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MINUTES OF MEETING  
CALIFORNIA LAW REVISION COMMISSION  
APRIL 8, 1999  
SACRAMENTO

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A meeting of the California Law Revision Commission was held in Sacramento on April 8, 1999.

**Commission:**

*Present:* Howard Wayne, Assembly Member, Vice Chairperson  
Bion M. Gregory, Legislative Counsel  
Edwin K. Marzec  
Sanford M. Skaggs  
Colin Wied

*Absent:* Arthur K. Marshall, Chairperson

**Staff:** Nathaniel Sterling, Executive Secretary  
Stan Ulrich, Assistant Executive Secretary  
Barbara S. Gaal, Staff Counsel  
Brian P. Hebert, Staff Counsel  
Robert J. Murphy, Staff Counsel

**Consultant:** J. Clark Kelso, Trial Court Unification, Administrative Rulemaking

**Other Persons:**

Mary Akens, paralegal, Law Office of J. William Yeates, Sacramento  
Herb Bolz, Office of Administrative Law, Sacramento  
Thomas Braun, Southern California Edison, Rosemead  
Randy Cape, Pacific Telesis, Sacramento  
Julian Chang, AT & T, San Francisco  
Frank Coats, Department of Motor Vehicles, Sacramento  
Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento  
Matthew Dodson, Consumer Attorneys of California, Sacramento  
A.J. Gardner, California Cable TV Association, Oakland  
Randy Golden, GTE, San Ramon  
Judith Iklé, California Public Utilities Commission, San Francisco  
Gerald James, Association of California State Attorneys and Administrative Law Judges, Professional Engineers in California Government, and California Association of Professional Scientists, Sacramento

Karen Jones, California Public Utilities Commission, San Francisco  
Sandy Klagge, Building Owners and Managers Association, Sacramento  
Miles E. Locker, Division of Labor Standards Enforcement, San Francisco  
Katherine Morehause, Caltel, Alamo  
Charlene Mathias, Office of Administrative Law, Sacramento  
Gary Pitzer, California Environmental Protection Agency, Sacramento  
Cindy Richburg, Sprint, Sacramento  
Daniel L. Siegel, Attorney General's Office, Sacramento  
Paul Sieracki, Sprint, Sacramento  
Les Spahn, Building Owners and Managers Association, Sacramento  
Shannon Sutherland, California Nurses Association, Sacramento  
Carolyn Veal-Hunter, Assembly Utilities & Commerce Committee, Sacramento  
Anthony Williams, Judicial Council, Sacramento  
Nancy T. Yamada, California State Employees Association, Sacramento

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### 1                   MINUTES OF FEBRUARY 4-5, 1999, COMMISSION MEETING

2           The Minutes of the February 4-5, 1999, meeting of the Law Revision  
3 Commission were approved as submitted by the staff.

### 4                   REPORT OF EXECUTIVE SECRETARY

#### 5   **Consultant Contracts**

6           The Executive Secretary reported that he plans to extend the Commission's  
7 contracts for consultation services with the following persons, all of which expire  
8 June 30, 1999:

- 9           • Professor Michael Asimow (administrative rulemaking).

1       • Professor David M. English (Uniform Health Care Decision Act). Professor  
2 English will be relocating to the University of Missouri this summer, but may be  
3 available for consultation when he is in California on other business. In addition,  
4 expenses for his work with the Commission could be shared by the National  
5 Conference of Commissioners on Uniform State Laws.

6       • Judge Joseph B. Harvey (Evidence Code). Judge Harvey will not  
7 complete his work by June 30. We may work out a part payment on the  
8 contract for the portion that is completed by that date.

9       • Institute for Legislative Practice (trial court unification). The scope of  
10 this contract will also be expanded to cover research performed for the  
11 Commission, in addition to expenses for the attendance of Professor  
12 Clark Kelso at Commission meetings and hearings.

13       With respect to new consultant contracts, the Executive Secretary reported on  
14 the following studies:

15       • Rules of construction for trusts and other instruments. Discussions are  
16 ongoing with several outstanding candidates for this study.

