

MEETING

STATE OF CALIFORNIA  
HEALTH AND HUMAN SERVICES AGENCY  
DEPARTMENT OF HEALTH SERVICES  
FORENSIC ALCOHOL REVIEW COMMITTEE

DEPARTMENT OF HEALTH SERVICES  
STATE PUBLIC HEALTH LABORATORY  
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CERTIFIED SHORTHAND REPORTER  
LICENSE NUMBER 13061

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

APPEARANCES

REVIEW COMMITTEE MEMBERS

Mr. Paul Kimsey, Ph.D., Chairperson  
Sergeant Ray Cardona (via videoconference)  
Ms. Patricia Lough (via videoconference)  
Mr. Bruce Lyle (via videoconference)  
Mr. Paul Sedgwick (via videoconference)  
Ms. Laura Tanney (via videoconference)  
Mr. Kenton Wong  
Mr. Torr Zielenski (via videoconference)

STAFF

Ms. Catherine Ewing, Office of Legal Services  
Mr. Clay Larson, Food & Drug Laboratory Services  
Ms. Cathy Ruebusch, Office of Regulations  
Dr. Mary Soliman, Food & Drug Laboratory Services

ALSO PRESENT

Ms. Janet Anderson, Seaquest  
Mr. Mark Kalchik, Bureau of Forensic Services  
Mr. Ron Moore, Orange County Sheriff's Department

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1 PROCEEDINGS

2 (There was a video-teleconference hookup  
3 that faded in and out throughout the course  
4 of the meeting.)

5 CHAIRPERSON KIMSEY: Welcome, everybody. As I  
6 mentioned, this is a sort of historic moment for Richmond.  
7 This is our first three-way videoconferencing, although we  
8 did test the system earlier. So it seems to be working  
9 quite well.

10 What we'll do is go around and introduce everybody  
11 that's here in Richmond. And then we'll introduce the  
12 people at the site in Sacramento. And then we'll  
13 introduce the people down in San Diego.

14 Hopefully this format will be helpful today and we  
15 can maybe, as a result, meet a bit more frequently to get  
16 our tasks done.

17 I'm Dr. Paul Kimsey. I'm representing the  
18 Department of Health Services on the Forensic Alcohol  
19 Review Committee.

20 COMMITTEE MEMBER WONG: Kenton Wong. I'm  
21 representing California Association of Criminalists.

22 CHAIRPERSON KIMSEY: And here we have -- Kathryn,  
23 do you want to introduce yourself.

24 THE REPORTER: I'm Kathryn Kenyon. I'm the court  
25 reporter for today.

1 CHAIRPERSON KIMSEY: The audience here in  
2 Richmond, we have --

3 MR. LARSON: Clay Larson, Food and Drug Lab  
4 Branch.

5 MS. SOLIMAN: Mary Soliman, Food and Drug  
6 Laboratory Branch.

7 CHAIRPERSON KIMSEY: We're passing a microphone  
8 around, down here.

9 MR. KALCHIK: Mark Kalchik, Department of Justice  
10 Laboratory, Fresno.

11 MS. SMITH: Sylvia Smith, Food and Drug Laboratory  
12 Branch.

13 CHAIRPERSON KIMSEY: Okay. The folks in  
14 Sacramento, do you want to introduce yourselves, please.

15 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski with  
16 the California --

17 (Thereupon the video-teleconference faded in  
18 and out.)

19 CHAIRPERSON KIMSEY: Could you repeat that?

20 COMMITTEE MEMBER ZIELENSKI: I'm Torr Zielenski  
21 with the California Public Defenders Association.

22 CHAIRPERSON KIMSEY: Okay. Thank you.

23 OFFICER GOMEZ: Officer Helen Gomez, California  
24 Highway Patrol.

25 CHAIRPERSON KIMSEY: Thank you.

1 Next.

2 SERGEANT CARDONA: Sergeant Ray Cardona,  
3 California Highway Patrol.

4 CHAIRPERSON KIMSEY: Good morning.

5 MS. EWING: Catherine Ewing, Department of Health  
6 Services, Office of Legal Services.

7 CHAIRPERSON KIMSEY: And next to you, Cathy.

8 MS. RUEBUSCH: Cathy Ruebusch, Office of  
9 Regulations, Department of Health Services.

10 CHAIRPERSON KIMSEY: The last two folks came in  
11 very clearly. So thank you.

12 Anyone else in Sacramento?

13 MS. RUEBUSCH: No, that's it.

14 CHAIRPERSON KIMSEY: San Diego?

15 MR. MOORE: Ron Moore, Orange County Sheriff's  
16 Department.

17 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick,  
18 California Association of Toxicologists.

19 COMMITTEE MEMBER LOUGH: Patricia Lough,  
20 California Association of Crime Lab Directors.

21 COMMITTEE MEMBER LYLE: Bruce Lyle, California  
22 State Coroners' Association.

23 COMMITTEE MEMBER TANNEY: Laura Tanney.  
24 California District Attorneys' Association.

25 CHAIRPERSON KIMSEY: Anyone else in San Diego?

1 Great. Okay.

2 Thank you very much.

3 The court reporter has mentioned that in this  
4 format it would be helpful, as we speak, if we introduce  
5 ourselves.

6 This is Paul Kimsey. Pretty much our first item  
7 on the agenda are opening remarks and discussion of the  
8 agenda.

9 Are there any concerns or suggestions on  
10 modifications of the agenda at this time?

11 I do know that some of the folks in Sacramento do  
12 have a meeting at 1:15, for about an hour. I don't know  
13 if we want to have a consideration to take maybe a late  
14 lunch. I know last time we took pretty much only a  
15 half-hour lunch. Maybe if we were to take a lunch at  
16 1:15 when they have to leave -- is it 1:15 when you have  
17 to leave in Sacramento?

18 MS. EWING: Actually, closer to -- at 1:25. We're  
19 going next door.

20 THE REPORTER: Just a reminder to please state  
21 your name before you speak.

22 MS. EWING: Sorry.

23 My name is Catherine Ewing.

24 COMMITTEE MEMBER ZIELENSKI: I have my car parked  
25 in two-hour parking, so if we could take some kind of a

1 break, maybe at around 11:20, that would give me a chance  
2 to walk four blocks to move my car, so I can avoid the  
3 price of the ticket.

4 CHAIRPERSON KIMSEY: Okay. If I -- This is Paul  
5 Kimsey.

6 We will certainly try and accommodate that.

7 Does the idea of breaking at maybe 1:15 for a  
8 half-hour lunch, does that meet everyone's luncheon plans?

9 Hearing no objections, we will break at 1:15,  
10 then, for a half hour.

11 Other comments about the agenda? Additions?  
12 Deletions?

13 My opening remarks, I think I will just -- even  
14 though we've met a number of times, I think it might be  
15 worth me reading it from the bill about the role of the  
16 committee.

17 I think when I read it this morning, I thought it  
18 might help us again.

19 "The Review Committee shall evaluate" --  
20 etc., etc. -- "and determine revisions  
21 that will limit those regulations to  
22 those that the Review Committee  
23 determines are reasonably necessary to  
24 ensure the competence of the  
25 laboratories and employees to prepare,

1           analyze, and report the results of the  
2           tests and comply with applicable laws.  
3           The Review Committee shall submit a  
4           summary of revisions to the California  
5           Health and Human Services Agency."

6           Obviously, there is quite a bit more context  
7 there, but I thought that might help focus this a bit.

8           There are a few items on the agenda, early on,  
9 that were items that we had discussed on our  
10 March 27th meeting. And I thought we might review those a  
11 little bit. Prior to that, though, I know Officer  
12 Cardona, you had requested to be removed from the  
13 Committee.

14           Did you want to -- I notice you have some people  
15 there in Sacramento. Were these people that you were  
16 recommending attend, or what is your interest at this  
17 point?

18           COMMITTEE MEMBER CARDONA: This is Sergeant  
19 Cardona.

20           I received a transfer back to field duty effective  
21 July 3rd. My replacement is not going to be here until  
22 August 1st, so my thinking was to bring Officer Gomez with  
23 me. She's a new addition to my unit. She will be there  
24 for probably a minimum of two years. She could, at  
25 minimum, brief the new supervisor in my unit regarding the

1 Committee, if you choose to elect my replacement to be on  
2 the Committee.

3 CHAIRPERSON KIMSEY: Thank you very much. The  
4 Department is sort of looking into how, you know, we go  
5 about appointing a new individual, but we will certainly  
6 take your comments into consideration.

7 Thank you very much. And thank you for the  
8 service that you provided to the Committee.

9 COMMITTEE MEMBER CARDONA: Thank you.

10 CHAIRPERSON KIMSEY: And good luck on your new  
11 assignment.

12 COMMITTEE MEMBER CARDONA: Thank you.

13 CHAIRPERSON KIMSEY: Other sort of housekeeping  
14 items before we get into the agenda?

15 Okay. We'd had some discussion at our previous  
16 meeting, on the 27th, about enforcement of the  
17 Department's role in enforcement of the regulations.

18 I know, internally, we're still having  
19 discussions. I mean, the Department internally is still  
20 having discussions. I don't know if we wanted to expand  
21 on that at this point. There are various options that we  
22 have discussed. The Committee had discussed obviously,  
23 last time, some ideas, and the Department is continuing  
24 some of those discussions internally. I don't know.

25 What is the pleasure of the Committee? Do we want

1 to sort of the continue some of that discussion on that  
2 enforcement? I know that internally the Department has  
3 gone back and forth a bit on this issue. Does anyone on  
4 the Committee have an opinion at this point?

5 COMMITTEE MEMBER LOUGH: This is Patricia Lough.

6 I have additional comments that might be helpful.

7 CHAIRPERSON KIMSEY: Thank you.

8 COMMITTEE MEMBER LOUGH: On the Web site for the  
9 Senate Assembly Committee on Health, the analyst Pulmano,  
10 P-U-L-M-A-N-O, prepared an analysis, and maybe that would  
11 help clarify for us what some of the additional intent was  
12 of the Senate.

13 And can I read a couple things?

14 CHAIRPERSON KIMSEY: Please do.

15 COMMITTEE MEMBER LOUGH: In summary, it says for  
16 this Senate Bill 1623, "eliminates the licensing and  
17 regulatory authority of the Department of Health Services  
18 over laboratories that perform blood, urine, tissue, or  
19 breath testing for law enforcement for determining the  
20 concentration of ethyl alcohol," etc., etc.

21 So to me, the key part was it eliminates the  
22 licensing and regulatory authority," and then it goes into  
23 specifically what this bill does in language. And under  
24 "comments," where it says, "purpose of the bill," it says  
25 the author of the bill points out that "Department of

1 Health Services does not have either regulatory or  
2 oversight power over any other forensic discipline."

3 And then it goes on to say, "It does not make  
4 sense to continue to require these laboratories to be  
5 licensed by the Department of Health."

6 So I thought I would just bring this analysis to  
7 everyone's attention.

8 CHAIRPERSON KIMSEY: Thank you.

9 Other comments?

10 I think we'll be coming back to this, obviously,  
11 in the future. And I don't know that we need to make any  
12 determination at this point. We had some -- the next  
13 item.

14 Go ahead.

15 COMMITTEE MEMBER ZIELENSKI: This is Torr  
16 Zielenski.

17 I had a couple of comments.

18 CHAIRPERSON KIMSEY: Could you get to the  
19 microphone a bit better, please.

20 COMMITTEE MEMBER ZIELENSKI: Okay. I'll try. Can  
21 you hear me now?

22 CHAIRPERSON KIMSEY: That's better.

23 COMMITTEE MEMBER ZIELENSKI: This is Torr  
24 Zielenski.

25 I have a few comments or questions with respect to

1 the enforcement issue. You know, I read through the  
2 legislation with respect to this bill. And the language  
3 in it indicates that the Department shall -- found a  
4 number of words -- the Committee shall implement  
5 regulations and revise regulations that are currently in  
6 existence. And it talks about how listing or the  
7 obligation of the laboratories --

8 (Thereupon the video-teleconference faded in  
9 and out.)

