

Admin.

February 6, 2014

Memorandum 2015-1

Commission Practices

At its October 2014 meeting, the Commission¹ directed the staff to prepare a memorandum discussing the Commission's deliberative practices.² This memorandum was prepared pursuant to that direction.

TYPES OF LAW REVISION WORK

In preparing this memorandum, the staff reviewed archival materials in an attempt to find prior discussion of the Commission's practices (many of which are formalized in the *Handbook of Commission Practices and Procedures*). In those materials, the staff found an interesting discussion of the different kinds of law revision that the Commission performs. Although that discussion does not bear directly on the Commission's practices, it sets up a useful taxonomy that may make it easier to think and talk about the Commission's work.

In a 1950 report to the former Code Commission, Legislative Counsel Ralph Kleps (who also served as the Code Commission's Secretary) prepared a background report discussing the kinds of work that could be performed by a permanent law revision commission. He divided that work into three categories — formal revision, mechanical revision, and policy making revision:

Formal revision of statutes deals solely with their form and expression and is carried on for the purpose of producing certainty and conciseness in expression and logic in arrangement of pre-existing statutes, so that they can be found readily and, when found, can be understood easily. Consolidation of overlapping provisions, correction of inaccurate, prolix, or redundant expressions, repeal of obsolete, superseded, or unconstitutional provisions, and the collection and enactment of the whole in logical

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Minutes (Oct. 2014), p. 3.

arrangement, without change in effect, are the aims of this type of revision.

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Substantive revision of law is the process by which the meaning and effect of pre-existing statutes are changed so as to accommodate them to changing conditions. This type of revision can be further classified into what we shall call mechanical substantive revision and policy-making substantive revision.

(a) Mechanical substantive revision is closely akin to formal revision and the two are often carried on side by side. As a matter of fact the two are often confused with one another, and it is difficult at times to ascertain just when the boundary between formal revision and mechanical substantive revision has been crossed. As its name might imply, mechanical substantive revision refers to minor substantive changes in the law of a non-controversial nature and involving little research and study.

Resolutions of conflicting provisions (where the intent of the Legislature is not clear) and repeals and minor changes of provisions which are not obsolete but merely outmoded are examples of this type of substantive revision.

(b) Policy-making substantive revision, on the other hand, involves major changes in the particular field of law, actually changing the policy of the State as to that field. Lengthy research and study of the shortcomings and inequities of the law are made by experts in the field involved and by research experts before any recommendations for changes are ventured. It is by this type of revision that a reform of a field of law is undertaken.³

In practice, it is sometimes difficult to draw lines between those categories and the Commission's studies will usually involve more than one of them. Nonetheless, the taxonomy is helpful because it has operational implications — the different kinds of work may require different kinds of procedures.

Formal revision (e.g., most of the work in the fish and game study) does not require an exercise of policy judgment. It turns on drafting expertise and carefulness. If such work is done correctly, there is usually little need for discussion. It can be approved as presented.

Mechanical revision (e.g., most of the work in the study of notice publication districts) is still largely technical, but it involves choices about how the law should operate. Such choices require discussion, in order to brainstorm and weigh the advantages and disadvantages of different approaches.

3. Ralph N. Kleps, California Code Commission, Committee on Continuous Revision of the Law, *Report on Substantive Revision of the Law* at 3 (Sept. 30, 1950).

Policy revision (e.g., the study of mediation confidentiality) may require the Commission to break new ground, determining what purpose the law should serve. Such weighty matters require robust discussion, including an extensive opportunity for public input.

CONSENT PROCEDURES

Many deliberative bodies — including the Legislature — routinely use “consent” procedures to quickly decide uncontroversial matters. Such procedures are used when a proposal is technical or minor in its effect, is unopposed, and there is likely to be no need to discuss it.

Such a proposal is typically placed onto a “proposed consent calendar.” Members of the body then have an opportunity to remove items from the calendar, if they see a need for discussion and a vote. Items that are not removed are approved without discussion.

The Commission has sometimes used informal consent procedures (marking certain decisions as presumed consent items, to be approved without discussion unless an objection is made), but it usually does not. Instead, the Commission typically walks through every decision point presented in staff memoranda, providing an opportunity for discussion of each. If a staff recommendation on a particular point is sound, the Commission may approve the recommendation without debate. This is especially likely when a decision involves formal or minor mechanical revisions. In those situations, there are no policy issues to be decided and the staff will usually have presented a technically correct solution.

This practice could create an impression of rubber-stamping, especially if the Commission works through a long list of minor technical points (of the type that other bodies might place on a consent calendar), approving all of them without significant discussion. This is ironic, because the same impression would probably not be created if the Commission had instead used a consent procedure to approve the same items en masse. The propriety and utility of an appropriately limited consent procedure is well-understood.

If the Commission is concerned that the individual consideration of uncontroversial staff recommendations could create a problematic perception, it may wish to use informal consent procedures more often. Doing so would also save meeting time. The downside is that the Commission would miss the

opportunity for improvement that sometimes comes from the separate examination of apparently straightforward matters.

Should informal consent procedures be used more often?

STUDY "POINT PERSON"

At the October 2014 meeting, Commissioner Kihiczak suggested a possible change to the Commission's study practice: Each member of the Commission could be assigned as a "point person" for a particular study. The point person would work "hand-in-hand" with the staff in preparing meeting materials. The commission did not make any decision on that proposal, nor was there much discussion of how the idea would work in practice.

The matter is raised here to provide an opportunity for further discussion.

NEW TOPIC PROPOSALS

At the same meeting, Commissioner Kihiczak also proposed that Commissioners should be encouraged or required to propose at least one new study topic each year. Again, there was no vote on the matter. It is raised here for further discussion.

It is worth noting that there are currently no restrictions on a Commissioner proposing a new study topic, either orally or in writing. Many Commissioners have done so in the past. Some Commissioner suggestions have led to major studies.

CONCLUDING OBSERVATIONS

Major Commission studies have long arcs. There is often an extended period in which the Commission primarily gathers background information. That information is presented in lengthy memoranda that are largely or entirely explanatory — they often require no discussion or decision.

Much of the Commission's current program of work has been in that mode for the last year. In 2014, the staff produced almost nothing but background information in two major studies: *State and Local Agency Access to Customer Information from Communication Service Providers* and *Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct*. This meant that a great deal of the Commission's resources were committed to work that did not require immediate Commission discussion or decisions. That too

may have created a perception that the Commission is not active enough in its deliberations.

That trend in the Commission's work is about to change. The Commission has completed its review of the background law on electronic surveillance and is about to begin the process of developing proposed legislation. The study of mediation confidentiality is also nearing the end of the background exposition phase. It seems likely that both of these studies will be producing extended discussion and weighty decisions in 2015.

Respectfully submitted,

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