17       • Revision of judicial procedures in civil cases in light of trial court  
18 unification. We have identified several possible candidates; this is a  
19 joint project with the Judicial Council, and we are discussing the  
20 candidates with them. This contract could take the form of a  
21 consultative panel of experts.

22       • Revision of judicial procedures in criminal cases in light of trial court  
23 unification. Professor Gerald Uelmen has expressed an interest in this  
24 project, and would be an excellent consultant.

25       With the possible exception of the civil procedure study, these new consultant  
26 contracts would all take the Commission's standard form of background studies,  
27 modestly compensated, plus travel expenses and per diem for attending  
28 Commission meetings.

### 29 **Priorities for Study**

30       The Executive Secretary reported that Commissioner Wied has identified a  
31 number of problems in the probate and estate planning area that the Commission  
32 might address. The Commission has decided to work individual probate issues  
33 into the Commission's agenda as time and resources permit. Commissioner Wied  
34 agreed to provide the staff with a list of the problem areas, which the staff will  
35 review and bring back to the Commission as appropriate.

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1       (1) The draft should address the obligation a telecommunications company to  
2 provide service to a building on request of the building owner.

3       (2) The draft should address the issue of removal of wiring from a building,  
4 including the cost burden of removal.

5       (3) The draft should not require the Public Utilities Commission to approve a  
6 compensation agreement made between a telecommunications company and  
7 building owner.

8       (4) The draft should not eliminate eminent domain authority.

9       (5) Many of the issues that have been raised in connection with the  
10 Connecticut approach will be addressed in Assembly Member Wright's bill when  
11 it is revised.

12       After considering these and other comments, the Commission decided to  
13 proceed to a draft of a tentative recommendation proposing the Connecticut  
14 approach, as modified. In preparing the draft tentative recommendation for  
15 Commission consideration, the staff should take into account comments made at  
16 the meeting, as well as comments received after the meeting. The Commission  
17 requested persons interested in commenting further to provide the staff with  
18 comments within three weeks after the meeting.

19       The Commission will continue to monitor pending legislation on this matter,  
20 including the Wright bill and the Peace bill. Apart from the Connecticut  
21 approach that it is developing, the Commission does not presently intend to do  
22 further work on either the issue of (1) condemnation of local public entity  
23 property by a private utility or (2) condemnation of private property generally by  
24 a privately owned public utility. This position could change if continuing  
25 problems outside the telecommunications/building area are demonstrated.

26       STUDY F-1300 – ENFORCEMENT OF JUDGMENTS UNDER THE FAMILY CODE

27       The Commission considered Memorandum 99-24 and the attached staff draft  
28 tentative recommendation on *Enforcement of Judgments Under the Family Code*. The  
29 Commission approved the tentative recommendation to be distributed for  
30 comment, with a view toward submitting a recommendation to the 2000  
31 legislative session.

32       (Note. Memorandum 99-24 supersedes Memorandum 98-66, which was  
33 originally scheduled for the August 1998 meeting, but not considered.)

1           STUDY H-451 – CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY

2           See entry in these Minutes under Study Em-451.

3                           STUDY J-1301 – TRIAL COURT UNIFICATION

4           The Commission considered Memorandum 99-22, and its First Supplement,  
5           concerning clean-up legislation on trial court unification. The Commission made  
6           the following decisions:

7           **Penal Code § 1214, Operative January 1, 2000**

8           The clean-up legislation (SB 210) includes an amendment of Penal Code  
9           Section 1214, operative January 1, 2000. The Comment to that provision should  
10          be revised to conform to the Legislative Counsel's position on conflicts between  
11          SB 2139 (Lockyer) and SB 1768 (Kopp):

12           **Penal Code § 1214, operative January 1, 2000 (added) (amended).**  
13           **Enforcement**