10 COMMITTEE MEMBER ZIELENSKI: -- in terms of the  
11 language used "mandatory." Mandatory. Shall. We talk  
12 about the 1215, which is -- what it is that we're involved  
13 in revising talks about how we shall utilize, implement  
14 some instrumentalities that have been put on the federal  
15 registers that are connected to NHTSA. Talks about how  
16 the laboratory shall be able to comply with ASCLD. So the  
17 legislation is replete with references to this mandatory  
18 language with respect to what laboratories shall do. And  
19 what they shall do are those things that are in compliance  
20 with regulations that we are ordered, or shall revise and  
21 amend.

22 So the question then becomes, how is it that these  
23 mandatory things that seems to be that the Legislature has  
24 a right to regulate, seems to me, this is a pervasive or a  
25 very -- is something that has tremendous impact up and

1 down the state in terms of the accuracy of the forensic  
2 alcohol testing, because of the number of drivers, number  
3 of people that are stopped and arrested for drunk driving.

4           It seems the me that there has to be some type of  
5 enforcement mechanism and powers that emanate from this  
6 committee's recommendation with some oversight with the  
7 Department.

8           I don't know whether or not that's going to be in  
9 terms of the Department filing a lawsuit against these  
10 laboratories for noncompliance in the form of seeking a  
11 injunctive relief. I don't know if that had been  
12 mentioned.

13           But my question is whether or not does  
14 licensing -- the fact that we don't have the ability to  
15 require a license and/or to revoke or reinstate a license,  
16 pursuant to the legislation, mean that there is not, in  
17 fact, an enforcement power in this legislation. And if  
18 so, how would this -- how would it be enforced? Is it  
19 going to have to be done through the courts?

20           (Thereupon the video-teleconference faded in  
21 and out.)

22           COMMITTEE MEMBER ZIELENSKI: -- policy. If the  
23 Department has to get involved in, one, registering these  
24 labs and, two, making sure that they are in compliance,  
25 and then if they are not in compliance, then go to court

1 seeking an injunctive relief.

2 I mean, that's my question. I don't know whether  
3 that needs to be addressed. I wasn't here at the last  
4 meeting, some of these things we talked about, but there  
5 was a member, apparently, from the Senate that worked on  
6 this bill, that came in and talked about the legislation.  
7 And I was unable to determine whether he admitted that  
8 there were inconsistencies in this legislation. And it  
9 seems very problematic to me.

10 CHAIRPERSON KIMSEY: Yeah. As I mentioned --  
11 thank you very much.

12 I'm not sure I can answer your question.

13 I know that some of the discussion we've had  
14 internally, the fact that it's in statute, the Department  
15 shall enforce these regulations gives the Department  
16 standing with -- to go to court or to be involved in a  
17 court action.

18 And if the Committee so desires, I'm sure that the  
19 Committee -- it would appear to me the Committee has the  
20 authority to clarify that or expand on that, but it's also  
21 my understanding that it's not necessary, that the  
22 statute, as it is written, gives the Department standing  
23 to go to court.

24 I don't know if Catherine Ewing would like to  
25 expand on that. But the statute does give the Department

1 quite clear standing in court, it's my understanding.

2 MS. EWING: And I think there are other -- sorry.

3 This is Catherine Ewing.

4 There are possibly injunctive actions that could  
5 be brought -- or maybe under the B&P code, there's various  
6 possible judicial remedies.

7 I think the issue that Mr. Zielenski raises is  
8 whether the Committee would want to adopt some kind of an  
9 administrative enforcement mechanism.

10 The bill, as written, doesn't seem to anticipate  
11 that there would be any kind of administrative  
12 enforcement. There's no license; there's no suspension or  
13 revocation of a license.

14 So it is perplexing that that provision was  
15 retained.

16 COMMITTEE MEMBER ZIELENSKI: Seems to me that to  
17 utilize the court process certainly creates a very  
18 elongated or protracted process of trying to remedy labs  
19 that are not in compliance. So it seems to me there needs  
20 to be some type of administrative review or enforcement  
21 mechanism would be much easier in terms of obtaining  
22 compliance.

23 COMMITTEE MEMBER TANNEY: Laura Tanney from San  
24 Diego.

25 This was an issue that we discussed at the last

1 meeting, and at that time I recall indicating that the  
2 court enforcement of this -- first of all, for court  
3 enforcement, I think there would have to be some sort of  
4 authority to bring an action. I don't see that anywhere  
5 in the statute, and it would be interesting to see what  
6 Judicial Council would have to say about the court's  
7 enforcing the regulations that we recommend.

8 In all practicality, as Mr. Zielenski just  
9 indicated, it would be an incredible use of the court's  
10 resources and time to try to manage every single potential  
11 violation that may occur in a laboratory. I just can't  
12 see that as a workable process until there's been some  
13 preliminary efforts for a laboratory to get in compliance,  
14 prior to the time it hits the courts.

15 CHAIRPERSON KIMSEY: Any other comments from the  
16 Committee?

17 Are there any comments from the audiences that may  
18 be at either -- any of the sites?

19 Okay.

20 Help me out, here. Sort as of the -- sort of as  
21 the de facto chair, we've had a number of these types of  
22 discussions, and in an effort to try to move things along  
23 and make some decisions, how does the Committee want to  
24 address this? I mean, obviously, this is one of the major  
25 issues that we keep coming back to: the issue of

1 enforcement. It also seems pretty clear that the intent  
2 of the legislation was to minimize the Department's role  
3 or at least greatly reduce the Department's role in  
4 regulating these laboratories. So this is the conflict  
5 that we're dealing with here.

6 What is the will of the Committee at this point?

7 COMMITTEE MEMBER TANNEY: Laura Tanney again.

8 Did Cathy or anybody else have a chance to look  
9 into the idea of the registration rather than licensing?  
10 We had talked about that as a possible solution to this.

11 MS. EWING: This is Catherine Ewing.

12 I briefly considered the issue of registration; I  
13 read the transcript, and it seems to me that the Committee  
14 had reached the conclusion that registration sounded a lot  
15 like licensing.

16 If you're considering something such as a  
17 regulation that requires that all laboratories engaging in  
18 this business notify the Department that they are engaged  
19 in this business, so there would be perhaps a Web site  
20 that listed those laboratories, that might be something  
21 that would be permissible. But to go beyond that and to  
22 have any requirements for being removed as a registrant or  
23 approved as a registrant, I think it's inconsistent with  
24 the bill. But again, I just thought about that  
25 preliminarily.

1 COMMITTEE MEMBER LOUGH: Patricia Lough.

2 Just for my own clarification, from the legal  
3 participants here, we're concerned about those four  
4 categories that may -- that need to be determined whether  
5 they are fulfilled prior to court.

6 Is it possible that that could be done in a  
7 discovery motion so it would not take up the court time?

8 COMMITTEE MEMBER TANNEY: That would take up the  
9 court time. First of all, it would be relevant to any  
10 criminal pleadings --

11 THE REPORTER: Who's speaking, please?

12 COMMITTEE MEMBER TANNEY: Sorry. It's Laura  
13 Tanney.

14 It would be irrelevant to any criminal proceedings  
15 that occur -- well, maybe irrelevant to the criminal  
16 proceedings. So it would not be properly discovered in a  
17 discovery motion, anyway, on a criminal case, under the  
18 discovery statutes.

19 With respect to the enforcement, it was my  
20 understanding that the whole reason for the legislation  
21 was so that laboratory associations such as ASCLD or  
22 organizations such as ASCLD would internally regulate the  
23 laboratories that are registered with them, anyway.

24 So I thought the enforcement provision was -- I  
25 realize the statute kept it in place, but I thought that

1 the primary enforcement was to obtain an ASCLD  
2 certification and potentially lose that if they are not in  
3 compliance. And to the extent that becomes relevant in a  
4 criminal case, it may be it's something that the defense  
5 could use. Did you lose your ASCLD certification? Why  
6 did you lose your ASCLD certification? And then that  
7 would go to the weight of the evidence that -- as far as  
8 the evidence of the blood alcohol testing.

9 COMMITTEE MEMBER LOUGH: Patricia Lough.

10 The bill before -- Senate Bill 1623 did, in fact,  
11 require ASCLD lab certification. And this one  
12 purposefully did not, because there was a lot of  
13 resistance by laboratories to be required to become a  
14 member of that and subject themselves to that. So we left  
15 that off.

16 Again, what we're doing here, the intention when  
17 the bill was written was to have the same rules as all  
18 other forensic disciplines. So while it is true that  
19 these things would take up court time and there is a  
20 higher volume of this type of cases than any other type of  
21 case, probably -- drugs and alcohol cases have higher  
22 volumes -- it might be in more trials. But the intention  
23 was to have them function like all other forensic  
24 disciplines, and that's no state oversight.

25 COMMITTEE MEMBER TANNEY: And but at the same

1 time, do those other disciplines have regulations under  
2 the Code of Regulations that essentially state what  
3 procedures need to be followed? I don't know of any.

4 COMMITTEE MEMBER LOUGH: There are no government  
5 regulations that I know of, but there are scientific  
6 guidelines that they are required to do. DNA, for  
7 instance, has a prescribed set of guidelines that they  
8 have to follow, much more specific than these four things  
9 than we have here.

10 COMMITTEE MEMBER TANNEY: And are those scientific  
11 guidelines in order to be accepted by the scientific  
12 community or are those scientific guidelines something  
13 that are statutory?

14 COMMITTEE MEMBER LOUGH: Scientific community.

15 COMMITTEE MEMBER WONG: I think it was clear from  
16 Roger Dunstan's call at our last meeting that the  
17 enforcement part that was left over was a remnant  
18 oversight on the part of the construction of 1623, and  
19 that that was in no way part of the intent of 1623. And I  
20 agree with Patty that the intent was to have forensic  
21 alcohol analysis in line with the rest of the forensic  
22 disciplines where the scrutiny was in the court and within  
23 scientific guidelines and procedures and protocols in  
24 laboratory manuals and each individual's procedures that  
25 are approved by ASCLD.

1 COMMITTEE MEMBER TANNEY: Laura Tanney.

2 Under that area, then, there would be really no  
3 place to have the regulations in the California Code of  
4 Regulations; is that correct?

5 COMMITTEE MEMBER WONG: Yes, as Roger Dunstan  
6 stated, I think he was saying that the intent was the  
7 enforcement part of it was just a remnant oversight that  
8 was not meant to still be hanging on there.

9 COMMITTEE MEMBER TANNEY: So my question, then --  
10 this is Laura Tanney again.

11 My question then becomes, is it premature for this  
12 Committee to even consider revising regulations before  
13 there is some cleanup legislation that's done to rectify  
14 the language of the statute?

15 CHAIRPERSON KIMSEY: This is Paul Kimsey.

16 And obviously it's my personal perspective that  
17 the statute was fairly clear. I mean, obviously it  
18 does -- the Department does have standing in court. The  
19 enforcement could be the role the Department would have if  
20 called into court or if something was pointed out to the  
21 Department. I mean, I don't know that -- obviously, I  
22 would not say this is a well written piece of legislation,  
23 but I don't know that there are internal conflicts that  
24 make it that we can't function as described in the  
25 legislation.

1 I don't know. Any other feelings on that? I  
2 mean, maybe from our attorneys?

3 COMMITTEE MEMBER ZIELENSKI: This is Torr  
4 Zielenski.

5 I have some discussion. It seems to me, after  
6 looking at these things, it seems to me that we are  
7 probably not going to be able to come up, in this  
8 Committee, with an answer to that -- the problem about  
9 whether or not we have enforcement out. It seems to me  
10 obviously, there is ambiguity in the legislation. It  
11 seems to me that we could do what it is the Legislature  
12 wanted us to do and then as we go through the appropriate  
13 sections and make recommendations and/or revisions (sic)  
14 and amendments to the legislation.

