



# The Search for Legislative Intent— “Just what the hell were you guys thinking?”

By Terry Care

The number varies, but each regular session the Nevada Legislature passes something close to 700 bills, some of absolutely no importance and others overwhelmingly significant. Inevitably, a few months after adjournment, many legislators receive a call, usually from a practitioner who had happened across one of those legislative summaries all *Communiqué* subscribers see and sometimes read, asking:

“I have a case implicating a new and really, really ambiguous statute from the last session, and I absolutely need something that shows legislative history, legislative intent. I’ve looked at all the committee minutes and everything else, and I can’t tell what you idiots were even trying to do. Just what were you thinking?”

Such a question, of course, presumes legislators were thinking, and, to the extent the deadlines contained within the 120-day limitation allowed for it, they were. But here is some important context: a regular session equates to the introduction of about 1,200 bills. With few exceptions, bills must be introduced by a certain date, pass out of the committee of the house of origin by a certain date, and be voted out of the house of origin by a certain date. And then the process must be repeated in the other house. It is akin to legislating with a shot clock: one deadline comes and goes and the countdown begins immediately for the next one. Some committees meet twice weekly, others three times, others Monday through Friday. It is not unusual for a committee to entertain four or five bills in a hearing. Ideally, there would

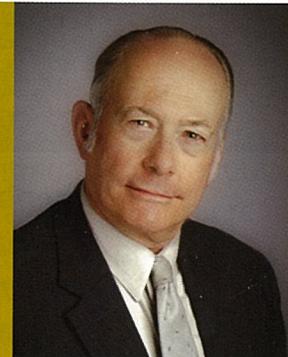
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be time for each legislator to read every bill, or at least to review each bill that comes before any of the three or so committees each legislator sits on. Most lawmakers will tell you there isn't. They're being honest.

Instead, a legislator's vote on a bill is often based upon the recommendation of a caucus, a plea from the bill's sponsor, a returned favor, the persuasive request of legislative leadership, or a quick understanding—or misunderstanding—of the bill's purpose as summarized hurriedly by proponents and opponents. It is the exception that a legislator digests a bill word-for-word, thinks about it, then independently goes with thumbs up or down. There is no indictment intended here. This is simply the process. In the end, legislating is a purely political, not an academic, exercise. And generally legislators are no more concerned about clarifying their intent than they are about the next solar eclipse.

So where in all this, whether it is a newly effective statute regarding foreclosure or anything else, can one unearth what the legislature collectively was trying to do?

The issue arises where a statute is indeed ambiguous, where a statute "is capable of being understood in two or more senses by reasonably informed persons." *McKay v. Board of Supervisors*, 102 Nev. 644, 649, 730 P.2d 438, 442 (1986). Before reasoning that a statute is ambiguous, how-

ever, a court first "will give the statute its plain meaning and will examine the statute as a whole without rendering words or phrases superfluous or rendering a provision nugatory. [The] court will award meaning to all words, phrases, and provisions of a statute." *Haney v. State*, 124 Nev. 408, 411-12, 185 P.3d 350, 353 (2008). But if, after that, "the statute is ambiguous, then [the] court will look beyond the statutory language itself to determine the legislative intent of the statute." *Id.* at 412, 185 P.3d at 353. So what does that mean?

Courts have resorted to several considerations to determine legislative intent, including: (1) statutory construction "in line with what reason and public policy would indicate the legislature intended," *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599-600, 959 P.2d 519, 521 (1998); (2) statutory interpretation "according to the entire statutory scheme," *State Industrial Insurance System v. Bokelman*, 113 Nev. 1116, 1123, 946 P.2d 179, 184 (1997), though a court may not "insert qualifying provisions not included, and may not rewrite the statute to conform to an assumed intention which does not appear from [the statute's] language," *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1099 (Cal. 1998), (superseded by statute on other grounds); (3) "circumstances which propelled the enactment of the statute," *Roberts v. State*, 104 Nev. 33, 38, 752 P.2d 218, 224

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(1988); (4) “contemporaneous circumstances” such as “the history of the times existing when the law was enacted, the previous state of the law, the evils intended to be corrected, and even, according to some cases, the habits and activities of the people,” *Orr Ditch and Water Company v. Justice Court*, 64 Nev. 138, 170–71, 178 P.2d 558, 573–74 (1947); and (5) interpretation by another jurisdiction’s court of a similar statutory provision from that state, *Zabeti v. State*, 120 Nev. 530, 534–35, 96 P.3d 773, 775–76 (2004).