14           **Comment.** Section 1214, as operative (with exceptions) January  
15           1, 2000, is ~~added to restore this version of the statute, which was~~  
16           ~~originally added by Chapter 587 of the Statutes of 1998 but~~  
17           ~~chaptered out by Chapter 931 of the Statutes of 1998~~ amended to  
18           accommodate unification of the municipal and superior courts in a  
19           county. Cal. Const. art. VI, § 5(e). New subdivision (c) continues the  
20           policy of former Code of Civil Procedure Section 86(a)(11), which  
21           provided that the municipal court had original jurisdiction in all  
22           actions to enforce restitution orders or restitution fines that were  
23           imposed by the municipal court (without any limitation on amount  
24           in controversy). In certain criminal cases, a municipal court could  
25           impose a restitution order or restitution fine. Penal Code §§ 1462(a)  
26           (misdemeanor or infraction case), 1462(b) (pronouncing judgment  
27           in noncapital criminal case). In a county in which there is no  
28           municipal court, Penal Code Section 1462(d) gives the superior  
29           court the jurisdiction provided in Section 1462(a)-(b). Thus, new  
30           subdivision (c) of this section accommodates trial court unification  
31           and continues the effect of former law.

32           See Code Civ. Proc. §§ 85 (limited civil cases), 86(a)(8)  
33           (enforcement of judgment in limited civil case).

34           **Penal Code § 1382. Dismissal of criminal case**

35           As suggested by the Judicial Council and the California Attorneys for  
36           Criminal Justice, the amendment of Penal Code Section 1382 in SB 210 should be  
37           revised as follows:

1           1382. (a) The court, unless good cause to the contrary is shown,  
2 shall order the action to be dismissed in the following cases:

3           ....

4           (2) In a felony case, when a defendant is not brought to trial  
5 within 60 days of the defendant's arraignment ~~in the superior court~~  
6 on an indictment or information, or reinstatement of criminal  
7 proceedings pursuant to Chapter 6 (commencing with Section 1367)  
8 of Title 10 of Part 2, ....

9           **Comment.** Section 1382 is amended to delete surplusage. See  
10 ~~Section 691 & Comment~~ accommodate unification of the municipal  
11 and superior courts in a county. Cal. Const. art. VI, § 5(e).

## 12   **Reclassification of Civil Cases**

13           SB 210 should be amended to incorporate Alternative B (Memorandum 99-22,  
14 Exhibit pp. 19-29).

## 15   **Small Claims Advisory Committee**

16           The previously-approved amendment of Code of Civil Procedure Section  
17 116.950 (February 1999 Minutes, pp. 8-9) should be revised to mention temporary  
18 judges as requested by the Judicial Council:

19           (d) The advisory committee shall be composed as follows:

20           ....

21           (6) Six judicial officers who have had extensive experience  
22 presiding in small claims court, appointed by the Judicial Council.  
23 Judicial officers appointed under this subdivision may include  
24 judicial officers of the superior court, judicial officers of the  
25 municipal court, judges of the appellate courts, and retired judicial  
26 officers, and temporary judges.

## 27   **Presiding Judge**

28           As requested by the Judicial Council, the following amendments should be  
29 inserted in SB 210, subject to deletion if they engender controversy:

### 30           **Gov't Code § 69508 (amended). Presiding judge in superior court** 31 **with three or more judges**

32           SEC. \_\_\_\_\_. Section 69508 of the Government Code is amended to  
33 read:

34           69508. (a) The judges of each superior court having three or  
35 more judges, shall choose from their own number a presiding judge  
36 who serves as such at their pleasure. Subject to the rules of the  
37 Judicial Council, ~~he~~ the presiding judge shall distribute the business  
38 of the court among the judges, and prescribe the order of business.

1           **(b) Notwithstanding subdivision (a), the Judicial Council may**  
2           **provide by rule of court for the qualifications of the presiding**  
3           **judge.**

4           **Gov't Code § 69508.5 (amended). Presiding judge in court with**  
5           **two judges**

6           SEC. \_\_\_\_\_. Section 69508.5 of the Government Code is amended  
7           to read:

8           69508.5. **(a)** In courts with two judges a presiding judge shall be  
9           selected by the judges each calendar year and the selection should  
10          be on the basis of administrative qualifications and interest.

11          **(b)** If a selection cannot be agreed upon, then the office of  
12          presiding judge shall be rotated each calendar year between the  
13          two judges, commencing with the senior judge. If the judges are of  
14          equal seniority, the first presiding judge shall be selected by lot.