15 The issue of enforcement could be addressed maybe  
16 at the end of the Committee's revision of the appropriate  
17 code section. And in the meantime, the legal department  
18 can find out whether or not we could, as a committee,  
19 develop some type of administrative enforcement mechanism  
20 that could be incorporated into the revisions or amendment  
21 to the legislation. If not, there seems to be in the  
22 regulation -- in spite of the mandatory language that  
23 appears to be in the statute simply be advisory and/or  
24 regulatory advisements to labs that are in existence, if  
25 that's truly what the Legislature intended.

1           But it seems to me, we should be able to go about  
2 our function, revise and/or amend the appropriate code  
3 section without worrying about whether or not we have  
4 enforcement capacity at this point.

5           (Thereupon the video-teleconference faded in  
6 and out.)

7           COMMITTEE MEMBER ZIELENSKI: -- may not be  
8 addressed at this point. It seems to have been addressed  
9 a number of times, and we keep going around in circles.

10          CHAIRPERSON KIMSEY: This is Paul Kimsey.

11          I tend to agree. I think in one sense, it's the  
12 Department's problem; the Department shall enforce these  
13 regulations. I think if the Department -- at some point  
14 the Department may address the Committee, but I think  
15 maybe for the purposes of doing the work that we've  
16 clearly been directed to do as a Committee, that we sort  
17 of move on. And if the Department requests some aspect of  
18 work from the Committee in this area, then we'll do so.  
19 And but I think the discussion has been very helpful and I  
20 thank the Committee for that.

21          The -- as we talked about last time, of  
22 registration, there's been a suggestion that at which we  
23 all pretty much had last time that sort of smacks of  
24 licensing. The idea of notification of doing this type of  
25 work in the state has been suggested as an alternative.

1           Any feelings on this idea of having a  
2 notification, a Web site, with people that have notified  
3 the Department that they are doing business in this area?

4           COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

5           I think that in light of the fact that we have no  
6 licensing enforcement, that way we have -- it seems to me  
7 that language stems from licensing, so it may have some  
8 independent significance which may be the basis to at  
9 least give the appearance of enforcement, even if they  
10 are, in fact, ultimately, you know, in terms of --

11           (Thereupon the video-teleconference faded in  
12 and out.)

13           COMMITTEE MEMBER ZIELENSKI: It seems to me that  
14 the idea of --

15           (Thereupon the video-teleconference faded in  
16 and out.)

17           COMMITTEE MEMBER ZIELENSKI: -- concerns that we  
18 have about licensing has merit to it. The registration  
19 appears to be a distinct concept from licensing.

20           I was reading through the statute. They talked  
21 about permits and registration and licensing, and what the  
22 deal did prohibit was requiring the Department to issue  
23 license and/or revoke license. Therefore, it did also use  
24 the word, in that same sentence, it used "permit" and  
25 "registration." It did not prohibit us from doing that.

1           So registration which seems to be a means of  
2 counseling, established some accountability on behalf of  
3 these labs that are doing business for law enforcement  
4 agencies. It seems to me that in conjunction with the  
5 statute, if the registration were implemented, it would  
6 create the appearance of the Department's ability to  
7 actually effectuate some type of enforcement, even if  
8 ultimately --

9           (Thereupon the video-teleconference faded in  
10 and out.)

11           COMMITTEE MEMBER ZIELENSKI: If it has some  
12 impact.

13           So sometimes the threat of invocation of power --

14           (Thereupon the video-teleconference faded in  
15 and out.)

16           CHAIRPERSON KIMSEY: Any other comments about  
17 registration or notification?

18           MS. EWING: Catherine Ewing.

19           I just wanted to ask Mr. Zielenski where that  
20 reference was, where it mentioned registration.

21           COMMITTEE MEMBER ZIELENSKI: I would have to go  
22 back to look at it. And after my review -- I will see if  
23 I could find that.

24           I don't know exactly where it was, but it was part  
25 of the original bill, especially about licensing, permits,

1 and actually let me check here.

2 CHAIRPERSON KIMSEY: So you would advocate, then,  
3 for registration?

4 COMMITTEE MEMBER ZIELENSKI: It seems to me that  
5 in light of the fact that we're restricted with respect to  
6 licensing, that registration -- unless somebody else has  
7 some other idea, it seems that -- it would appear to be a  
8 mechanism about which we can get some idea about who's out  
9 there doing business. And in the meantime, they, as a  
10 result of this registration, would become aware of the  
11 fact that SB 1623 requirements. And that language appears  
12 to be mandatory in nature. Obviously, if they read  
13 that --

14 (Thereupon the video-teleconference faded in  
15 and out.)

16 COMMITTEE MEMBER ZIELENSKI: -- and requirements.  
17 So doing -- appear to me that they would want to comply  
18 with that language that is in the legislation, and  
19 ultimately turn out that the Department had no enforcement  
20 power, that would only come about --

21 (Thereupon the video-teleconference faded in  
22 and out.)

23 COMMITTEE MEMBER ZIELENSKI: -- litigation with  
24 the court -- the Department didn't have the authority.

25 I don't know how many labs that would want to

1 undertake the obligation of litigating that particular  
2 issue as opposed to maintaining compliance with something  
3 that appears to be objective and reasonable.

4 CHAIRPERSON KIMSEY: And some of this may get into  
5 the distinction between registration and notification. I  
6 mean, obviously as a mechanism of communication for  
7 businesses knowing the requirements and the regulations,  
8 notification would probably be sufficient for  
9 communication, but I'm not sure of the distinctions  
10 between registration and notification.

11 COMMITTEE MEMBER LOUGH: Patricia Lough.

12 I have a thought. This only applies to labs doing  
13 work for law enforcement agencies. If the Department  
14 wanted to disseminate information, perhaps they would  
15 disseminate it to the law enforcement agencies who in turn  
16 could advise those laboratories doing the work for them.  
17 It does not apply to all other labs: defense labs,  
18 independent laboratories. So they wouldn't ever be  
19 licensed or have any ability to be notified of  
20 information, but that would be one way that the law  
21 enforcement agencies could advise the laboratories.

22 CHAIRPERSON KIMSEY: Other comments?

23 I think that's sufficient discussion. It might  
24 come up. As you see by our agenda, we're going to be  
25 going through the Subcommittee's work product later on

1 today, and if this comes up in that context, we can  
2 continue the discussion. But I think for now, unless  
3 someone has additional comments, we do have in the record  
4 that we've had some discussion about registration and  
5 notification.

6 Maybe it would -- if we have a subnote there that  
7 we would like to get an opinion on the difference and  
8 maybe some examples of registration versus notification in  
9 programs.

10 The next item on the agenda from March 27th was  
11 the statutory authority to regulate breath alcohol  
12 analysis.

13 We've gone back and forth about this a bit with  
14 concern about the Department's -- or at least the  
15 legislative authority to be regulating police officers  
16 doing this work. I guess that's an authority the  
17 Department has in regulation, but it was unclear how that  
18 ended up in this particular bill, 1623.

19 Anyone want to give us some more background on  
20 that?

21 I think Laura Tanney, I think you were the one who  
22 had mentioned some aspects of this in our last meeting?

23 COMMITTEE MEMBER TANNEY: Yes, I did.

24 This is Laura Tanney.

25 And I have to review my notes to help refresh my

1 memory about that, but my big concern was that -- yes,  
2 okay.

3 My big concern is that Title 17 of the California  
4 Code of Regulations is designed to regulate laboratories,  
5 forensic laboratories. And I believe there's also a  
6 provision in the Legislation now that discusses regulating  
7 laboratories.

8 My concern is that particularly with respect to  
9 the revisions that the Subcommittee worked on, is that  
10 they attempt to be reaching out to extend their authority  
11 or the regulatory process, over officers who are going out  
12 in the field, conducting breath alcohol analysis.

13 And I'm not sure that there's any statutory  
14 authority for -- nor do I think it was actually the intent  
15 of the Subcommittee to do that. But I think by the  
16 literal interpretation of the revisions, that is, in fact,  
17 what it attempts to do. And I believe that even in the  
18 comments by Cathy Ruebusch that that -- she indeed points  
19 that out as a problem in terms of how one does define  
20 "laboratory," whether it's a place, an entity, and whether  
21 it covers breath alcohol operators. And with respect to  
22 the language in the revisions -- suggested revisions or  
23 preliminary revisions, in defining breath alcohol  
24 analysis, and the qualifications of the persons who would  
25 be qualified -- who would be able to conduct breath

1 alcohol analysis, they are essentially the qualifications  
2 necessary for a scientist or a laboratory analyst, which  
3 most police officers do not have. So I think the  
4 suggested revisions have to be very clear in  
5 distinguishing that a person who uses a point-of-arrest  
6 breath alcohol machine, which essentially conducts the  
7 analysis on the spot, is not who is intended to be  
8 regulated underneath -- under these regulations.

9           So it's a broad issue of the fact that I don't  
10 believe that there's any legislation -- here we go, the  
11 California Health and Safety Code, Sections 100700 through  
12 100703, with respect to what the current statute says  
13 laboratories can do and what our Review Committee can do.  
14 Again, we're talking about laboratories engage in the  
15 performance of forensic alcohol analysis tests by or for  
16 law enforcement agencies on blood urine tissue or breath.  
17 It does say that.

18           But then we're talking about laboratories. And at  
19 no time have I ever known a police officer to be  
20 considered part of the laboratory. And nor do I think  
21 they should be now. So I have a real concern.

22           And in that regard, with respect to Sergeant  
23 Cardona's indication that he will no longer to be able to  
24 sit on the Committee and the indication that a substitute  
25 will need to be found, I would like to urge whoever the

1 appointing authority is to fill that membership, to find  
2 somebody who will be actively involved in reviewing these  
3 proposals from the point of view of a law enforcement  
4 officer going out in the field. Because I think that  
5 somebody needs to be aware of what technology is being  
6 used in the field, what officers are doing out in the  
7 field, and be concerned with these attempts to regulate  
8 that process.

9           So I don't know if Cathy Ruebusch has had any  
10 opportunity since the last meeting to look further into  
11 the issue of whether there's any statutory or any other  
12 authority for these regulations to regulate the officer in  
13 the field.

14           MS. EWING: Catherine Ewing --

15           CHAIRPERSON KIMSEY: Go ahead.

16           MS. EWING: This is Catherine Ewing -- Sorry, Dr.  
17 Kimsey. I didn't mean to interrupt.

18           This is Catherine Ewing from the Office of Legal  
19 Services.

20           I don't think it was really an issue for Cathy  
21 Ruebusch since she's in the Office of Regulations. It is  
22 something that the Department's legal office has looked  
23 into, preliminarily, and I think a plausible argument can  
24 be made that there is authority to include, within the  
25 regulations, laboratories that are engaged, as it says, in

1 the performance of analysis of breath. And 100701 also  
2 mentions breath alcohol instruments.

3 Obviously, the regulations in their first draft  
4 didn't really capture the differences between a law  
5 enforcement officer in the field and a laboratory.

6 But if the question is whether there is authority  
7 for the Committee to include the activities of the  
8 officers, at least to some extent, I think there is an  
9 argument that they have that authority.

10 CHAIRPERSON KIMSEY: Thank you, Cathy.

11 Maybe some history here might be helpful. Can --  
12 maybe Clay from the program can talk about how -- or  
13 historically how law enforcement officers have been  
14 regulated in this area.

15 MR. LARSON: You put me on the spot, here.

16 Clay Larson.

17 The old statutes included Section 100715,  
18 specifically authorized the Department to write  
19 regulations to describe the procedures that law  
20 enforcement personnel would use to perform breath alcohol  
21 analysis.

22 I would disagree slightly with Laura Tanney's  
23 comment that Title 17 was intended to apply only to  
24 forensic alcohol laboratories. Article 7 deals with  
25 breath alcohol analysis. It establishes the required

1 training of the operator, number of samples to take,  
2 deprivation or observation period, required precision,  
3 etc., etc.

4 All those requirements apply to the police  
5 officer, at the roadside, doing that test or in the jail  
6 doing that breath testing. But again, historically, that  
7 was specifically authorized under the old Health and  
8 Safety Code, Section 100715.

