

Admin.

May 23, 2022

## Memorandum 2022-33

### Use of Subcommittees

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At the Commission's<sup>1</sup> May 2022 meeting, the staff was asked about the possible use of subcommittees, as a way of better leveraging the Commission's resources on large projects. The staff committed to researching whether there are any legal impediments to doing so.<sup>2</sup> This memorandum reports the staff's findings.

#### PRIOR COMMISSION DECISIONS

The Commission's *Handbook of Practices and Procedures* is, in large part, a compilation of prior Commission decisions on how to conduct its work. As such, it does not bind the Commission. The Commission is always free to make different decisions.

However, the *Handbook* is a valuable source of institutional memory and it is useful to revisit the Commission's prior thinking when considering matters that it addresses.

With respect to the use of standing subcommittees (as distinguished from the *ad hoc* subcommittees that are formed when the Commission meets with less than a quorum), Section 250(d) of the 2019 edition of the *Handbook* states:

The Commission does not use standing subcommittees to initially review studies on the Commission's agenda and submit their recommendations to the Commission.

As background for that decision, the *Handbook* cites the Minutes of the Commission's January and May meetings in 1960. The staff has reviewed those Minutes and the staff memorandum that was the subject of those Minutes.

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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](http://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.

2. Minutes (May 12, 2022), p. 3.

In January 1960, the Commission considered a suggestion by former Executive Secretary John R. McDonough, Jr., that the Commission consider returning to a prior practice of using standing subcommittees to increase its productivity. He wrote:

Return to the use of committees of the Commission. This system, used by the New York Law Revision Commission, was abandoned by us for three reasons: (1) it proved more difficult to get some members to attend committee meetings than to attend Commission meetings; from the staff side it was, in calling members, more like asking a favor than determining the time for fulfilling of a predetermined obligation; (2) some members did not seem to perform with as much sense of responsibility and seriousness of purpose when the question was what recommendation to make to the Commission as they did when, sitting with the Commission, they were deciding what recommendation to make to the Legislature; thus, they “ducked” difficult questions by referring them to the Commission and they cast votes which they reversed when the same matters were before the Commission; (3) the committee meetings imposed a heavy burden on the staff. The last of these should be a good deal less of a problem with the new Assistant Executive Secretary. The other two could be overcome if the Commission were to decide that service on the Commission imposes the same obligation to attend committee meetings as Commission meetings and were to delegate (and the committees were to accept) substantially final responsibility for action on the studies assigned. A committee system is a waste of time, of course, unless the decisions of committees are very nearly automatically endorsed by the full Commission (as the Legislature, by and large, endorses the work of its committees). This implies an important departure in substance from the “Rule of Five Votes.” Perhaps the committee system would work with smaller studies even if it would not with the larger ones.<sup>3</sup>

The proposal, which was rejected, included elements that are not a necessary part of the use of subcommittees. The proposal was that subcommittees would make recommendations to the Commission as a whole, which would be routinely adopted as a matter of deference.

Another possibility would be to use subcommittees as a fact-finding mechanism, involving Commissioners directly in a process that would ordinarily be conducted by staff alone.

There may well be other productive uses for subcommittees.

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3. Memorandum 1960-1, Exhibit pp. 15-16 (emphasis in original).

In May of 1960, the Commission clarified the scope of its January decision against using standing subcommittees:

The statement referring to the Commission's disapproval of the use of committees is to be revised to indicate that the Commission disapproved only the use of a standing committee to initially review studies on the Commission's agenda and to submit its recommendations to the Commission.<sup>4</sup>

Thus, the Commission did not reject all use of subcommittees. Rather, they disapproved the use of subcommittees to form an initial set of recommendations at the commencement of a study, to which the Commission would to some extent defer.

#### OPEN MEETING ACT

The Bagley-Keene Open Meeting Act<sup>5</sup> imposes certain requirements on the conduct of a "meeting" of a "state body." Most importantly, such a meeting must be open to the public, with sufficient advance notice to ensure a meaningful opportunity to attend and be heard on matters before the body.