15          **(c) Notwithstanding subdivisions (a) and (b), the Judicial**  
16          **Council may provide by rule of court for the qualifications of the**  
17          **presiding judge.**

#### 18           **Conversion of Referees to Commissioners**

19           The Judicial Council withdrew its request that SB 210 be amended to include  
20           provisions converting certain referees to commissioners.

#### 21           **Terminology: Civil Case Other Than a Limited Civil Case**

22           A provision along the following lines should be inserted in SB 210:

#### 23           **Code Civ. Proc. § 88 (added). “Unlimited civil case” defined**

24           SEC. \_\_\_\_\_. Section 88 is added to the Code of Civil Procedure, to  
25           read:

26           88. A civil action or proceeding other than a limited civil case  
27           may be referred to as an unlimited civil case.

28           **Comment.** Section 88 is added to provide a convenient means of  
29           referring to a civil case other than a limited civil case. The new term  
30           (unlimited civil case) reflects the broad jurisdiction of the superior  
31           court. Cal. Const. art. VI, § 10. Despite this terminology, some  
32           restrictions apply (e.g., the superior court does not have jurisdiction  
33           of a case that is exclusively within the jurisdiction of the federal  
34           courts).

35           A small claims case is a type of limited civil case, not an  
36           unlimited civil case. See Sections 85 & 86 & Comments.

1 **Penal Code § 899. Selection of grand jury**

2 As recommended by the staff, the Commission deferred consideration of the  
3 issues relating to Penal Code Section 899, which are discussed at pages 2-4 of the  
4 First Supplement to Memorandum 99-22.

5 **STUDY L-649 – UNIFORM PRINCIPAL AND INCOME ACT**

6 The Commission considered Memorandum 99-25, and its First Supplement,  
7 concerning the recommendation proposing the *Uniform Principal and Income Act*.  
8 The Commission approved the revisions set out in the memorandum and  
9 supplement, which implemented the consensus arising out of the staff meeting  
10 with representatives of the California Bankers Association and others on March  
11 19. In addition, Section 16336(b) was revised for clarity and consistency, to read  
12 as follows:

13 (b) A trustee may not make an adjustment between principal  
14 and income in any of the following circumstances:

15 (1) Where it would diminish the income interest in a trust that  
16 (A) that requires all of the income to be paid at least annually to a  
17 spouse and (B) for which, if the trustee did not have the power to  
18 make the adjustment, an estate tax or gift tax marital deduction  
19 would be allowed, in whole or in part.

20 ....

21 (4) ~~From~~ Where it would be made from any amount that is  
22 permanently set aside for charitable purposes under a will or trust,  
23 unless both income and principal are so set aside.

24 ....

25 **STUDY L-4000 – HEALTH CARE DECISIONS**

26 The Commission heard an oral report on recent developments concerning AB  
27 891, which would implement the Commission's recommendation on *Health Care*  
28 *Decisions for Adults Without Decisionmaking Capacity*. The Assistant Executive  
29 Secretary reported that the Assembly Judiciary Committee consultant working  
30 on AB 891 did not believe the bill could be properly analyzed in the time  
31 available to meet fiscal bill deadlines if it contained "highly controversial"  
32 provisions, principally the surrogate committee rules in Chapter 4 (proposed  
33 Prob. Code §§ 4720-4726). Accordingly, the staff recommended that these  
34 provisions and related conforming revisions, including the proposed repeal of  
35 the "Epple bill" consent procedure for nursing homes (Health & Safety Code §

1 1418.8), be amended out of AB 891 and made the subject of a separate ongoing  
2 study, with a view toward submitting legislation next session. The Commission  
3 approved the staff recommendation, subject to the agreement of the author,  
4 Assemblywoman Elaine Alquist.

5 STUDY N-300 – ADMINISTRATIVE RULEMAKING

6 The Commission considered Memorandum 99-20 and its First Supplement,  
7 and approved the draft tentative recommendation for circulation, with the  
8 following changes:

9 **Gov't Code § 11340.9(e). Individual advice exception**

10 Revise the Comment to proposed Section 11340.9(e) as follows:

11 **Comment. ...**

12 ...