9 CHAIRPERSON KIMSEY: Which was removed by the  
10 legislation?

11 MR. LARSON: Which was removed by the legislation,  
12 and replaced with a more general comment about  
13 laboratories engaged in the testing by or for --

14 COMMITTEE MEMBER TANNEY: Laura Tanney.

15 MR. LARSON: Sorry, go ahead.

16 COMMITTEE MEMBER TANNEY: Laura Tanney.

17 I have no quarrel with the fact that the  
18 regulations cover forensic alcohol laboratories engaged in  
19 breath alcohol analysis, to the extent that they are  
20 involved in the breath alcohol analysis. And then  
21 certifying the results of those analyses, I think there  
22 has to be procedures that the laboratory follows or  
23 recommended procedures for the officers to use out in the  
24 field. I have no interest in officers not following  
25 standard regulations or standard protocol, I should say,

1 with respect to taking breath.

2           However, I think 100715 was repealed and that is a  
3 statement that there is no longer any authority. And  
4 while we can look at the history of the law to say, yes,  
5 they did have the authority, the fact is, under the  
6 literal interpretation, which is the interpretation that  
7 it has to be followed, unless it's ambiguous, and I don't  
8 believe it is, it's been repealed.

9           Now, with respect to, again, whether the law  
10 enforcement -- most law enforcement officers -- most law  
11 enforcement agencies have a forensic alcohol analysis  
12 program that -- in a laboratory that certifies the  
13 results.

14           And again, if the laboratory says, "We're not  
15 going to certify the results unless this protocol is  
16 followed," I think that's appropriate. But to have these  
17 regulations say that the officer must have a science  
18 degree in order to -- well again, it's the -- I'm not  
19 going into the specific language of the revisions.

20           CHAIRPERSON KIMSEY: Yeah. And we can  
21 certainly --

22           COMMITTEE MEMBER TANNEY: I don't have a problem.

23           CHAIRPERSON KIMSEY: Go ahead.

24           COMMITTEE MEMBER TANNEY: I don't have -- like I  
25 said, I don't have a problem with including what a

1 laboratory needs to do. What I have a problem with is  
2 defining an officer as part of the laboratory or an  
3 employee of the laboratory which has to do with the  
4 specific wording and the revisions that can be changed to  
5 probably avoid that.

6 But the way it's written -- I'm just looking at  
7 the revisions that were submitted, and the way it's  
8 written, from a legal analysis, which goes literal  
9 interpretation of the -- of the wording first and then if  
10 there's ambiguities then to intent, if there is any  
11 evidence of intent. But from the language that was used  
12 in the suggested revisions, it seems to cast a net over  
13 the law enforcement officer going out in the field and --  
14 operating breath alcohol equipment.

15 CHAIRPERSON KIMSEY: And --

16 COMMITTEE MEMBER LOUGH: Patricia Lough.

17 What Laura is saying is, it brings to light that  
18 dilemma that Cathy Ruebusch explained to the Subcommittee,  
19 that the issues seem to be a terminology issue, what would  
20 be acceptable to her office. So that is something that  
21 needs to be addressed. The intention was never to take  
22 away the ability for a police officer to give a test. It  
23 was never to do that. We don't want to do that. We want  
24 to keep it exactly as it is. It's just that the existing  
25 language was not compliant with the regulations. So

1 Laura's reading is probably correct where right now it  
2 looks like only a lab person can do it. And we certainly  
3 do not want it to say that. So that is something we do  
4 need to look at, language, with Cathy Ruebusch.

5 CHAIRPERSON KIMSEY: Yes. And I think we can do  
6 that later on in our meeting today. In fact, maybe we'll  
7 put this as one of our first areas to look at, when we get  
8 to reviewing the Subcommittee's work. But that's been a  
9 good discussion.

10 The next item from our March 27th meeting on the  
11 agenda is the control of forensic alcohol evidence.

12 And I believe there was some question about a  
13 residual sample, who might have control of that, and how  
14 that might be utilized.

15 And again, I think Laura, you had some concerns  
16 here.

17 COMMITTEE MEMBER TANNEY: I'm sorry. I missed  
18 what you said. What issue are we addressing?

19 CHAIRPERSON KIMSEY: This is the control of  
20 forensic alcohol evidence. This is one of the issues that  
21 came up at our March 27th meeting. I think the discussion  
22 was along the lines of sample, left-over sample or  
23 residual sample, who would have control of that ownership,  
24 whether it was the courts or the laboratory or -- and  
25 that's just from my own memory. But I believe you had

1 raised some concerns about the ownership of those samples.

2 COMMITTEE MEMBER TANNEY: Do you recall what  
3 section of the regulations that's found in?

4 CHAIRPERSON KIMSEY: Let me look here.  
5 I think I marked it in the transcript.

6 MR. LARSON: It's Article 5.

7 COMMITTEE MEMBER LOUGH: Patricia Lough.

8 In the regulations, probably the section on blood  
9 collection and retention. 1219.1.

10 CHAIRPERSON KIMSEY: Thank you.

11 COMMITTEE MEMBER LOUGH: That may -- that may have  
12 started the conversation.

13 COMMITTEE MEMBER TANNEY: I recall a discussion  
14 regarding the fact that right now, in order for the  
15 defense to get a split of alcohol, they are required to  
16 get a stipulation or a court order to get a split -- I'm  
17 sorry, not alcohol. A split of blood from the laboratory.

18 And the only thing I can think of -- I cannot  
19 recall and I do not have a copy of the transcript with me.  
20 I cannot recall what the specifics were of our last  
21 discussion. I know that several of us brought up the fact  
22 that I think that you were referring to subdivision (f)?

23 COMMITTEE MEMBER LOUGH: It could be (f), but I  
24 think your office probably has a concern that a court  
25 order comes in and the sample gets submitted without going

1 through the prosecutor's office, without -- just going  
2 through and getting an okay from prosecution.

3 COMMITTEE MEMBER TANNEY: Currently, they have to  
4 go through the prosecution to get an order.

5 COMMITTEE MEMBER LOUGH: To get the court order.

6 COMMITTEE MEMBER TANNEY: Yes.

7 COMMITTEE MEMBER LOUGH: Okay.

8 COMMITTEE MEMBER TANNEY: And we want to preserve  
9 that.

10 CHAIRPERSON KIMSEY: Yes. I think it was item  
11 (f)there, in 1219.1.

12 And obviously, we can come back to this when we go  
13 through. And maybe this will be the second item on our --  
14 when we start going through the work product.

15 Any other comments though, before we move on?

16 The other item, the last item on this part of the  
17 agenda was the ASCLD/LAB approval of Department's  
18 proficiency testing program. The Department is still in  
19 discussions on whether or not this is something that we  
20 are authorized to do, and if the Department would be  
21 interested in attempting. So we don't really have much  
22 more to report on that particular agenda item.

23 COMMITTEE MEMBER LOUGH: I have a question then.

24 CHAIRPERSON KIMSEY: Sure.

25 COMMITTEE MEMBER LOUGH: Is it possible the

1 Department -- the Department can approve ASCLD/LAB  
2 approved vendors at this time, while they are making that  
3 determination?

4 CHAIRPERSON KIMSEY: That's part of our  
5 discussion, internally. And we -- I believe there's been  
6 a series of letters and we are actually reviewing that  
7 specific request, but we haven't been able to make a  
8 determination yet.

9 COMMITTEE MEMBER LOUGH: Thank you.

10 CHAIRPERSON KIMSEY: Any other comments? This is  
11 sort of an opportunity. We have a bit of a time, here,  
12 for any comments from the public on any of the items that  
13 we've discussed with regards to -- anywhere from  
14 enforcement or registration notification, any of the items  
15 that we've discussed on the agenda so far.

16 This is the opportunity to have your comments read  
17 into the record.

18 We have one comment here in Richmond. We're  
19 passing the microphone.

20 Please identify yourself.

21 MR. KALCHIK: Mark Kalchik.

22 On the question of the reanalysis, is the problem  
23 that it just says, "The defendant can request a portion of  
24 the sample." It doesn't require a court order or  
25 anything? Because we do require a court order, request

1 from the prosecutor's office, a court order for a sample  
2 now.

3 COMMITTEE MEMBER TANNEY: You're cutting out here,  
4 just so you know.

5 MR. KALCHIK: I'll try again.

6 Is the question that the way the wording reads  
7 now, that the defendant shall just make a request for a  
8 split sample, and they can get that bypassing the court or  
9 the prosecutor, is how it looks like it reads in Section  
10 (f)?

11 COMMITTEE MEMBER TANNEY: Yes. That is the  
12 concern. I'm thinking (f)(2). I think that's exactly it,  
13 now that you mention it, that it indicates that any time a  
14 request is made, the laboratory or law enforcement agency  
15 shall provide the defendant with a portion of the  
16 remaining sample.

17 And you're right, currently we do require -- there  
18 is a court order required. As any evidence that's  
19 impounded by law enforcement agency, it's really in the  
20 possession of the court.

21 COMMITTEE MEMBER ZIELENSKI: This is Torr  
22 Zielenski.

23 I think --

24 CHAIRPERSON KIMSEY: Please speak up a little bit  
25 and identify yourself. We can't hear your very well.

1 Please try and speak a little closer to the microphone.

2 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

3 With respect to the split sample, it seems to me  
4 that is something that is procurable from the D.A.'s  
5 office pursuant to discovery statutes. Since it is  
6 evidence they would intend into use against the  
7 defendant --

8 (Thereupon the video-teleconference faded in  
9 and out.)

10 COMMITTEE MEMBER ZIELENSKI: -- to provide that  
11 sample for retest.

12 The defendant may want a protective order for the  
13 sample, to preserve the sample in case there's some kind  
14 of dissipation of the evidence.

15 But ordinarily that would be something that would  
16 be discoverable either from the D.A.'s office, on a  
17 discovery basis made available to defense, so they can  
18 transport for analysis. If the D.A. opposed that, and did  
19 not want to give it to us, pursuant to the discovery  
20 statute, then the defendant would be required to go to  
21 court and file a motion to compel production of that  
22 evidence for analysis.

23 COMMITTEE MEMBER TANNEY: Laura Tanney.

24 So in other words, that's already resolved in the  
25 criminal discovery statutes, and does not need to be part

1 of these regulations.

2 COMMITTEE MEMBER ZIELENSKI: I'm not sure that it  
3 necessarily needs to be a part of these regulations. I  
4 still would like to make sure that there is sufficient  
5 sample procured for retesting, if it's available.

6 I see that at some point it was marked off and  
7 then lined out in one area of the -- I think it was under  
8 1219.1(b). Make sure that there was --

9 (Thereupon the video-teleconference faded in  
10 and out.)

11 COMMITTEE MEMBER ZIELENSKI: -- or other tissue  
12 material that is subject to being retested, otherwise  
13 obviously it creates -- fairness and independent  
14 evaluation and obviously --

15 (Thereupon the video-teleconference faded in  
16 and out.)

17 COMMITTEE MEMBER ZIELENSKI: -- otherwise, it  
18 creates an argument obtained or something that's not  
19 subject to be testified in court.

20 MS. RUEBUSCH: This is Cathy Ruebusch from Office  
21 of Regulations.

22 May I make a comment.

23 CHAIRPERSON KIMSEY: Please.

24 MS. RUEBUSCH: The difficulty that you're  
25 proposing is the word "sufficient." That is why that

1 section was struck. If you can give me some language that  
2 tells me exactly what that means so that it can be put  
3 into regulation for the purposes of meeting the clarity  
4 standard of the APA, I will be happy to put it in  
5 regulations. That's the difficulty with that.  
6 "Sufficient" is considered a term that can mean just about  
7 anything, depending on who you are. So that's the  
8 difficulty with it. You can put anything you want into  
9 these regulations as long as you can say why you need it  
10 and what authority you have.

11 We're having -- excuse me. But we're having  
12 feedback here. So I'm -- it's a little difficult to  
13 speak. But the bottom line is -- thank you.