One important question about the use subcommittees is whether their proceedings would be a "meeting" of a "state body" that is governed by Bagley-Keene. There are two separate provisions of the "state body" definition that could apply to a subcommittee.

First, "state body" includes a formally-created advisory subcommittee that is comprised of three or more persons.<sup>6</sup> Summarizing that rule, the California Attorney General writes:

The Act governs two types of advisory bodies: (1) those advisory bodies created by the Legislature and (2) those advisory bodies having three or more members that are created by formal action of another body. ([Gov't Code] § 11121(c).) If an advisory body created by formal action of another body has only two members, it is not covered by the Bagley-Keene Act. Accordingly, that body can do its business without worrying about the notice and open meeting requirements of the Act. However, if it consists of three people, then it would qualify as an advisory committee subject to the requirements of the Act.

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4. Minutes (May 20-21, 1960), p. 4.

5. Gov't Code §§ 11120-11132.

6. Gov't Code §§ 11121(c). See also 2001 Cal. Stat. ch. 243, § 1. The staff reviewed committee analyses of that legislation and did not find any information relevant to the present discussion.

When a body authorizes or directs an individual to create a new body, that body is deemed to have been created by formal action of the parent body even if the individual makes all decisions regarding composition of the committee. The same result would apply where the individual states an intention to create an advisory body but seeks approval or ratification of that decision by the body.

Finally, the body will probably be deemed to have acted by formal action whenever the chair of the body, acting in his or her official capacity, creates an advisory committee. Ultimately, unless the advisory committee is created by staff or an individual board member, independent of the body's authorization or desires, it probably should be viewed as having been created by formal action of the body.<sup>7</sup>

In addition, "state body" includes any multimember committee that exercises authority delegated by a state body.<sup>8</sup> As the Attorney General explains:

The critical issue for this type of body is whether the committee exercises some power that has been delegated to it by another body. If the body has been delegated the power to act, it is a delegated committee. ([Gov't Code] § 11121(b).) A classic example is the executive committee that is given authority to act on behalf of the entire body between meetings. Such executive committees are delegated committees and are covered by the requirements of the Act.

There is no specific size requirement for the delegated body. However, to be a body, it still must be comprised of multiple members. Thus, a single individual is not a delegated body.<sup>9</sup>

## DISCUSSION

It seems clear that the use of subcommittees would be legally permissible. The only legal question is whether the subcommittee would be subject to the open meeting requirements of Bagley-Keene. Those requirements would apply to a subcommittee of either of the following types:

- A "multimember" body to which Commission authority has been delegated.
- An advisory body of three or more persons, if formally created by the Commission or any Commissioner.

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7. Cal. Att'y Gen., *A Handy Guide to The Bagley-Keene Open Meeting Act* at 3 (2004).

8. Gov't Code § 11121(b).

9. Cal. Att'y Gen., *A Handy Guide to The Bagley-Keene Open Meeting Act* at 4 (2004).

If the Commission prefers the greater flexibility that comes with exemption from the requirements of Bagley-Keene, an advisory subcommittee would need to be limited to two persons and a subcommittee exercising delegated powers would need to be limited to a single person.

The Commission would also need to decide the purpose served by the subcommittee. Should it be limited to collecting information relevant to a study, perhaps by convening meetings with stakeholder groups to hear their input (which could then be summarized in a staff memorandum or oral presentation for the full Commission)? Such a function would not be incompatible with the Commission's historic practice or the law.

Or should a subcommittee be tasked with developing components of a recommendation (including making decisions about proposed reform legislation)? If a subcommittee were formed for that purpose, should its recommendations be given any weight beyond their persuasive effect?

Commissioners should give these matters some thought in advance of discussing the issue at the August meeting.

Respectfully submitted,

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Executive Director