13 If an agency receives multiple requests for the same advice, it  
14 should adopt a clarifying regulation. ~~However, the failure to do so~~  
15 ~~does not bar the issuance of further individual advice on the same~~  
16 ~~subject under this subdivision.~~

17 In addition, the staff will investigate whether there would be any public  
18 opposition to an exception for the Division of Labor Standards Enforcement to  
19 the rule that individual advice is not entitled to judicial deference.

20 **§ 11340.9(d). Internal management exception**

21 Revise proposed Section 11340.9(d) as follows:

22 11340.9. The requirements of this chapter do not apply to any of  
23 the following:

24 ...

25 (d) An agency rule concerning only the internal management of  
26 the agency that does not ~~directly and~~ significantly affect the legal  
27 rights or obligations of any person.

28 Conforming changes will be made to the Comment to Section 11340.9(d).

29 **§ 11340.9(f). Audit protocol exception**

30 The staff will solicit input from the Department of Corporations, the  
31 Franchise Tax Board, and the State Board of Equalizations on the usefulness of  
32 the exception proposed in Section 11340.9(f).

1    **“Policy Manual” Exception**

2       In *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996), the  
3   Supreme Court recognized an exemption from the Administrative Procedure Act  
4   rulemaking requirements for:

5           a policy manual that is no more than a restatement or summary,  
6           without commentary, of the agency’s prior decisions in specific  
7           cases and its prior advice letters....

8   The proposed law should include a provision superseding the quoted language  
9   by expressly providing that an agency restatement or summary of its individual  
10  advice and adjudicative decisions is not exempt from the rulemaking procedure.  
11  However, it should be made clear that this does not preclude an agency from  
12  preparing its prior advice letters and adjudicative decisions in such a way as to  
13  enhance their accessibility as public records.

14  **§§ 11368.010-11368.100. Negotiated rulemaking**

15       Delete the proposed negotiated rulemaking procedure. Instead, add language  
16  making clear that an agency is not precluded from consulting with interested  
17  persons before preparing a notice of proposed action.

18                           STUDY N-301 – ADVISORY INTERPRETATIONS

19       The Commission considered the First and Second Supplements to  
20  Memorandum 99-17, the First Supplement to Memorandum 99-20, a letter from  
21  the Division of Labor Standards Enforcement (attached as Exhibit pp. 3-5), and a  
22  letter from Commission consultant Professor Michael Asimow (attached as  
23  Exhibit pp. 6-7), relating to AB 486. The Commission made the following  
24  decisions:

25       (1) The Comment to Government Code Section 11343 should be revised along  
26  the following lines:

27           **Comment.** Section 11343 is amended to extend the application  
28           of the section to regulations adopted pursuant to Article 11 (consent  
29           regulation procedure). Enactment of the statute amending this  
30           section is not intended to ratify or abrogate the opinion in *Tidewater*  
31           *Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 59 Cal. Rptr. 2d 186  
32           (1996).

(2) Proposed Government Code Section 11360.090 should be amended to provide for review by the Office of Administrative Law (OAL) of an agency's authority to interpret the provision of law that is the subject of an advisory interpretation. The Comment to that section should note that authority to interpret a provision of law may be implied from an agency's responsibility to enforce or administer that law. Also, a provision should be added requiring that an agency provide OAL with the record of adoption of an advisory interpretation when OAL review of the advisory interpretation has been requested. On providing this record the agency would be required to cite its authority to interpret the provision of law that is the subject of the advisory interpretation.

(3) The Comment to proposed Government Code Section 11360.030(b) should be revised as follows:

**Comment. ...**

While an advisory interpretation should not be accorded any deference by a court in interpreting a provision of law that is the subject of the advisory interpretation, this does not preclude a court from independently reaching the same interpretive conclusion. Nor is the adopting agency precluded from advancing the same interpretation on its own merits. Nothing in subdivision (b) affects the deference a court may accord an agency interpretation expressed by other lawful means.

In addition, the staff will investigate whether there would be any public opposition to an exception for the Division of Labor Standards Enforcement to the rule that an advisory interpretation is not entitled to judicial deference.