Courts also examine extrinsic aids such as: (1) committee reports and legislative journals, *University and Community College System of Nevada v. Nevadans for Sound Government*, 120 Nev. 712, 732, 100 P.3d 179, 194 (2004); (2) testimony in committee and exhibits offered with testimony, *Lowe Enterprises Residential Partners, L.P. v. Dist. Ct.*, 118 Nev. 92, 103–04, 40 P.3d 405, 412 (2002); and (3) the history of a bill’s amendments adopted and rejected, *Nevadans for the Protection of Property Rights, Inc. v. Heller*, 122 Nev. 894, 911, 141 P. 3d. 1235, 1246 (2006).

What courts will not consider is a post-adjudgment assertion of legislative intent by the very lawmakers responsible for the legislation. “[I]n ascertaining the meaning of a statute the court will not be governed or influenced by the views or opinions of any or all of the members of the Leg-

islature, or its legislative committees or any other person.” See 2 *Sutherland Statutory Construction*, § 5011, 3d Ed. So, while you are free to press a legislator for an explanation of a bill—and most are willing to offer one—the response is no more authoritative than yesterday’s weather forecast. And it can happen that the history of a statute one would expect to find in committee testimony and journals with floor debate virtually doesn’t exist. As one court remarked, accurately, “[a]lthough Nevada legislative history is scarce and often fraught with peril for the careful investigator, it can sometimes be useful.” *In re Giampietro v. Giampietro*, 317 B.R. 841, 847 n.8 (D. Nev. 2004). How can that be?

Many committee witnesses distribute exhibits, and some actually submit copies of their testimony. In those cases where legislators then tailor their questions and remarks to those handouts and testimony, intent is fairly decipherable. But not all witnesses subscribe to that practice. Also, committee members, usually because of scheduling conflicts, do not attend all hearings, and when they are present they don’t always say something on the record. Thus, legislative intent before a committee might be confined to the ruminations of a single legislator. And sometimes a committee will process a bill with barely any questions or comments, usually because the members have been told prior to the hearing that there is no opposition, or because a deal was negotiated



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prior to the hearing. In such cases, committee minutes will offer nothing in the way of legislative intent.

With few exceptions, both the Senate and Assembly convene daily for floor sessions, and each body keeps and makes public a journal for each such day. But that doesn't mean that a legislator's remarks will appear in the journal for a particular day. During my time in the legislature, a senator ordinarily had to request his remarks be entered in the journal, and even then he was permitted to review and revise his remarks before they were published. On occasion, a senator would request that all comments regarding floor debate on a specific bill be made part of the journal. Senators were then allowed to review their comments in draft form, and even revise them. So the printed journal did not contain the remarks as captured in original form.

When testifying before legislative committees, attorneys should consider beforehand whether intent might become an issue later. If so, they will want to provide committee staff sufficient written copies of their testimony, with exhibits, for distribution to committee members and staff. (Each house committee has its rules on the number of copies. Further, each house committee has its rules on how far in advance written materials should be submitted.) This does not mean an attorney need to stick to his script when testifying, but he should offer some notion of what he believes the bill is intended to do if enacted. It is not uncommon for a committee chairman to limit the amount of time for a bill's discussion, and to request that a witness hold his remarks to, say, five minutes. If so, say what you can in the allotted time and then ask that your written testimony be made part of the record. It will be. Someday a court might need to read it. And if that ever happens, odds are that court will have before it starkly competing briefs but with a shared passage: "In its wisdom, the legislature clearly intended . . . ." **■**

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