
Legal Briefs



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Elementary legal considerations

This article focuses on the various sources of law, how law comes to exist, the distinction between criminal and civil law, the enforcement of law, and the role which "facts" and "law" play in deciding legal cases.

The three major sources of law are *statutes*, *regulations*, and *decisions* of judges (also referred to as *case law*). In the United States, law can be made at a federal or state level and, on some issues, on a county or municipal level. These three sources of law are dealt with similarly at federal and state levels.

Statutes

Statutes can change the "law" in any number of ways but, generally, major changes in "law" are accomplished by statute. Case law represents an effort by judges to determine what the "law" is. If major changes are required, in our legal system, it is the function of the legislature to make them.

Regulations

Regulations set forth specific information on statutes and may be issued under the statutes. In order for these regulations to exist, a statute must authorize that regulations be created to further

govern the details of the statute. These regulations are usually issued by an agency or department head. For example, tax statutes routinely authorize the Secretary of the Treasury to issue regulations. (Normally, he delegates this obligation to the Commissioner of the Internal Revenue Service). Tax regulations are detailed, explaining how certain provisions will be used and sometimes providing actual examples. Regulations are treated as if they were law as long as they are not arbitrary or misinterpret what the legislature meant.

Court decisions

Lastly is the accumulation of court decisions arising out of lawsuits. Court decisions interpret the application of statutes to specific facts by trying to determine what the legislature would have wanted if this factual pattern had come before it. Sometimes the courts interpret regulations. Courts also exercise a veto function when it is felt that an agency head issued incorrect regulations based on a misunderstanding of what the legislature was trying to do in passing a statute or when it is felt that the legislature exceeded its constitutional powers in passing a statute.

In the United States, as in England, there is

also a large body of "law" which was never contained in a statute but which was created by the courts in solving disputes. This body of law is called *common law*. An example of "common law" is the law governing negligence. Even though "common law" is not derived from statute, it can be changed or modified by statute.

Court decisions are considered *controlling* (the judge's decision must be consistent with the prior case even if the judge is convinced it was wrong) if an opinion is written by a judge within the same jurisdiction. If, on the other hand, the opinion is written by a judge outside of the jurisdiction, then it is only considered *persuasive*. Thus, opinions within the same jurisdiction carry more weight than those outside a given jurisdiction.

Criminal and civil law

Criminal law is derived from a code of conduct or standards established by the legislature in order to regulate the behavior of citizens. These criminal statutes and regulations can be enforced only by the government, either state or federal. The government enforces the criminal law on behalf of the victims, if any, and on behalf of the other citizens. Civil law, on the other hand, is enforced by the citizens. Criminal law tends to be of two types: law against acts which are bad in themselves (laws which prohibit evils such as murder, robbery, etc.) and law against acts where the threat of a jail sentence is helpful to the needs of society (laws which prohibit administering anesthetics without a nursing or medical license).

While there are distinctions between the criminal and civil areas of law, there is also an overlap between these two. Sometimes, there are both criminal and civil consequences of behavior. For example, if someone administers an anesthetic without a nursing or medical license, the state can bring a law suit for violating a state criminal statute. The patient to whom the anesthetic was administered may not be a part of this lawsuit, but may be a witness who helps determine the facts. That patient, however, may have a civil legal action against the violator if injury results from that unauthorized administration of anesthesia.

Some statutes which regulate the behavior of citizens and which are enforced by the government also provide a corresponding "private" right of action for the citizens so that they can also help enforce that statute. For example, in the area of antitrust there are criminal statutes which prohibit the formation of monopolies in a given industry. To help enforce this type of statute, persons damaged by the monopolies have a right to bring

a civil case. In effect, the government has created several mechanisms by which a statute can be enforced. On the other hand, courts do not allow people to sue just anyone doing the wrong thing. The people allowed to sue are often required to have been directly hurt or damaged by the illegal conduct.

Enforcement of the law

This also brings up a very important point about the abstract nature of law. Cases do not get to court unless someone brings them there. Cases are usually brought to court by people who are hurt by illegal action and by the government, through the United States Attorney or Attorney General.