(4) The staff will work with OAL to resolve the other issues raised in the First and Second Supplements to Memorandum 99-17.

☐ APPROVED AS SUBMITTED

\_\_\_\_\_  
Date

☐ APPROVED AS CORRECTED  
(for corrections, see Minutes of next meeting)

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary

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## California Legislature



## Assembly Committee on Natural Resources

HOWARD WAYNE  
CHAIR

VICE CHAIRMAN  
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Elaine Alquist  
Richard Dickerson  
Hannah-Beth Jackson  
Fred Keeley  
Alan Lowenthal  
Mike Machado  
Carole Migden  
Rico Oller  
Robert Pacheco

April 5, 1999

Mr. Nathaniel Sterling  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

**Re: Proposed Environmental Law Consolidation**

Dear Mr. Sterling and Members of the Commission:

Thank you for testifying at our March 16 hearing and educating the Committee regarding the environmental law consolidation efforts. This letter is written in response to your request for more feedback from Committee members. After careful consideration of the testimony and written comments provided to you and the Committee, it is our conclusion that the benefits of continuing with the environmental law consolidation project are not justified by their costs.

At the March 16 hearing, and in previous comments received regarding the consolidation, the following problematic issues were noted, among others:

- 1) This effort would require 20-25% of the Commission's attorney resources over the next seven years.
- 2) There is no consensus that there is a body of law that would be considered as environmental law. This is dissimilar to the situation involving evidence or family law, each of which justifies consolidation into a unique code.
- 3) There are numerous, conflicting statutes that have relied on judicial interpretation concerning their appropriate application. Because many of these provisions are mutually exclusive, an attempt to "consolidate" them without consideration of historical context (including placement in various code sections) could lead to a basic misunderstanding about their application.
- 4) Statutory consolidation will require regulatory consolidation, which, given the length and breadth of regulations developed by numerous agencies, will require excessive amounts of time and money to develop. It should be noted that our extensive body of regulations have been developed over time, responding to statutes as they are created. To attempt to revamp all regulations at once is unrealistic and impractical.

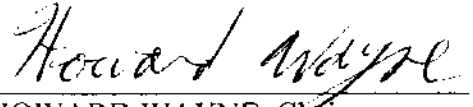
April 5, 1999


Page 2

- 5) Exceptions to consolidation may "swallow the rule". It was noted by Commission staff that many conflicting provisions would have to be left in place and put "side-by side". Based on the potential for vast conflicts, a "consolidated" environmental code is likely to be voluminous, defeating the purpose of consolidation.
- 6) Consolidated materials already exist. Several publishers already produce selected environmental codes. While by no means exhaustive, the intent of the materials is to provide a convenient source for commonly used codes. With the advent of (and declining cost of) the use of CD-ROM systems, it is also possible to search multiple code sections, case law and regulations using a few discs. Compact discs retain all the historical context of the current universe of environmental statutes.

In short, while a noble idea, the practicality of developing a consolidated environmental code is diminished by the potential confusion, inconsistency and cost of the task. For these reasons, we strongly urge that the Commission end this project and focus its efforts on other, more productive projects.

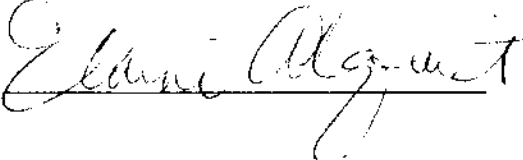
Sincerely,


  
HOWARD WAYNE, Chair  
Assembly Natural Resources Committee

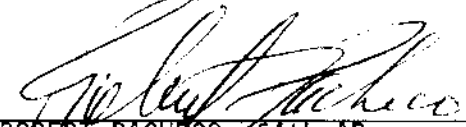
  
FRED KEELEY, 27th AD


  
HANNAH-BETH JACKSON, 35th AD

  
ALAN LOWENTHAL, 54th AD



  
SAM AANESTAD, 3rd AD

  
ROBERT PACHECO, 64th AD

  
MICHAEL J. MACHADO, 17th AD

  
RICHARD DICKERSON, 2nd AD

## DEPARTMENT OF INDUSTRIAL RELATIONS

## DIVISION OF LABOR STANDARDS ENFORCEMENT

## LEGAL SECTION

455 Golden Gate Avenue, 9th Floor  
San Francisco, CA 94102  
(415) 703-4863



MILES E. LOCKER, Chief Counsel

April 8, 1999

Law Revision Commission  
RECEIVED

APR - 9 1999

The Honorable Howard Wayne, Assemblyman  
California Assembly  
State Capitol  
Sacramento, California 95814

