection of the fact that there is no consistently applied standard clarifying what factually to look for to find "legislative intent."

Is a legislative intent inquiry seeking to determine what each individual legislator subjectively understood and intended? Clearly a virtually impossible task. Is it then seeking an objective intent? What the intent appears to be from the materials that are available? This standard is much more achievable and also has the virtue of putting the legislature on notice they should pay attention to what is being said. This standard also reflects the reality of the often combative legislative process.

To the extent there have been attempts to provide a standard they seem to lean toward the subjective standard. Many cases speak of legislative intent as finding the "collegial" view of the legislature – what the legislature as a group envisioned. Some cases go so far as to require that any statement be presented to the entire legislature in order to be considered as reflective of the collegial view. These cases seem to visualize a collegial view as something akin to a group sitting around discussing every ramification of some proposal in great detail until an agreement on all the possible issues is reached. This fiction is wildly unreflective of the legislative process.

In California in a two-year legislative session typically somewhere around 7000 to 9000 different bills will be introduced. Many, if not most of the bills will be amended, often many times over the course of legislative deliberations. Some bills are very short and concise but many bills are scores, or even hundreds of pages in length amending scores or hundreds of different code sections. It is an enormous volume of material, far beyond the capability of any single legislator to even thoroughly read once, given the myriad other demands on a legislator's time. Any particular legislator will have a relatively detailed knowledge of only a tiny fraction of the pending bills. Even as to that tiny fraction, there could be many possible ramifications from the language chosen which will not have occurred to anyone in the legislature.

Beyond the fact the sheer number of proposed changes in any legislative session is overwhelming large, the legislature virtually never meets collegially. Even within the Assembly or Senate the only time they meet as a body is when a bill comes up on the floor for final vote, and typically in California (and most states) the discussion on any particular bill is short, minimal and very general.

With some documents such as Federal Committee reports, or letters to the Journal in California the legislature is making explicit statements of what they intended – the "collegial view" can work in such situations involving direct statements of intent as long as one accepts the statements as putting other legislator's on notice of the stated intent.

But in the absence of direct statements of intent this formulation of the collegial view breaks down completely when applied to clarify specific details of how tiny parts of any legislation should be construed.

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Some courts reject many potentially useful documents on the basis they were not viewed by all legislators. This is a particularly glaring fiction in California as virtually no document ever is viewed by all – or even substantially all - legislators. And it is doubtful all the legislators read the actual language of any given statute.

In fact both Congress and the California legislature operate largely by delegation, reliance on staff and colleagues, on reputation and trust, and by relying on people who do not like the legislation to voice their objections. The actual "collegial" view of an individual legislator at best usually does not extend beyond a general understanding of the problem addressed, the general nature of the proposed solutions, the knowledge the legislation is a negotiated agreement between stakeholders who agree that the legislation is probably a good idea and finally, that it has no provisions objectionable to anyone with the political clout to cause problems.

There is probably no theoretical formulation for legislative intent that will be above objection in all cases. One of the strengths of logic is criticism, but criticism doesn't solve problems, and relying on "plain meaning" often means excluding consideration of other modes of thought that are important to human affairs. But moving from "plain meaning" to the "collegial view" is sometimes little improvement in finding a realistic mechanism to understand what the legislature intended. The "collegial view" simply substitutes a fictional view of reality that can lead courts to exclude probative legislative intent documents on the grounds not all legislators saw the document. The end result is not much different than relying on the plain meaning rule, excluding possibly valuable information to focus on parsing the specific words of the statute.

There are alternative theoretical frameworks that more accurately reflect the legislative process and could lead to more consistently realistic findings on legislative intent, particularly if viewed as alternative tools in ones toolbox rather than as a formula that always produces the correct answer. These alternative rationales are consistent with what many courts have actually done in finding legislative intent. Two examples of useful optional rationales that better reflect the reality of the legislative process and could be useful in particular situations are:

1. Seeking to extrapolate objectively what the legislature would have viewed as the result that is most consistent with their concerns. What would the legislature likely have done if it considered the particular issue before the court? The extrapolation is based on weighing what documents reveal to the be problem to be solved, the general concerns of the legislators, the proposed solutions and the legislative actions on the various alternatives before them, The goal is not to extrapolate what any particular legislator thought or knew, but to find the result that is most consistent with the expressed concerns to be addressed by the Statute.

2. Operating on a "notice" theory. This theory makes sense as a reflection of the enormous volume of materials a legislator is responsible for voting on. The only way a legislator can handle that volume of information is to downplay the details and focus on objections from other parties. In this theory any particular document might act as "notice" to the legislature of a particular detail or construction of the proposal. The probative value of the notice depends on how widely the particular document was distributed, or whether the same concept was presented in a number of documents from a number of sources. Even a document with a relatively low probative value could potentially be decisive if the document is consistent with other documents about how to address the broader goals of the legislation and there are no alternatives addressing the same issue.