

Hi, this is Chris Micheli with the Sacramento governmental relations firm of Aperia & Micheli and an adjunct professor at McGeorge School of Law. Thanks for joining today's podcast, where we talk about drafting criminal, or penal, code statutes.

Drafting criminal, or penal, code statutes is an important undertaking for any bill drafter because of the consequences for those who violate such statutes, which can include imprisonment as well as financial penalties, and because the courts at both the state and federal levels generally strictly construe these types of statutes. As a result, those who draft criminal laws must take a number of issues under consideration.

Here's some valuable guidance for drafting criminal or penal statutes as provided by Athabasca University in Canada in its graduate diploma in legislative drafting program. They suggest a number of factors to consider, such as ensuring that legislation does not violate any fundamental right or freedom that's guaranteed under the state or federal constitution, as well as some specific items, such as guaranteeing a right to a fair hearing, restricting the seizure of an individual's property, limiting in clear language enforcement authority, providing adequate review of prosecutorial conduct.

What do general laws concerning crimes or criminals usually provide? Generally, there are four major provisions. First, the offenses are defined and usually classified as different offenses, such as a serious crime. Second, the level of culpability is provided. Third, general defenses are provided, and then fourth, the parties are defined. For example, those committing the offense versus those who may aid and abet the offense. There are obviously some other provisions such as criminal procedure, evidence, court jurisdiction that are also dealt with.

Now, Athabasca University provides several steps to be taken by the bill drafter when he or she is determining the content of criminal or penal code provisions. Some of these include, is similar conduct already subject to existing law? Naturally we would not want any duplication which could create a double jeopardy problem.

What conduct precisely is being prohibited? The prohibited activity must be clear in the statute so that individuals know what conduct is a criminal offense. Should the mental element be expressly addressed? Is it a strict liability offense or does it require proof of mens rea, or a mental component? For example, intent, willful conduct, reckless negligence. What's the maximum and perhaps the minimum penalty for committing the offense? Is a fine imposed, imprisonment, or both? Does that change for a second or subsequent offense? Are any special defenses allowed? For example, if reasonable care were exercised, is there still going to be criminal liability? How about the age of the offender? Does duress or self-defense apply in this case?

With this information, what are some of the drafting rules for drafting criminal or penal statutes? Well, in general, again, these statutes contain a few key elements, including a statement of the prohibited conduct, a statement that engage in that prohibited conduct, constitutes, or is a criminal offense, and then what's the punishment for violating the law?

Based upon the rules of the state or federal governments at which the bill drafter is operating, the offense can be expressed generally in one of three ways, declaratory, conditional, or mandatory. What's an example of each? Declaratory is a person who does X commits an offense. Conditional, if a person does X, that person commits an offense. Mandatory, a person is prohibited from doing X or that person commits an offense.

Bill drafters are usually advised to expressly state that violating the specified conduct constitutes a criminal offense and then sets forth the penalty. The initial sentence is generally preferred to begin with a person who, as opposed to any person. Also the present tense should be used in stating the elements of the criminal offense. In addition, bill drafters should clearly describe who the offender is and what behavior is prohibited.

As a general rule, again, most criminal statutes simply refer to a person and then focus on the prohibited conduct. However, in some instances, a specific offender is defined in the statute. For example, a type of licensee or a corporation. Thereafter, the bill drafter must prescribe the prohibited conduct, and here it's important to avoid overly broad or ambiguous or legalistic terms. That's because the language should provide certainty to those who will be affected by the prohibition and the ultimate penalty.

The same applies to the mental element of the crime. While there is a general presumption that criminal offenses carry a mental element, it's best to specify and provide clear guidance in that regard. As a result, the drafters should provide a specific intent to be used. On the other hand, if the intent is to exclude a mental element, then use appropriate words to make that clear. Criminal or penal code statutes often use terms to express a required mental state, such as willful or knowing.

Finally, with strict liability offenses, they not only apply to individuals, but also corporations, and that should be duly noted. These are some of the highlights in drafting criminal or penal statutes. Thanks for joining. I hope you enjoyed it.