File: \_\_\_\_\_

Re: **Assembly Bill 486**

Dear Assemblyman Wayne:

The Division of Labor Standards Enforcement of the Department of Industrial Relations, an agency that is headed by the State Labor Commissioner, thanks you for the opportunity to express our concerns regarding the above-referenced Assembly Bill. As a whole, we view AB 486 as a laudable method of enabling state agencies to provide the public with advisory interpretations of the various laws, regulations, and court decisions which the agencies enforce. However, there is one aspect of the bill that we find troubling.

Section 3, Article 10 of the bill would, among other things, add section 11360.030 to the Government Code. In its current form, section 11360.030(a) provides: "Except as provided in subsection (b), an advisory interpretation has no legal effect and is entitled to no judicial deference. . . ." For the reasons discussed below, we believe that it would be a grave error to preclude courts from giving any judicial deference to an advisory interpretation adopted by the Division of Labor Standards Enforcement. We therefore propose that section 11360.030(a) be amended to provide: "Except as provided in subsections (b) and (d), an advisory interpretation has no legal effect and is entitled to no judicial deference. . . .", and that subsection (d) be added to provide: "Courts shall not be precluded from giving judicial deference to the advisory interpretations adopted by the Division of Labor Standards Enforcement of the Department of Industrial Relations."

We believe that this amendment is necessitated by the unique relationship between our agency and the Industrial Welfare Commission ("IWC"), the body that is empowered to adopt regulations governing wages, hours, and working conditions. (See Labor Code sections 1171, et seq.) Our agency is responsible for the enforcement of the various IWC wage orders. Although we must necessarily interpret the IWC's regulations in order to enforce them, we cannot adopt regulations that would enlarge or narrow the provisions of the IWC's regulations, as to do so would invade an area that the legislature intended to be exclusively occupied by the IWC. In recognition of our Division's need to interpret the wage and hour provisions that we enforce (and the public's need for guidance), in 1980 the Legislature enacted Labor Code section 1198.4, which authorizes the Division to "make available to the public any enforcement policy statements or interpretations of orders of the Industrial Welfare Commission."

The courts, no less than the public at large, have benefitted and should continue to benefit from the Division's interpretations of wage and hour requirements. The Labor Commissioner's special expertise in this complex area of law is founded upon more than seventy years of experience in interpreting and enforcing the IWC's wage orders. The existing "no deference" provision flatly denies the courts the opportunity to consider the Division's advisory interpretations, thereby depriving the courts of the opportunity to rely on our agency's special expertise. By carving out a limited exception for our Division from this "no deference" provision, the courts will be permitted to consider these interpretations, and to assign whatever weight to them the courts may deem appropriate. This approach is consistent with the Supreme Court's holding in *Yamaha Corporation v. State Board of Equalization* (1998) 19 Cal.4th 1, wherein the Court ruled that courts may give deference to an agency's advisory letters which interpret statutes or regulations that are enforced by that agency, and that the degree of deference is to be determined by the court based on factors that may vary on a case by case basis.

The limited amendment that we propose would not make our agency's advisory interpretations binding on the public - it would merely permit courts to consider those interpretations. Courts would be permitted to follow or not follow our interpretation, based on the courts' independent assessment of the meaning of the law. We are therefore confident that those organizations that have expressed their support for a general "no deference" provision in this legislation would agree to a limited

Assemblyman Howard Wayne  
April 8, 1999  
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exception for our Division.

Thank you for your consideration of our concerns. Feel free to contact me with any questions.