14 Bottom line is, anything can be put into  
15 regulation if you have the authority to do it and you can  
16 give me a reason to meet the necessity standard. The  
17 difficulty we have here is more a point of what do you  
18 want it to say, and then I can help you, and the program  
19 can help you, nail down the language for the purposes of  
20 meeting the APA.

21 If you want the language of "sufficient sample,"  
22 we're going to have to come up with what does that mean.

23 Other than that, you can say that.

24 COMMITTEE MEMBER ZIELENSKI: That makes sense --  
25 Torr Zielenski.

1           That makes good sense to me. It seems to me that  
2 since you have a number of scientists on the committee  
3 that could probably give us the minimal requirements of  
4 what would be necessary to get, render clarity to that  
5 particular ambiguity to exactly what "sufficient blood"  
6 means. Obviously that would be something that would be  
7 within the realm of what scientists do and would know and  
8 could place the foundation with respect to a issue, I  
9 would think.

10           MS. RUEBUSCH: This is Cathy Ruebusch again.

11           The Subcommittee could not specify that. And I  
12 was working with the scientists, so that's part of the  
13 difficulty. We have methods and instruments that have  
14 different needs for the purposes of sampling.

15           So in order to give that kind of specificity in  
16 the regulatory language, we were having a lot of  
17 difficulty with that. That is part of why it got struck.  
18 It doesn't mean that we shouldn't continue working on it,  
19 but it was a point of difficulty for the Subcommittee in  
20 trying to redraft regulations.

21           CHAIRPERSON KIMSEY: This is Paul Kimsey --

22           COMMITTEE MEMBER TANNEY: This is Laura Tanney.

23           CHAIRPERSON KIMSEY: Go ahead. Go ahead, Laura.

24           COMMITTEE MEMBER TANNEY: Sorry.

25           You know, it's interesting because from the

1 standpoint of the scientists and the prosecution,  
2 "sufficient" is exactly the term that is the appropriate  
3 term because of the different sensitivities of various  
4 alcohol testing equipment or because -- and also because  
5 of the difficulty sometimes of collecting blood from  
6 subjects.

7           So if you specify two tubes and only one tube can  
8 be drawn because of the ability to obtain blood from the  
9 subject, is that then a violation of the regulation? So I  
10 would be cautious about specifying, for instance, two  
11 tubes or even a particular amount of cc's. But -- and I  
12 don't -- I understand your concern that it's vague, but is  
13 there a way to explain in the analysis why that term is  
14 necessary?

15           MS. RUEBUSCH: Cathy Ruebusch.

16           This is the difficulty with it. When do you know  
17 if they have -- when does the laboratory know that they  
18 have collected a sufficient amount in order to remain in  
19 compliance with the regulation? That's what we're going  
20 to have to be able to discuss. Do they just know that?  
21 As scientists, they know when that is the case? The  
22 statement of reasons will need to speak to this. I'm not  
23 saying that you cannot use this kind of terminology, but I  
24 will tell you, from my experience and the Department's  
25 experience and promulgating regulations, according to the

1 California statutes, and that is the Administrative  
2 Procedures Act, this will be considered vague language  
3 that we will have to be able to somehow convince the  
4 Office of Administrative Law that this is clear to the  
5 regulated public, that the laboratories know this. And we  
6 do not have to be any more clear than this, than using the  
7 terminology "sufficient." So it's going to take some very  
8 fancy language footwork in order to get a statement of  
9 reasons that will support the use of that language kind of  
10 language.

11 The Committee is going to have to consider that,  
12 when they are writing the statement of reasons to support  
13 this. If you want to use that kind of terminology, you  
14 certainly may. However, I am advising you of the risk  
15 that you take in using vague language.

16 COMMITTEE MEMBER TANNEY: I appreciate that.

17 Thank you.

18 COMMITTEE MEMBER WONG: Kenton Wong with a  
19 question for Cathy Ruebusch.

20 Cathy, how is it that the original statute in 1219  
21 in subparagraph 2 had the word "sufficient" when it was  
22 vague to begin with, even though in our field it was  
23 understood by everybody. I understand what you're saying.

24 MS. RUEBUSCH: This is Cathy Ruebusch.

25 Promulgated in the 1970s before the statute that

1 we now must write regulations under was promulgated by the  
2 Legislature. The Legislature adopted the APA starting in  
3 1979. These were written back in the early '70s. You  
4 could get away with a lot of language in the 1970s that  
5 you cannot get away with now. That's the bottom line.

6 MR. LARSON: Can I make a comment? Clay Larson.

7 Regarding the specific item, we're talking about  
8 control of forensic alcohol evidence. I don't think the  
9 discussion dealt with the minutia of the language, and the  
10 discussion we had now is appropriate for language later in  
11 the meeting.

12 I think it related more to discussion that  
13 occurred at the first meeting. It's on Page 90 -- if  
14 Laura Tanney has had a chance to get a copy -- 90 to 93 of  
15 the transcript in which Laura Tanney asked the question,  
16 whether seized evidence -- she certainly indicated that  
17 evidence obtained by search warrant was seized. The  
18 question was whether or not evidence obtained under the  
19 applied consent rules was seized. She indicated, "I don't  
20 know the answer. I will have to look into it."

21 But I think that was the narrower focus of the  
22 discussion on the control of seized evidence, as described  
23 in this agenda item.

24 One other point, I've got a couple of notes here.  
25 I can't read them all. But I want to clarify one thing.

1           Kenton Wong said that he believed that Mr. Dunstan  
2 had indicated that 100725 was probably a mistake.

3           Actually, Mr. Dunstan says, "Well, I don't want to  
4 say that the intent was to remove the section." He went  
5 on to indicate that as a staff person working for the  
6 Senate, suggesting that the Senate screwed up might not be  
7 the best career move.

8           He specifically said he didn't want to say it was  
9 the intent of the Senate to remove that section.

10           CHAIRPERSON KIMSEY: Other comments from the  
11 public?

12           Well, it looks like we have been starting to look  
13 at the Subcommittee's work product already. I think it's  
14 probably worth -- why don't we just go ahead and continue  
15 the discussion on 1219.1 with regards to -- just -- I  
16 think the reason that the term "sufficient" has probably  
17 worked in the past is that laboratories would assume that  
18 they would know if they had a sufficient sample to  
19 complete an analysis. And so some expansion -- I  
20 understand the difficulty of quantifying that as to one  
21 mil or half a mil, because technology in the future  
22 will -- it just varies with the technology that you are  
23 using currently, and also it would be hard to anticipate  
24 future technology.

25           But I think either "sufficient" can be defined or

1 some language can be put around "sufficient" for the  
2 running of an accurate sample, or something to that  
3 effect, that might solve that. I understand the ambiguity  
4 of "sufficient" outside the context of some of the science  
5 around that.

6 But would "sufficient" for the accurate -- the  
7 accuracy of a test or something to that effect, is that  
8 less ambiguous, Cathy Ruebusch, that might be helpful?

9 MS. RUEBUSCH: This is Cathy Ruebusch.

10 The difficulty that you will run into and that  
11 kind of thing -- you can say anything you want. Okay?  
12 That's my caveat. However, the statement of reasons will  
13 need to speak to the component that makes it difficult to  
14 quantify this. And we can speak to different  
15 instrumentation, different methods, whatever. The  
16 critical piece will be that you explain that this cannot  
17 be specified any more clearly. But the question will  
18 always arise, How does the laboratory know that it is in  
19 compliance with this requirement? So we will need to  
20 speak to that in the statement of reasons, that as  
21 scientists, they know what their instruments can do; they  
22 know what other instruments are being used out there; they  
23 know when a sample is of a great enough quality as well as  
24 quantity to be effective.

25 Anyway, the bottom line is we will have to speak

1 to all these things in the statement of reasons. It may  
2 fly. I'm not saying that it's a total, you know, sinker  
3 no matter what you do. But this is where it's going to be  
4 critical that the scientists, in the statement of reasons,  
5 give lots of good understanding, so that when you have the  
6 lawyer at the Office of Administrative Law reading this,  
7 he or she says, "I get it. It makes sense." If we can do  
8 that, it will pass. If we can't, I can guarantee you,  
9 there will be a question. And the person who gets that  
10 question is me. They call me, the Office of  
11 Administrative Law. And if I can not dance around this  
12 enough to get them to understand, they will say, "Thank  
13 you very much. Your regulations, and that is, all of your  
14 regulations, are disallowed." They do not just say one  
15 particular subsection is disallowed; they disallow them  
16 all.

17           So the critical piece is that we try to get as  
18 clear as we possibly can, and when we must use language  
19 like this, we explain it very well so that everyone, not  
20 just the lawyers, but also the public says, "Hey, no  
21 problem. I know. I understand what it takes to be in  
22 compliance."

23           CHAIRPERSON KIMSEY: And maybe "sufficient" would  
24 be in -- with the consultation of the manufacturers'  
25 recommendations for the type of test being performed.

1 MS. RUEBUSCH: Perhaps.

2 COMMITTEE MEMBER LOUGH: Patricia Lough.

3 I don't think you would want to do -- by  
4 manufacturer so much as by protocol of the laboratory  
5 performing the work. By taking this out, if the  
6 regulations require that we do duplicate determinations, I  
7 think we struck this out in Subcommittee because it would  
8 be left to the forensic alcohol analyst whether they had a  
9 suitable amount or not.

10 So we just simply struck it than to try to say you  
11 have to have at least one 10-mil tube, because then do  
12 they throw away a tube that's a short draw? We just  
13 didn't want to give the law enforcement agency or the  
14 person collecting the blood the idea that, well, I  
15 couldn't make that minimum so we just discard it. We were  
16 worried about that.

17 COMMITTEE MEMBER TANNEY: Laura Tanney.

18 Not only that, but as technology changes, the  
19 amount of blood that is necessary may change also. If you  
20 look at DNA testing and now they can take a tiny, tiny,  
21 tiny little spot of blood or fluid -- body fluid and find  
22 DNA, whereas years ago they couldn't.

23 So if you set a minimum determination -- minimum  
24 quantity of blood, and five years from you now, only need  
25 a fraction of that, you don't want to have to revise the

1 regulations every time the technology changes.

2 MS. RUEBUSCH: This is Cathy Ruebusch.

3 I'm sorry. According to the California APA, that  
4 is what you have to do. That is the intent of the  
5 California APA, that if there are changes that need to be  
6 made, the public has a right to comment on those changes  
7 that you want them to adhere to in regulation.

8 Unfortunately, in one of the most cumbersome  
9 processes -- in fact, it is the most cumbersome  
10 promulgating process in the United States. But it is what  
11 it is.

12 Their intent is, when the Legislature put this  
13 together, they wanted us to have to jump through lots of  
14 hoops before we impose requirements on the public. They  
15 want us to have to listen to the public when we do that.  
16 So we are not allowed to take into consideration, at the  
17 time of regulation promulgation, what future technology  
18 will be. I appreciate your desire to do so.

19 Every program I work with wants to do exactly the  
20 same thing, because they don't want to do this every other  
21 week. Because believe me, a lot of them, things are  
22 changing far more rapidly than they are in changing in  
23 your field, but that is the way the APA is written. This  
24 is its point, that if something changes, the public has a  
25 right to comment on it. We're stuck with that.

1           So I'm sorry, but I cannot -- you know, I will  
2 tell you that vague language is the problem. If you are  
3 trying to regulate for the future, you will run into  
4 difficulties with that.

5           CHAIRPERSON KIMSEY: This is Paul Kimsey.

6           Just for everyone to sort of follow along here a  
7 bit, I believe this is on Page 20 of the handout of what  
8 we call the multicolored document of the Subcommittee's  
9 work. Page 20.

10          And then sort of helping -- direct everybody to  
11 that, this is obviously for discussions, but if we said  
12 something -- "sufficient blood shall be collected to  
13 permit duplicate determinations as described in the  
14 laboratories' operating protocols," is that something that  
15 you think Cathy, might be defensible when we have to  
16 submit these? Or is that too vague again?

