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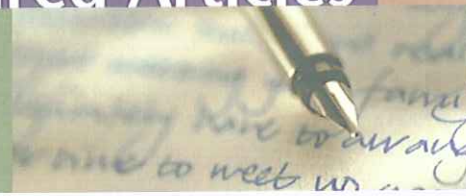
When Neighboring States Disagree: Teaching Statutory Interpretation Through Client Letter Writing

Lisa A. Tucker



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From there, we turn to other interpretative questions: If the fact-finder has discretion to assess timing issues case by case, what factors should be considered? Do the rules themselves identify any such considerations, either on their face or by reasonable inference? Should students look to other timing requirements in the ethics rules to make arguments by analogy? What about cases, ethics opinions, or secondary sources? And, finally, how do these factors apply to the specific facts of the assignment?

As another general issue, the explanatory comments raise interesting questions of “legislative history,” because they are designed to “explain[] and illustrate[] the meaning and purpose” of the rules. Yet the comments are only guides to meaning, and the text of the rules themselves is authoritative. How can students use these comments to help support their interpretation of a given rule?

One such way is for the students to shore up their policy arguments. Should a court err on the side of disqualification if there’s any doubt whether secrets could have been disclosed before a screen was imposed? On the one hand, ensuring confidentiality of client secrets is a bedrock principle of the attorney/client relationship. On the other hand, interpreting the disqualification rules too strictly could hinder the ability of lawyers to move from firm to firm, and could be used as a litigation tactic to unfairly force opposing parties to be stripped of their chosen counsel.

In sum, basing a brief writing assignment on ethics codes allows me to reinforce statutory interpretation techniques introduced the previous semester, plus drive home some ethical lessons about maintaining client confidentiality and how law firms try to avoid conflicts of interest.

- 1 The problem was originally created by my Michigan colleague Phil Frost.
- 2 For an article on a similar theme, see Amy Montemarano, *Using Federal Rule of Civil Procedure 11 to Teach Statutory Construction*, 20 *The Second Draft* 9 (Dec. 2005).
- 3 Mich. R. Prof. Conduct 1.10(b). By contrast, the ABA’s Model Rules of Professional Conduct do not formally authorize screens for lawyers moving laterally from firm to firm, and only allow screens in limited situations such as when government lawyers move to the private sector or when a prospective client reveals confidential information to an attorney during an initial interview. See Model R. Prof. Conduct 1.11(b) & 1.18(d).

When Neighboring States Disagree: Teaching Statutory Interpretation Through Client Letter Writing

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Students should understand that lawyers routinely research, consult, and interpret statutes when counseling clients, and that they often communicate this statutory analysis in letters to the client. Furthermore, students should be aware of and attendant to the fact that their competent and diligent work interpreting statutes will directly impact clients. Finally, students must learn that different states may interpret identical statutory terms using different approaches to construction and reaching different conclusions as to meaning.

With these goals in mind, I devised a client letter problem involving a bar applicant charged with driving under the influence. The client knows that she had started the engine of her car but had not yet put the car in gear when she was arrested; however, the client is not sure in which state her car was located, as the parking lot of the bar where she had consumed five beers straddles the border of Connecticut and Rhode Island. Therefore, students must analyze the issue of what constitutes “operating” a vehicle in two neighboring jurisdictions and counsel the client as to possible conviction and penalties in both states.

The problem makes for a good beginning exercise in statutory interpretation and construction because: (1) each state has very few cases interpreting its statute, making the research and synthesis tasks fairly straightforward; (2) students must perform legal research in two different jurisdictions, sharpening their legal research skills; (3) while the statutory language in both states’ statutes is similar, the two states interpret the language in opposite ways; (4) courts in the two states use different approaches to interpreting the statute—Rhode Island uses legislative history, Connecticut uses



plain language as well as comparison of the statute to those of other jurisdictions and public policy; and (5) as the students are asked to communicate their analysis to a client, they begin to understand the importance to real people of careful and considered statutory analysis.

In the end, the students correctly deduce that the client would almost certainly be not guilty of DUI in Rhode Island, as the court notes that “the trial justice, in denying the defendant’s motion for judgment of acquittal, concluded that the term ‘operates,’ as it appears in the amended version of § 31-27-2(a), includes being in actual physical control. Such a conclusion, however, is not in accord with the history of § 31-27-2(a). The actual physical control language was specifically deleted from the section by the Legislature. It was erroneous for the trial justice to conclude that, following the amendment of § 31-27-2(a), the term ‘operates’ includes being in actual physical control. By amending § 31-27-2(a) and taking out the actual physical control language, the Legislature apparently did not intend to prohibit [sitting on a motorcycle with its engine running].” *State v. Capuano*, 591 A.2d 35, 37 (R.I. 1991).

On the other hand, if the client was in Connecticut when she was arrested, she may well be guilty. The Connecticut court looks first to plain language: “We begin our analysis by looking to the statutory provision in question. General Statutes § 14-227a(a) provides in relevant part: ‘No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both’ Section 14-227a(a) prohibits *operating* a motor vehicle while under the influence rather than merely *driving* a motor vehicle while under the influence. It is well settled that ‘operating’ encompasses a broader range of conduct than does ‘driving.’ (citations omitted). . . . Nothing in our definition of ‘operation’ requires the vehicle to be in motion” *State v. Haight*, 903 A.2d 217, 220 (R.I. 2006). The court then surveys the law of several other states, most of which support its interpretation, and discusses Connecticut’s “unambiguous policy . . . [of] ensuring that our highways are safe from the carnage associated with drunken drivers.” *Id.* at 222.

While this client letter problem would certainly work as a memo, it is particularly poignant in its letter form, in part because the letter-writing exercise permits discussion of how to deliver difficult news to a client and how to explain that laws differ from state to state. The

fact that the client is a recent law school graduate who is applying to the bar makes the problem particularly relevant for students, who may not have realized that such conduct must be revealed in a bar application.

A Recipe for Understanding Statutes¹

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How is a criminal assault statute like a recipe for blueberry pie? And no, I’m not talking about the consequences of eating someone’s bad cooking!

One of the hardest tasks for students during their first year of law school is learning how to analyze and outline a statute. After all, statutes are full of strange new language and are organized in a manner that law students are not familiar with. What students do not realize, however, is that understanding statutes is not as unfamiliar as they think. Every time law students bake brownies for friends or cook beef stew for the family, they are practicing the same skill used in breaking down a statute or identifying the elements of a cause of action.

In order to demonstrate this in class, I assign students a statute and ask them to outline it in a manner that makes clear what the elements are. Consider the following simple statute for assault, drawn from the Texas Penal Code § 22.01(a)(1): “A person commits an offense if the person intentionally, knowingly, or recklessly causes bodily injury to another. . . .”

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What are the elements of criminal assault under the foregoing statute? Student responses to this question have varied wildly, from listing every word