Sincerely,

A handwritten signature in dark ink, appearing to read "Miles E. Locker". The signature is fluid and cursive, with the first name "Miles" being the most prominent part.

Miles E. Locker  
Chief Counsel

cc: Stephen J. Smith, Director-Industrial Relations  
Marcy V. Saunders, State Labor Commissioner  
Tom Grogan, Assistant Labor Commissioner  
Herbert Bolz, Office of Administrative Law  
Brian Hebert, Law Revision Commission



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To: Brian Hebert FAX (650) 494-1827  
From: Michael Asimow  
Re: OAL's letter of April 2, 1999, concerning advisory interpretations  
Date: April 5, 1999

I am sorry I can't attend the Commission meeting on April 8 and I would like to offer the following comments on OAL's April 2 letter.

1. Policy manuals. I oppose placing any material about policy manuals in AB 486 which concerns the separate question of advisory interpretations. It is extraneous to the subject of that bill. I don't think AB 486 should be amended to include everything on everyone's wish list, either mine or OAL's.

If anything should be done about the Tidewater dictum, it should be in legislation relating to an individual advice exception (see Memorandum 99-20) which the Commission is still working on.

I now think the Commission was right at its previous meeting in deciding to do nothing about the dictum in Tidewater permitting an agency to issue compilations of its individualized advice letters or its prior precedents.

If an agency can issue individualized advice letters, and if these letters are available to requestors under the Public Records Act, it's hard for me to see the harm in allowing the agency to publish them in one place "as a restatement or summary without commentary" as the Supreme Court put it. Publication of such summaries seems like good government to me. By putting out a summary, the agency has saved people the trouble of requesting the letters.

As far as the agency's publishing "its prior decisions in specific cases," again I don't see the harm. Doing so simply saves requestors the trouble of filing a Public Records request to get the decisions. Of course, the agency cannot cite its decisions as precedents without compliance with the new precedent decision provision in GC §11425.60. I don't think Tidewater will cause any confusion on that score.

The case law mentioned by OAL in its letter confirms that the courts are not having any problem with the Tidewater dictum and I would prefer that it be left alone--neither codified nor repealed. Perhaps

if there are implementation problems with Tidewater, OAL could issue a regulation clarifying the matter.

2. I am uncertain about OAL's suggestion that its review of advisory interpretations be on the grounds of authority as well as consistency. Under the APA, "authority" means the "provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." APA §11349(b).

However, an advisory interpretation can contain interpretations of statute, regulation, agency order, court decision, etc. Prop. GC §11360.010. In some of these cases, it may not be apparent "what provision of law permits or obligates the agency to adopt, amend, or repeal" the interpretation in question.

I think the existing draft, §11360.090(e), which allows OAL to disapprove an interpretation if it is "inconsistent with the provision of law it interprets" is sufficient and less likely to create confusion. Under the consistency standard, OAL can decide whether the interpretation is "in harmony with, and in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." GC §11349(d). That's sufficient to allow OAL to disapprove an interpretation because it is legally erroneous.

I agree with OAL that their review on the basis of consistency is independent and I agree that the comment should include the material on "consistency" review drawn from OAL's regulations.

3. I think the suggested language is superfluous. §11360.010(a) states that the procedure for advisory interpretations is intended as an alternative to the adoption of a regulation; (c) makes clear that the article does not provide an alternative means of adopting binding regulations. The comment makes clear that §11340.5 remains in effect. How could there be any doubt on the question? What is OAL worried about?

OAL's proposed statutory language paraphrases §11340.5(a); I don't think it is a good idea for one statute to paraphrase another since the later statute could be read as an amendment of §11340.5. In any event, doing so is confusing.

4. I agree with OAL's comments with respect to judicial review although I think the statute as presently drafted is consistent with what OAL is suggesting. §11360.100 does not call for judicial review of OAL's approval or disapproval; it calls for judicial review of the advisory interpretation itself.

I agree that a party should not be required to seek OAL review as an administrative remedy that must be exhausted. I agree with OAL's comments about agency actions following OAL disapproval decisions.

5. I have no position on OAL's issue 5.

I hope the foregoing is helpful to the Commission.