17          MS. RUEBUSCH: Perhaps.

18          This is Cathy Ruebusch.

19          Here's the difficulty with that. Is it always  
20 going to be the same forensic alcohol lab, or will it  
21 possibly be one of the defense's labs that is going to be  
22 doing the duplicate analysis? If it is going to be  
23 someone other than the lab that has drawn the original  
24 sample, I submit to you, again, how do they know what is  
25 sufficient if they do not know what the methods or

1 instrumentation is of the lab that very likely or quite  
2 possibly could be doing the duplicate analysis. That's  
3 where the difficulty arises. And if I can think of these  
4 question, so can other people. I am playing devil's  
5 advocate here. Believe me, I would love to be able to  
6 just say "sufficient blood," get over it, move on. But I  
7 can't. My job is to tell you where the pitfalls are in  
8 this, and that's where the pitfall is. If I can come up  
9 with these questions, so can others. And if these  
10 questions arise, we have to be able to respond to them.  
11 This is what --

12 COMMITTEE MEMBER TANNEY: Cathy, do we have to  
13 explain if we redact a provision, why we're redacting it?

14 MS. RUEBUSCH: Yes. It's considered a repeal and  
15 we have to explain why we are repealing.

16 MR. LARSON: Clay Larson from the --

17 COMMITTEE MEMBER TANNEY: So we can't keep the  
18 language that currently exists.

19 MS. RUEBUSCH: Okay. Yes, you can. Hang on. Let  
20 me tell you how you can do that. You can do that by not  
21 touching the regulation as it is written now. And the  
22 regulation is the numbered section. If you do not touch  
23 wherever this is in current regulation and allow that to  
24 stand as it is currently written, the Office of  
25 Administrative Law will not look at the current section.

1 Because one of the implied determinations when the APA  
2 went into effect was the Office of Administrative Law  
3 blessed all regulation as being in compliance at that  
4 time. Now, if you go to change it, then the regulation  
5 becomes open to the current standards. So if you don't  
6 touch the language as it is currently written, in that  
7 section, we don't have to do anything with it. Now, there  
8 is some touching you can do that are considered what are  
9 called Rule 100 changes. And that refers to Title 1 of  
10 the California Code of Regulations, Section 100. That  
11 says, as long as you do not change the regulatory intent  
12 of the language, you can make a change that is considered  
13 not substantive.

14 We -- I said you probably could only touch the  
15 component of this section that spoke to the code in the  
16 Vehicle Code. The code section, the Vehicle Code number.  
17 If that is all we do, we can call it a Rule 100 change and  
18 likely the Office of Administrative Law will say, yes  
19 indeed, that is not changing the regulation; so therefore,  
20 you can do that. Then you can keep the language as it is  
21 currently written.

22 CHAIRPERSON KIMSEY: This is Paul.

23 MS. RUEBUSCH: But that's all you can do.

24 CHAIRPERSON KIMSEY: A quick clarification. When  
25 you say "section," would a section be 1219 or 1219.1?

1 MS. RUEBUSCH: 1219.1. 1219 and 1219.1 are two  
2 totally separate sections regardless of a point -- coming  
3 after -- you know a number after a point. By the way  
4 regulation is written, it does not matter. If it's  
5 numbered and has a heading it is considered a section. So  
6 1219 is a section. 1219.1 is a section. Whatever comes  
7 after. 1219.2, .3, they are all sections. They are all  
8 under a particular article. But they are all independent  
9 of each other.

10 CHAIRPERSON KIMSEY: And the subcategories of (a,  
11 (b), and (c) relate to a section. They are all in the  
12 same section.

13 MS. RUEBUSCH: They are subsections of the  
14 section.

15 CHAIRPERSON KIMSEY: Okay. And you can't -- and  
16 if you mess with a subsection, you're messing with a whole  
17 section.

18 MS. RUEBUSCH: Yes, sir, you are.

19 CHAIRPERSON KIMSEY: Excuse the phrase. Okay.

20 COMMITTEE MEMBER LOUGH: Patricia Lough.

21 We will look at that and just maintain the  
22 language as is. Because when the Subcommittee met we  
23 looked at each one of those, but if none of those are  
24 really in opposition with anyone, we might just keep the  
25 language as it is.

1 CHAIRPERSON KIMSEY: So that would be 12 --

2 MS. RUEBUSCH: Cathy Ruebusch again.

3 May I give you just a comment in response to  
4 Patty's comment. You can keep the language as it is. The  
5 critical component of that will be to ensure that it does  
6 not conflict with any other language that you do amend  
7 anywhere. If it does, then you are required to amend this  
8 language as well. So be very careful in that process.

9 CHAIRPERSON KIMSEY: Thank you. We also are  
10 getting to that time when we need to have some people look  
11 at their car meters, I believe. So why don't we take a --  
12 a ten-minute break.

13 COMMITTEE MEMBER ZIELENSKI: I'm about four blocks  
14 away.

15 CHAIRPERSON KIMSEY: 15-minute break.

16 COMMITTEE MEMBER ZIELENSKI: In 15 minutes?

17 CHAIRPERSON KIMSEY: Okay. We'll take a 15-minute  
18 break.

19 (Thereupon the video-teleconference faded in  
20 and out.)

21 CHAIRPERSON KIMSEY: We've been working on some  
22 technical issues. It's our feeling down here in Richmond  
23 that there's only one microphone on your table there, in  
24 Sacramento, that actually works. And it's the one that's  
25 probably furthest away from Torr, because we're having the

1 most difficulty --

2 MS. RUEBUSCH: You're right.

3 CHAIRPERSON KIMSEY: So if we can move that to the  
4 center or pass that around, that would be helpful.

5 This is Paul again. I think the readjustment  
6 you're doing in Sacramento will work. Why don't we go  
7 around that room and go ahead and speak into the  
8 microphone.

9 COMMITTEE MEMBER ZIELENSKI: I moved. Can you  
10 hear me now?

11 CHAIRPERSON KIMSEY: That's quite a bit better.  
12 Why don't we just go ahead and test that room. Why don't  
13 each of you sort of speak and see if the microphone is  
14 picking up your voice as well.

15 COMMITTEE MEMBER CARDONA: Ray Cardona.

16 CHAIRPERSON KIMSEY: Great.

17 MS. EWING: Catherine Ewing.

18 CHAIRPERSON KIMSEY: Great.

19 MS. RUEBUSCH: Cathy Ruebusch.

20 CHAIRPERSON KIMSEY: Great.

21 OFFICER GOMEZ: Helen Gomez.

22 CHAIRPERSON KIMSEY: Much better.

23 Is there someone there that can sort of move the  
24 camera a little bit so we can see Torr? If not, we can  
25 call somebody there in Sacramento to do it.

1 MR. LARSON: Move the table.

2 CHAIRPERSON KIMSEY: That's better. I think that  
3 will work.

4 COMMITTEE MEMBER ZIELENSKI: Now we're losing  
5 Helen.

6 CHAIRPERSON KIMSEY: No, no. We can still see  
7 her. Now if you would all stand on your heads.

8 (Laughter.)

9 CHAIRPERSON KIMSEY: Thank you very much. I think  
10 that will make things easier for our stenographer.

11 Okay. We're back, and I think we were having some  
12 very good discussion. Kenton and I talked a little bit  
13 here, as I'm sure we all were, one of our topics was the  
14 Section 100 option seems to be something we might want to  
15 consider looking at these sections, in their entirety. A  
16 lot of these regulations have been in place for numbers of  
17 years and that could be a good thing or a bad thing. But  
18 if the Committee can determine that a section can stand,  
19 then we do not have to address it, then that might help our  
20 workload initially. Obviously this Committee will  
21 continue to meet into the future, and if we want to take  
22 up another section, I assume that would be our  
23 prerogative. But I think the first thing that we need to  
24 do when we look at a section is to see if we need to alter  
25 it at all, cognizant of the difficulty of changing --

1 realizing what changing the section would endure -- I  
2 mean, engender for our workload issue.

3 Did I make myself clear? What is the feeling of  
4 the Committee though?

5 (Yeses.)

6 CHAIRPERSON KIMSEY: Okay. In thinking about  
7 that, obviously 1219.1 is a very large section. And the  
8 Subcommittee had taken the opportunity to make some  
9 recommendations. I mean, obviously, in 1219.1(a) we  
10 recommended dropping "as soon as feasible," which on the  
11 surface doesn't strike me as being absolutely necessary.  
12 But so in looking at 1219.1, is this section that we want  
13 to address, or is this something that, as it is currently  
14 exists, something that the Committee could accept?

15 Let's hear from the Committee first. Then we can  
16 have the public comment.

17 COMMITTEE MEMBER LOUGH: Patricia Lough.

18 I think in that section the only thing we really  
19 need to update is the Vehicle Code section, which is an  
20 easy change. The other things would then come into a  
21 definition issue for Cathy Ruebusch and maybe we would  
22 just need to change the definitions. For example, under  
23 1219.1, now (b), where it says "other volatile organic  
24 disinfectant," we had some questions with Cathy about  
25 defining those things. But if we can go back and define

1 those, then we probably wouldn't have to do anything but  
2 update the Vehicle Code.

3 We might also want to reference --

4 MS. RUEBUSCH: Excuse me. Patty, can I interrupt  
5 for a second. This is Cathy Ruebusch.

6 I would strongly recommend not putting something  
7 in the definitions if we are not changing the section.  
8 And let me tell you why. You change regulatory intent.  
9 When you do that, essentially you are specifying what the  
10 regulation means, which may not be how it currently is  
11 identified as meaning. If you do that, you -- it's no  
12 longer a Rule 100 change. So we need to be very, very,  
13 very careful about putting anything in the definition if  
14 we're not touching the section.

15 COMMITTEE MEMBER LOUGH: Okay. Yes, there's  
16 actually two that might be a good Section 100 change, and  
17 that would be that Vehicle Code section. But also under  
18 (b), there was a Department of Health advisory about  
19 removing one of the disinfectants, and this would be a  
20 good time to remove it because it's a health issue.

21 MS. RUEBUSCH: I'm sorry. That change is -- I'm  
22 sorry, Patty.

23 I understand what you're saying, but -- this is  
24 Cathy Ruebusch for the stenographer.

25 You're changing regulatory intent. I don't care

1 if there's been an advisory. That is not regulation.  
2 What is regulation is what is in the regulations as they  
3 are written now. If you are going to strike something,  
4 you are changing the regulation. We're touching the  
5 section. I would say don't touch it. Okay. I'm going to  
6 say how critical is this to make this change? That's what  
7 I'm asking you. If this is not that critical, if nobody's  
8 making a big fuss about it, I would strongly recommend you  
9 don't do that.

10 COMMITTEE MEMBER LOUGH: Okay. Patricia Lough --  
11 well, personally -- yes. I think I don't know many places  
12 that would use something that is restricted. So if we  
13 leave it in, it doesn't bother me because probably  
14 nobody's using it.

15 MS. RUEBUSCH: Then there's no problem.

16 COMMITTEE MEMBER LOUGH: Okay. So just the  
17 Vehicle Code then.

18 COMMITTEE MEMBER ZIELENSKI: There's an  
19 alternative there; right?

20 MS. RUEBUSCH: Right. There's an alternative.

21 CHAIRPERSON KIMSEY: There's a question on --  
22 let's see, it's 19.1. Actually, I guess it's (f)(2) where  
23 it says text of concern was law enforcement agency.  
24 "These regulations do not regulate law enforcement  
25 agencies as written. Question of authority to regulate

1 based on new statute."

2 Is that something that we can leave in?

3 MS. RUEBUSCH: I'm sorry. Where is this? Paul, I  
4 apologize. Where is this, please? Oh, I see okay.

5 CHAIRPERSON KIMSEY: It's (f) (2) on Page 22.

6 We have in yellow there, it says, "law enforcement  
7 agency," and then the question from Office of Regs was the  
8 question of authority to regulate based on new statute.

