

Developing a Legislative Intent Argument

This document, along with other documents related to using legislative documents to find legislative intent, are posted at <https://www.legislativeintent.com/Web/Free.Library>

The first step in developing a legislative Intent argument may sometimes involve countering an argument the court should not even look at Legislative Intent.

I. Countering objections to the use of Legislative Documents

A. The plain meaning rule – (See the companion to this document on the plain meaning rule)

B. The Separation of Powers Doctrine Argument: Some commentators have argued that the separation of powers doctrine precludes courts from looking at legislative intent, on the basis it impinges on the courts role in interpreting the law. This argument seems to be grounded in the notion the courts have no obligation to seek the intended purpose of the law, their only obligation is to see what the words chosen mean to the court. On reflection this seems to make the separation of powers doctrine a doctrine of procedure rather than substance and in fact turns the doctrine on its head. In effect the argument requires the legislature cater to some future courts perceptions. Words are tools with which the legislature seeks to communicate the law; they are not in the end the law itself. If the chosen words do not convey the thought behind the words accurately and the means are available to clarify the meaning, the separation of powers doctrine would seem to oblige the court to seek to understand the actual intent.

C. Relying on Legislative Intent Makes the Law Less Predictable: Some cases and commentators have argued the courts should not try to ascertain legislative intent because it makes the law less accessible and precise than simply relying on the words of the statute. Beyond the fact this viewpoint dismisses the possibility of ambiguity in the language it seems to view symmetry and clear black lines in the law as more valuable than fairness to the parties before the court and underlying society. And if the law is ambiguous in a given situation to the court it will presumably be just as ambiguous to the public in that same situation.

D. There is No Definable Legislative Intent. Arguments of this sort often occur as part of an effort to assert the plain meaning rule should control. As noted in the companion publication “Defining Legislative Intent” it is probably not possible to formulate a theory of legislative intent that fits all circumstances all of the time because of the inherent complexity of the legislative process, and the difficulty of conveying complex thoughts in simple language. There will always be logical objections to the weaknesses of any solution to a construction problem. But we don’t look at legislative intent unless there is language construction problem to be solved and a simple basic rule of good decision-making is always applicable – if it is relevant, more information is better than less.

II. Basic principals applicable to both state and federal law.

Once the plain meaning rule has been hurdled, and the court is satisfied sufficient ambiguity exists to require resort to legislative intent, the next step is to develop a thorough understanding of how the legislation developed. Admittedly this takes time, the temptation to do a quick search for a nice quote can be strong. But the more you know about the legislative history, the better you understand the statute and your case. Often as you dig deeper into the legislative history it sparks a deeper understanding of the nuances of the statute that may lead to valuable new insights that go beyond legislative intent. Specific steps include:

1. Develop an understanding of the legislative process both –

- a. Procedurally – How did the language read as first proposed, what committees considered the proposal, when were amendments made and where was the proposal when it was amended
 - b. As an adversarial process – who was lobbying in support of the proposal and what were they trying to accomplish, who was active in opposition what were their objections, who was responsible for amendments to the proposal.
2. Become familiar with the documents available pertinent to your issue –
 3. Identify where in the process the changes you care about occurred – this provides a mechanism to narrow the scope of your search for explanations for why the language was changed.
 5. Be open to both direct and circumstantial evidence of intent. You not always going to find a statement directly on point to your issue, but patience and a thorough knowledge of how the proposal developed can often allow you to document who sponsored the language and why.

III. Factors Specific to California Law.

For details on the types of documents available in California see the publication regarding samples of California Legislative Documents at <https://www.legislativeintent.com/Web/Free.Library>

You take an enormous risk in California if you rely on a key word search and just start plugging quotes into your moving papers. Unlike Federal law, California legislative intent materials are primarily working documents, not after the fact statements of intent. You need to understand where in the process the document fits to judge it's probative value. The quote you pick out to rely upon may, for example, turn out to be from a document reflecting the proposal before major amendments revised exactly the language you need to explain, or be from a document that is in the nature of a minor background statement, rather than a highly persuasive official document developed as a formal part of the legislative process. With some documents you may need to use collections of documents with similar statements to corroborate one another.

In understanding California legislative enactments you have to begin by seeking a thorough understanding of who brought the idea to the legislature, and how they justified the proposal. You need to know who opposed the idea, and why. Once you have these factors in mind you need to study the evolution of the language of the proposal as it was amended by the legislature. Once you have identified the points in time that changes to the language you care about occurred you look for contemporaneous documents to help understand why that change occurred.

If the language was in the proposal as introduced, look to the explanations of the sponsors as to why the proposal was necessary. If the language appeared in an amendment to the proposal during the legislative process the changes are often reflective of a direct effort to mollify some party opposed to the proposal whose opposition is strong enough to put the proposals final approval at risk. If you can find why the objecting party was opposed to the bill, and compare that to the language of the bill as amended, you usually have documented the reason for the change.

IV. Factors Specific To Federal Law:

Federal documents are published documents often containing specific statements of intent, but also often containing discussion that is of value in developing arguments of "circumstantial" intent where a specific statement addressing your issue is not available. The following discusses both arguments and the documents ordinarily useful for determining legislative intent of Federal Statutes:

- a. Direct intent: The quick key word search to pull out a quote is less likely to expose you to serious loss of credibility in arguing Federal legislative intent, as many Federal documents are prepared as explicit statements of intent. However you still face the issue of being sure the language any quote

is addressing is the final version of the language key to your issue. The better practice with Federal law is to make sure you know when the language you care about was finalized in the proposal, so you can insure any quote you want to use is addressing the final language, or, if it is not addressing the final language, clarify why it is still pertinent. Published documents containing statements of intent commonly could include:

- i. Committee Reports – Explicit explanations by committees as to what they are trying to accomplish that accompany a particular proposal to the floor of the House or Senate.
 - ii. Congressional Record excerpts – Explicit statements for the record by members of Congress on the floor of the House or Senate explaining their thinking.
 - iii. Committee Prints – Published explanations of Committee actions on a particular proposal for more general distribution.
 - iv. Presidential signing statements
- b. Circumstantial intent: Despite the voluminous documentation often available on Federal enactments, on many occasions you won't find a quote squarely addressing your issue. In that circumstance you need to develop an understanding of the competing forces influencing the legislation so you can develop an argument on how the language you are focused upon fits into the broader policies Congress sought to achieve. The process described above for California law will leave you much better prepared to defend your position as the ground under your feet shifts during the normal give and take of litigation. The better you understand the legislative history the more prepared you will be to deal with new arguments or points raised by opposing counsel. Published documents containing other information that can be used to construct circumstantial evidence of intent:
- i. Committee Reports – Will also contain background discussion of how legislative developed, what prior proposals are pertinent and what hearings were held.
 - ii. Congressional Record excerpts – May sometimes contain background discussion of how legislative developed, what prior proposals are pertinent, what hearings were held, what problems are being addressed and what source outside the Congress might have generated a particular proposal.
 - iii. Committee Prints – May also contain background discussion of how legislative developed, what prior proposals are pertinent and what hearings were held.
 - iv. Committee hearing transcripts – contain testimony from interested parties about pending legislation. Frequently testimony identifying problems or making suggestions at committee hearings will spawn language drafted to address the problem or suggestion.
 - v. Bill copies – the changes in language made by amendments can raise inferences of intent, particularly when linked to other circumstances documenting the amendments were to address a particular issue or concern.