

CALIFORNIA LAW REVISION COMMISSION

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March 26, 1999

<i>Date:</i> April 8, 1999	<i>Place:</i> Sacramento
April 8 (Thu.) 10:00 am – 5:00 pm	State Capitol Room 317
Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please call 650-494-1335 and you will be notified of any late changes.	
Most Commission meeting materials are available on the Internet at: http://www.clrc.ca.gov	

☞ **Please Note Change in April Meeting Date**

FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

Thursday, April 8

1. MINUTES OF FEBRUARY 4-5, 1999, MEETING (2/24/99)
2. ADMINISTRATIVE MATTERS
 - Report of Executive Secretary**
3. 1999 LEGISLATIVE PROGRAM
 - Status of Bills**
 - Memorandum 99-17 (NS) (to be sent)
 - AB 846 — Uniform Principal and Income Act (Study L-649)**
 - Memorandum 99-25 (SU) (3/26/99)
4. ENVIRONMENT CODE (STUDY E-100)
 - Status of Project**
 - Memorandum 99-18 (BH) (3/18/99)
5. ENFORCEMENT OF JUDGMENTS UNDER THE FAMILY CODE (STUDY F-1300)
 - Draft Tentative Recommendation**
 - Memorandum 99-24 (SU) (3/5/99)
 - ☞ This replaces Memorandum 98-66 (previously distributed for the meeting)

6. ADMINISTRATIVE RULEMAKING (STUDY N-300)
 - Draft Tentative Recommendation**
Memorandum 99-20 (BH) (3/9/99)

7. JUDICIAL REVIEW OF AGENCY ACTION (STUDY N-200)
 - Selected Issues**
Memorandum 99-21 (RM) (3/8/99)

8. TRIAL COURT UNIFICATION: STUDIES IN JUDICIAL ADMINISTRATION
 - Followup Legislation (Study J-1301)**
Memorandum 99-22 (BG) (to be sent)
 - Appointment of Receiver (Study J-1302)**
Memorandum 99-9 (RM) (12/18/98)
 - Jurisdictional Classification of Good Faith Improver Claim (Study J-1303)**
Memorandum 99-10 (RM) (1/26/99)
 - Stay of Mechanic's Lien Foreclosure Pending Arbitration (Study J-1304)**
Memorandum 99-11 (RM) (3/9/99)
 - Penal Code Cleanup (Study JM-1305)**
Memorandum 99-12 (RM) (1/11/99)
 - Right to Court Reporter in Criminal Case (Study JM-1306)**
Memorandum 99-13 (RM) (3/25/99)
 - Law Library Board in Unified Court (Study J-1307)**
Memorandum 99-14 (BG) (to be sent)
 - Affidavit Under Fish and Game Code Section 2357 (Study J-1308)**
Memorandum 99-15 (RM) (1/28/99)

9. CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY (STUDY EMH-451)

Special Order of Business 1:30 PM
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 - The Connecticut Approach**
Memorandum 99-19 (NS) (3/16/99)

10. CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS (STUDY K-410)
 - Draft of Recommendation**
Memorandum 99-23 (BG) (3/24/99)

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

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

C O N T E N T S

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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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1999 LEGISLATIVE PROGRAM

The Commission considered Memorandum 99-17, relating to the 1999 legislative program. The Executive Secretary noted that AB 486 (Wayne), relating to administrative rulemaking, has been approved unanimously by the Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development.

For additional material relating to bills in the 1999 legislative program, see the entries in these Minutes under the following studies:

- AB 486: See Study N-301 – Advisory Interpretations
- AB 846: See Study L-649 – Uniform Principal and Income Act
- AB 891: See Study L-4000 – Health Care Decisions
- SB 201: See Study J-1301 – Trial Court Unification

STUDY E-100 – ENVIRONMENTAL LAW

The Commission considered Memorandum 99-18 and a letter from members of the Assembly Natural Resources Committee (attached as Exhibit pp. 1-2). Based on the contents of the letter and similar sentiments expressed by Senator Sher (Chair of the Senate Environmental Quality Committee) to the Assembly Committee Chair, the Commission decided to discontinue its study of the reorganization of California’s environmental and natural resource statutes. The staff will work with the Air Resources Board to develop legislation to correct purely technical defects in the air resource statutes.

STUDY EM 451 – CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY

The Commission considered Memorandum 99-19, relating to condemnation by privately owned public utilities, and in particular developing as an alternative the Connecticut administrative approach to providing access to buildings for telecommunications service. Commissioner Skaggs did not participate in this matter.

Comments from interested persons present at the meeting, including representatives of building owners, telecommunications companies, and the Public Utilities Commission, were generally supportive of the Connecticut approach. Specific criticisms of either the Connecticut approach, or the Law Revision Commission staff’s adaptation of the Connecticut approach, made by persons present at the meeting included:

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 **“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).

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

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

13 **Comment. ...**

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

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

25 (4) The staff will work with OAL to resolve the other issues raised in the First
26 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

April 5, 1999

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 Carole Migden
 Rico Oller
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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.

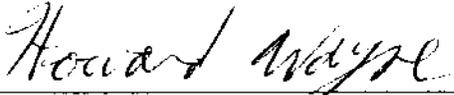
April 5, 1999

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.

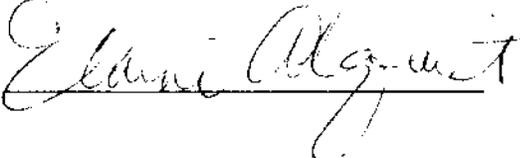
Sincerely,


HOWARD WAYNE, Chair
Assembly Natural Resources Committee

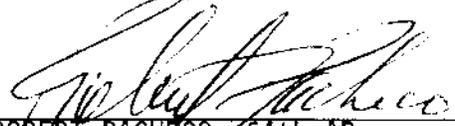

FRED KEELEY, 27th AD


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.

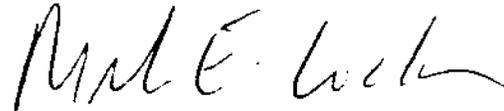
The limited amendment that we propose would not make our agency's advisory interpretations binding on the public - - it would merely permit courts to consider those interpretations. Courts would be permitted to follow or not follow our interpretation, based on the courts' independent assessment of the 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

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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 cursive script, appearing to read "Miles E. Locker".

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.