9 Can we leave things in regulation that the statute  
10 supersedes?

11 MS. RUEBUSCH: No. This is Cathy. No.

12 CHAIRPERSON KIMSEY: Okay. So based on that --

13 MS. RUEBUSCH: But we can also -- Paul, here's an  
14 alternative addressing this. We can repeal language from  
15 the regulations. A classic example would be anything that  
16 references licensing, and say it is being repealed by  
17 operation of law. That is considered a Rule 100 change  
18 also. However, let me just let you know, we have done  
19 this on several occasions and been overruled that that was  
20 indeed the case. But it would be reasonable to argue it,  
21 and if we get overruled, address the issue at that time.

22 CHAIRPERSON KIMSEY: Okay.

23 COMMITTEE MEMBER LOUGH: Cathy? Patricia Lough.

24 Take a look at 1219.1, what is now (f). And there  
25 were questions with the original language that you have

1 for this Subcommittee. If we leave the original language,  
2 do we have to address those questions, or would that be a  
3 change?

4 MS. RUEBUSCH: This is current (g) or current (f)?

5 COMMITTEE MEMBER LOUGH: Well, it's now (f) on our  
6 color-coded --

7 MS. RUEBUSCH: So it is current (g).

8 COMMITTEE MEMBER LOUGH: No, it's --

9 MS. RUEBUSCH: "In order for allow for an analysis  
10 by the defendant"?

11 COMMITTEE MEMBER LOUGH: Yes.

12 MS. RUEBUSCH: Is that the one?

13 COMMITTEE MEMBER LOUGH: Yes.

14 MS. RUEBUSCH: Yeah. Current subsection (g). If  
15 you don't touch it, you don't have to answer the  
16 questions.

17 COMMITTEE MEMBER LOUGH: Oh, okay.

18 MS. RUEBUSCH: Those questions all come from the  
19 premise of -- we're amending the section and we must  
20 therefore address all issues in the section. If we do not  
21 amend the section, other than by Rule 100 changes, we do  
22 not have to address those issues.

23 COMMITTEE MEMBER TANNEY: Laura Tanney.

24 I agree that the section is working as it is now  
25 and does not need to make the changes other than the two

1 that are specified that we've discussed Rule 100 changes.

2 CHAIRPERSON KIMSEY: Any other comments?

3 MS. EWING: I just had a question. Are we talking  
4 about 1216.1? Is that what you're talking about?

5 CHAIRPERSON KIMSEY: 1219.

6 MS. EWING: And the two sections 100s are to  
7 change the Vehicle Code and what else?

8 COMMITTEE MEMBER LOUGH: That's it.

9 MS. RUEBUSCH: This is Cathy Ruebusch.

10 We're having a discussion here. Is that truly a  
11 Rule 100 change, the repeal of "law enforcement agency"?  
12 Here's the critical piece. If we strike that, you know,  
13 repeal that language, we will have to repeal all  
14 references to "law enforcement agency" in the current  
15 regulations, because our argument is that the statute  
16 repeals our ability to regulate them. You can't have your  
17 cake and eat it too. That's the critical piece. You  
18 cannot then regulate them someplace else and say, by the  
19 way we want to keep it here.

20 COMMITTEE MEMBER TANNEY: I guess -- Laura Tanney.

21 We can reserve that for further discussion once we  
22 look at all the regulations with that being right now the  
23 option we would like to explore, leaving it as is with the  
24 two potential Rule 100 changes subject to modifying that,  
25 after we look at all of it.

1           COMMITTEE MEMBER ZIELENSKI: This is Torr  
2 Zielenski.

3           CHAIRPERSON KIMSEY: Go ahead.

4           COMMITTEE MEMBER ZIELENSKI: It seems to me that  
5 it's either in or it's out, depending on all aspects of  
6 the statute, depending on whether or not it's been  
7 repealed; right? So it's either in or out with respect  
8 to -- if we look at the other aspects of legislation and  
9 we find out there that was intent for law enforcement to  
10 be involved, then it should be included. We have to come  
11 up with a justification for why we believe it's part of  
12 the legislation that should be kept intact.

13          COMMITTEE MEMBER TANNEY: Laura Tanney.

14          I have already indicated that I do not believe the  
15 regulations are designed or the intent or should enforce  
16 or regulate law enforcement officers or law enforcement  
17 agencies. A laboratory is part of an agency, so to the  
18 extent they regulate that laboratory, that's appropriate.  
19 But not the agency itself.

20          CHAIRPERSON KIMSEY: Other comments from the  
21 Committee?

22          Comments from the public?

23          MR. LARSON: This is Clay Larson from the --

24          CHAIRPERSON KIMSEY: Do the Committee members want  
25 to speak?

1 COMMITTEE MEMBER LOUGH: Patricia Lough.

2 Before we leave that topic, we may want to --  
3 another reference to the Vehicle Code section which would  
4 be an update, and it's kind of an addition, but it's  
5 something that were in those underground regulations or  
6 however it was. That 23158(g) of the Vehicle Code, if we  
7 could include the (g). We can include that? Maybe since  
8 Clay is going to be talking anyway, that's the uniform  
9 standards for withdrawal, handling, and preservation of  
10 blood samples. That was one of Clay's proposals to  
11 include that in that section.

12 So Clay, if you want to address that too.

13 CHAIRPERSON KIMSEY: For the Committee, that's on  
14 the Page 8 of the program's comments, Item 28 on that  
15 page.

16 Go ahead, Mr. Larson.

17 MR. LARSON: I do want to comment. You may have  
18 touched the -- Clay Larson.

19 The section, subsection (f) (2) regarding law  
20 enforcement, just so we're not too confused here, I don't  
21 believe there's been any -- there's been a change in the  
22 statute which may or may not affect the Department's  
23 ability to regulate law enforcement performing breath  
24 alcohol analysis. I don't believe that there's been any  
25 change to the statutes with regards to the ability for the

1 Department to regulate law enforcement involvement in  
2 forensic alcohol -- in the analysis of the blood, urine,  
3 and tissue samples, which this section covers. So I don't  
4 believe it would be a section -- eliminating this would  
5 not be a Section 100 change, since there's not been any  
6 changes in the statutes. This statute and the old  
7 statutes are similarly written. They refer to the testing  
8 by or for law enforcement. The same kind of language  
9 existed before. I think the real change in the statutes  
10 that may impact us, I think, relates mainly to the impact  
11 of the regulations on law enforcement's testing of breath  
12 samples, not blood, urine, and tissue samples, which this  
13 section covers.

14 And I don't have any comments regarding the  
15 uniform standards over and above what was in these  
16 program's comments.

17 CHAIRPERSON KIMSEY: Thank you.

18 Is there any other discussion from the Committee  
19 with regards to 1219.1 in the Section 100 rule? It sounds  
20 like, if I can summarize, that we don't see a necessity to  
21 open up this section if those Section 100 exemptions can  
22 be -- can be put in place, that we can basically live with  
23 this regulation?

24 COMMITTEE MEMBER TANNEY: Yes.

25 COMMITTEE MEMBER LYLE: Bruce Lyle.

1 Yes.

2 COMMITTEE MEMBER LOUGH: Patricia Lough.

3 Yes, I think it would be good to have that in our  
4 final draft for review, yes.

5 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

6 Yes.

7 CHAIRPERSON KIMSEY: Thank you.

8 COMMITTEE MEMBER WONG: Kenton Wong.

9 Yes.

10 CHAIRPERSON KIMSEY: Okay. This is historic.

11 (Laughter.)

12 CHAIRPERSON KIMSEY: What's the -- should we just  
13 continue on with 1219.2?

14 This is Paul.

15 Or is there another section that we want to take  
16 up?

17 MS. EWING: This is Catherine Ewing.

18 As a member of the public, but I know I have to  
19 review these one day, would it be possible to go in order  
20 so that nothing's overlooked?

21 CHAIRPERSON KIMSEY: Is that advocating for to  
22 going to .2 or for going to the very beginning of the  
23 document?

24 MS. EWING: Well, I was thinking the beginning of  
25 the document, because I thought we had addressed the

1 second section of the regulations and skipped the others.

2 COMMITTEE MEMBER TANNEY: Laura Tanney.

3 Cathy, I think at the last meeting we had, there  
4 were a lot of issues with respect to the 1216.1. And it's  
5 such a long section, and the 1216.2 that we might -- this  
6 is just a suggestion. We might stay where we were. I  
7 don't mean to confuse you, if you want to go back to that.  
8 But I think those are going to require a lot of work  
9 whereas if we can limit the sections -- we can remove the  
10 sections as is, it might help to speed things along.

11 But I have no strong feelings one way --

12 MS. EWING: I would just ask you if you can go in  
13 order and decide if you can consider that as a Rule 100  
14 and get through them that way and then go back to the  
15 others. That's all I'm saying.

16 COMMITTEE MEMBER TANNEY: Oh, okay.

17 CHAIRPERSON KIMSEY: So I think that's a good  
18 suggestion. I mean we're always -- let's see.

19 So if we go to Article 1, 1215 is the first  
20 section. And 1215.1, this is the definitions. There  
21 might be some argument in doing the definitions last,  
22 because that will be affected by any -- well, probably be  
23 affected by any sections we change.

24 Do we want to start with Article 1 or Article 2?

25 What's the feeling of the Committee?

1 COMMITTEE MEMBER LOUGH: Patricia Lough.

2 Why don't we go ahead and do one, then, because  
3 some of those definitions will affect those other  
4 sections, so we may as well deal with them now.

5 CHAIRPERSON KIMSEY: Okay.

6 So 1215.1 definitions we have under (a), we have  
7 "alcohol." The Subcommittee is proposing striking quite a  
8 bit of that sentence. First sentence.

9 COMMITTEE MEMBER LOUGH: That's because some  
10 issues Cathy had with language. So maybe if we can glance  
11 through these and see what we really want removed and then  
12 what we can live with.

13 CHAIRPERSON KIMSEY: Okay.

14 MS. RUEBUSCH: Cathy Ruebusch.

15 May I make a comment here?

16 This section, if you want it to truly be solely a  
17 Rule 100 change, the only thing you can strike is (k);  
18 that refers to license. Any other changes made are  
19 changes in regulatory intent, and that includes striking  
20 forensic alcohol supervisor, changing the definition for  
21 forensic alcohol analyst, forensic alcohol analyst  
22 trainee.

23 You -- the Subcommittee wanted several changes in  
24 the definitions that, I think, we cannot call Rule 100  
25 changes. So we will have to consider this -- any rewrite

1 of the definitions -- amendment to regulation that  
2 requires justification and will have to meet the current  
3 APA standards.

4 CHAIRPERSON KIMSEY: I was just thinking that  
5 maybe -- we have a new factor that maybe the Subcommittee  
6 wasn't considering in the sense that could we live with  
7 what is currently -- I think we are thinking of this as an  
8 opportunity where we might have had some ideas that we  
9 thought would be put in, but weren't necessarily things  
10 that we could not live with, if they were left in. But we  
11 did change like on (m), we did strike "alveolar."

12 MS. RUEBUSCH: That was struck because we did not  
13 use the term in the amended regulation. If you use the  
14 term, then it has to be defined.

15 CHAIRPERSON KIMSEY: Right.

16 COMMITTEE MEMBER TANNEY: Can we leave the  
17 definition even if we choose to strike it and it's not  
18 used anywhere else? So it would be --

19 MS. RUEBUSCH: This is Cathy Ruebusch.

20 If you make no other changes in the section except  
21 to remove the definition of "license," yes. If you make  
22 any other changes, you will need to remove it if you're  
23 not using it.

24 CHAIRPERSON KIMSEY: We do have on Page 7, at the  
25 bottom, we have other definitions proposed. They are all

1 in yellow. As Cathy was pointing out, "breath alcohol  
2 operator," "organic volatile," "agency."

3 MS. RUEBUSCH: This is Cathy Ruebusch.

4 We only need to address these definitions if we  
5 are going to include them as terms in the amended  
6 regulation. If you don't amend the regulation, we don't  
7 have to get any more specific than currently.