Some types of law may be difficult to enforce, such as a law against suicide. Sometimes these laws are not enforced because they are outmoded, unfashionable or forgotten. For example, in some states there are laws which prohibit certain conduct on Sundays which is not prohibited on the other days of the week. Enforcement of this type of law is not always automatic and is not always uniform.

Why, then, does such a law exist? There are several possible reasons. First, if the government enforces this law against one business operator and is thereby able to provide an example, then it may not be necessary for the government to enforce every violator of this law. Second, enforcement of some laws may be politically "undesirable" during certain times of our history, while during others such enforcement may be politically mandated. Third, economic conditions may be controlling factors. There may be times in which the economic ramifications of such enforcement run counter to the goals and agendas of the government and the business community.

The role of facts and law

During a trial, both *law* and *facts* are determined. The law is exclusively ascertained by the judge, while the facts are ascertained by the jury, if there is one, or by the judge, if there is not. Evidence is offered by both parties to the judge or the jury to help them determine what the facts are. The method by which the facts are ascertained is an important consideration. There are some facts which lie in the jury's collective common sense and experience. For example, the jury decides from the evidence of what a driver says or does whether that driver was acting in a reckless and negligent manner or whether that driver appeared to be intoxicated. The judge is prohibited from deter-

mining and commenting upon the facts which fall within the jury's jurisdiction.

There are some cases, however, in which the facts to be determined are technical and complex. In these cases, the parties may provide expert witnesses to help explain and interpret the technical and complex evidence. The medical field is one of the many areas in which expert witnesses are often found. It is interesting to note that judges show significant deference toward the medical profession which they do not show to most other professions.

Judges often rely upon experts for factual testimony to determine the meaning of medical practice statutes and to establish the recognized practice which nurses and doctors use to perform their duties and responsibilities. For example, in the *Dagmar Nelson* case, expert testimony was used to establish that it was recognized practice to permit nurses to administer anesthetics.

There are other cases, however, in which the extent of the court's deference is questionable. In one case an anesthesiologist attempted to testify about the legal liability of a supervising physician. Here the court relied upon the expert witness for more than an explanation and information about a technical matter. Similarly, the judge in the *Dagmar Nelson* case considered expert testimony that what Dagmar Nelson was doing was not diagnosing or prescribing "within the meaning of the Medical Practice Act." Usually, questions about liability and the meaning of a medical practice act are considered questions of law and not subjects of expert testimony. Clearly, even judges get confused about the use of expert testimony.

The importance of language

Understanding the use and importance of language is vital to understanding legal analyses. A significant portion of the duties and responsibilities of lawyers and judges is determining the intent of persons from an interpretation of the language used in court opinions, statutes, and other docu-

ments. When ambiguous language is used, more than one interpretation from the same set of words can be derived. In such a situation, the court will look for other evidence of what was intended. Sometimes when ambiguous language is used, it is obvious that the parties never really agreed on those terms and conditions and the courts will have no choice but to ignore what was done. Sometimes the courts are required to enforce a provision in a way which nobody intended.

Moreover, the use of ambiguous language is one of the most frequent reasons why litigation occurs. If the parties cannot agree on the meaning of particular words, then they must seek a court's final interpretation. The importance of language is also ignored in a document in which two different sets of words are used to say the same thing. When a lawyer or a court analyzes and interprets this document, it must be assumed that the parties used different words because they meant different things. Thus, not only is the use of specific language vital to legal analysis, but the consistent use of that language is vital as well.

Another factor which lawyers consider when they draft a legal document is to provide terms which will govern the parties when they have not met the required conditions of the document. Without this information, a court has difficulty enforcing the intent of the parties. For example, if a legal document provides that an act must take place within 24-hours of a particular event, that document must also provide the conditions and terms which will govern the parties if the act does not take place within that time period.

Many people have become impatient about the use and necessity of concise language. They assume that "we know what we mean" when we write something. But in fact, misuse of language is one of the biggest reasons why lawsuits arise. If we insist on clear and concise language at all times, we can avoid many possible legal conflicts.