8 COMMITTEE MEMBER TANNEY: Cathy, this is Laura  
9 Tanney.

10 I have another question.

11 If we use some new terms later on in the  
12 regulations but we don't want to touch this definition  
13 section, within this subsection that we change later on,  
14 can we include the definition to avoid changing the  
15 section? Do you understand my question?

16 MS. RUEBUSCH: I'm sorry? I'm getting feedback  
17 here. It's distracting me. It's distracting me.

18 Yes, technically you can. It is considered bad  
19 form, but there's a lot of bad form in regulation.

20 COMMITTEE MEMBER TANNEY: Thank you.

21 CHAIRPERSON KIMSEY: So this means we would be  
22 leaving in, as an example, on Page 6, item (h), "forensic  
23 alcohol analyst trainee," which the Subcommittee had  
24 proposed to strike.

25 COMMITTEE MEMBER LOUGH: Patricia Lough.

1           I think those definitions -- I mean, those titles  
2   there could probably stay, and when we get to who that is  
3   in Article 2, that might be a place where those things  
4   could be defined a little differently because they are  
5   certainly not -- Because labs aren't licensed now, they're  
6   not Department of Health classifications. But  
7   laboratories could probably work within those general  
8   terms, so that we didn't have to worry about striking  
9   them.

10           So I think that for Article 1, it probably would  
11   be fine. For Article 2, we would probably have to -- we  
12   would have to make changes there.

13           COMMITTEE MEMBER WONG:   Kenton Wong.

14           I wanted to see what the other Committee members  
15   felt about Cathy's comment that amending or changing the  
16   way Laura was suggesting may not be good form or pretty,  
17   but it still works and is effective.

18           I'm okay with that.

19           CHAIRPERSON KIMSEY:   I agree.

20           COMMITTEE MEMBER LYLE:   Bruce Lyle.

21           I'm fine with it.

22           COMMITTEE MEMBER SEDGWICK:   Paul Sedgwick.

23           I agree.

24           COMMITTEE MEMBER ZIELENSKI:   Torr Zielenski.

25           I agree with that.

1 COMMITTEE MEMBER CARDONA: Ray Cardona.

2 I agree.

3 CHAIRPERSON KIMSEY: So is it the feeling of the  
4 Committee that -- this is Paul Kimsey again -- that  
5 1215.1, the Definitions section can stand, at least until  
6 we -- at this point, until we find an exception to that  
7 further on?

8 Okay. This is Paul.

9 I would say that would be fine.

10 Kenton?

11 COMMITTEE MEMBER WONG: I approve that.

12 CHAIRPERSON KIMSEY: Other Committee members?

13 COMMITTEE MEMBER LOUGH: Patricia Lough.

14 Yes.

15 COMMITTEE MEMBER LYLE: Bruce Lyle.

16 None of it gives me any heartburn.

17 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

18 Yes.

19 COMMITTEE MEMBER TANNEY: Laura Tanney.

20 Yes.

21 CHAIRPERSON KIMSEY: Okay. I think that moves.

22 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

23 Yes.

24 CHAIRPERSON KIMSEY: Okay. Thank you.

25 COMMITTEE MEMBER ZIELENSKI: Sorry.

1           On Page 10, Article 2, 1216, I think we've all  
2 talked about that this section will need rewriting. So  
3 1216.1, 1216.2, do we have that both of these are going to  
4 need rewriting?

5           MS. RUEBUSCH: Paul, this is Cathy Ruebusch.

6           Yes, it's going to need rewriting.

7           CHAIRPERSON KIMSEY: Okay.

8           MS. RUEBUSCH: 1216 is repealed, Paul. It's  
9 proposed for repeal.

10          CHAIRPERSON KIMSEY: Okay. That's right.

11          Thank you.

12          16.2, this is the qualifications of forensic  
13 alcohol analyst.

14          MS. RUEBUSCH: Paul, this is Cathy Ruebusch.

15          That is a new -- newly adopted section. It is not  
16 in current regulation. That makes it automatically  
17 something that if we can -- if we want to do the proposed  
18 section, that automatically is new regulation.

19          CHAIRPERSON KIMSEY: Okay.

20          That moves us on to Article 3, 1217, that's also  
21 been removed because it's licenses. So all of Article 3.

22          We're on to Article 4 which is Training of  
23 Personnel, 1218. It looks like that's been removed too.

24          MS. RUEBUSCH: Paul?

25          CHAIRPERSON KIMSEY: Yes.

1 MS. RUEBUSCH: Paul, excuse me. It's Cathy  
2 Ruebusch again.

3 Just for the record, Article 3 is called  
4 "licensing procedures." There are components of Article 3  
5 that are not necessarily solely licensing related. I  
6 point to proficiency testing in 1217.7. If the Committee  
7 desires to include that in regulation, my recommendation  
8 would be to just repeal what is currently there and write  
9 a new section and call it new regulation.

10 It would be less messy, but there are components  
11 of these sections, that even though they are under  
12 licensing are not necessarily something that we do not  
13 want to address -- the Committee does not want to address.

14 CHAIRPERSON KIMSEY: Okay. But we can address  
15 that in a new section?

16 MS. RUEBUSCH: I would recommend that.

17 CHAIRPERSON KIMSEY: Yeah. There's no point in  
18 opening this section just for that one area, I would  
19 think.

20 Article 4 is repealed -- proposed to be repealed.

21 So we're back to Article 5. And we've talked  
22 about 1219.1.

23 1219.2, which is on Page 22, is Urine Collection  
24 and Retention. Let's look at this and see if it's a  
25 pretty short section.

1 MS. RUEBUSCH: Paul, this is Cathy Ruebusch.

2 CHAIRPERSON KIMSEY: Yes.

3 MS. RUEBUSCH: 1219 is proposed for repeal because  
4 it refers to "handled in a manner approved by the  
5 Department."

6 If you retain that language, you are saying, then,  
7 that the Department will still have the authority to do  
8 that. Since there is no licensing authority, there will  
9 need to be some discussion in the statement of reasons  
10 about our authority to do what we're doing.

11 CHAIRPERSON KIMSEY: So --

12 MS. RUEBUSCH: And how the Department is going to  
13 approve things.

14 CHAIRPERSON KIMSEY: All right. So 1219.

15 Go ahead.

16 COMMITTEE MEMBER LOUGH: Patricia Lough.

17 Can we just take out that first sentence in 1219,  
18 because it refers to the Department, and that's no longer  
19 applicable as a 100?

20 MS. RUEBUSCH: Just a second.

21 Cathy Ruebusch.

22 Why do you need the second sentence? We will have  
23 to explain why we need the second sentence. If you take  
24 out the first sentence, you will have to, because you are  
25 truly changing the intent there.

1 COMMITTEE MEMBER LOUGH: The second sentence is --

2 MS. RUEBUSCH: "The identity and integrity of the  
3 sample shall be maintained through collection to analysis  
4 and reporting."

5 COMMITTEE MEMBER LOUGH: That's still an accurate  
6 statement. Yes.

7 MS. RUEBUSCH: It's a statement of intent. It is  
8 not a statement of regulation. We -- in current  
9 regulation, by the standards of APA, we do not include  
10 statements of intent in regulation anymore. I would  
11 strongly recommend we just repeal the entire section.

12 CHAIRPERSON KIMSEY: This is Paul Kimsey.

13 I'm fine with that.

14 Other Committee members?

15 COMMITTEE MEMBER TANNEY: Laura Tanney.

16 That's okay.

17 COMMITTEE MEMBER LOUGH: Patricia Lough.

18 It's okay.

19 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

20 Okay.

21 COMMITTEE MEMBER LYLE: Bruce Lyle.

22 Okay.

23 COMMITTEE MEMBER WONG: Kenton Wong.

24 I agree.

25 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

1 I agree.

2 CHAIRPERSON KIMSEY: Thank you.

3 Public comment?

4 MR. LARSON: Yeah, I think it should be -- this  
5 relates back to the issue that -- Clay Larson -- that  
6 Patty Lough brought up regarding the Uniform Standards  
7 Act. I would agree that the simple -- perhaps under the  
8 old regulation, the simple statement that the identity and  
9 integrity of the sample should be maintained through  
10 collection, analysis, and reporting, was incomplete in  
11 that it didn't indicate how it was done. In fact, the  
12 Department had procedures which related to that  
13 requirement.

14 But I would suggest that it's not completely  
15 inappropriate to require that you maintain identity and  
16 integrity and that failure to do that shouldn't violate  
17 some regulation.

18 The primary vehicle is something that is  
19 indirectly referenced in the Vehicle Code, but  
20 maybe, unfortunately, the exact title of the document that  
21 drives all this is not mentioned in the Vehicle Code; it's  
22 simply described in the Vehicle Code.

23 So I'm not a voting member, obviously, but I think  
24 it's reasonable that the regulations address the question  
25 of whether, you know, this goes to the trier of fact. Do

1 you have any idea whether the sample was the defendant's  
2 sample?

3 MS. RUEBUSCH: This is Cathy.

4 You have other -- if you maintain other of your  
5 regulations as they are, it speaks to the identification  
6 of the sample. I don't particularly like some of the  
7 language, but that isn't the point. If you don't amend  
8 it, you can keep it.

9 As far as integrity is concerned, that is not a  
10 defined term. And so just using that term, you will have  
11 a define it; you will have to specify how you determine  
12 that the integrity has been maintained.

13 All your procedures that have been to this point,  
14 policies of the Department or requirements that are not  
15 specified in regulation, would have to be put into  
16 regulation if you intend to use them.

17 CHAIRPERSON KIMSEY: This is Paul.

18 And I think, you know, you look at 1219.1, those  
19 are the specifics there of what -- of complying with that  
20 part of the regulation really does speak to the integrity  
21 and labeling like using sterile hypodermic needles. I  
22 think it actually does give definition to the integrity  
23 and identity of the samples.

24 Other comments though?

25 MS. RUEBUSCH: This is Cathy Ruebusch.

1 I would have to say that you need to maintain the  
2 integrity.

3 COMMITTEE MEMBER TANNEY: Laura Tanney.

4 That's right. And realistically speaking, we're  
5 talking about law enforcement agencies and law enforcement  
6 laboratories. If they didn't preserve the identity of the  
7 sample, we would have zero prosecutions, and that would  
8 defeat the whole purpose.

9 So I don't think this is an issue that needs to be  
10 addressed in this section.

11 MR. LARSON: Just one quick follow-up comment.

12 For instance, what Cathy Ruebusch said, actually  
13 to agree with something she said in her comments, that  
14 there are no requirements in the current regulations with  
15 respect to labeling.

16 I'm embarrassed if I'm wrong on this.

17 CHAIRPERSON KIMSEY: Other comments?

18 Moving on to 1219.2, Urine Collection and  
19 Retention, we had proposed to add, you know, "of the  
20 person involved in a traffic accident or traffic  
21 violation."

22 COMMITTEE MEMBER LOUGH: Patricia Lough.

23 I think we can keep the original language.

24 COMMITTEE MEMBER TANNEY: Laura Tanney.

25 I agree, except this is another section in (c) (1)

1 where they refer to a law enforcement agency in  
2 possession.

3 COMMITTEE MEMBER SEDGWICK: I should probably  
4 point out here that it may very well be the law  
5 enforcement agency that is in possession of the blood,  
6 rather than the laboratory.

7 And since we are regulating the possession and the  
8 integrity of the bloods, themselves, it is appropriate to  
9 tell a law enforcement agency how they should do it or  
10 what to do with it. And I'm saying that only because it's  
11 possible -- well, it's at least conceivable that an  
12 analysis, once it's performed in the laboratory, and they  
13 are finished, the blood can be sent to a police property  
14 room, for instance. It's not part of the laboratory.  
15 Same thing with urine.

16 MS. RUEBUSCH: This is Cathy Ruebusch.

17 I heard from your discussion that you are  
18 considering, though there hasn't been a vote, not  
19 including law enforcement agencies or their personnel in  
20 our regulations.

21 If we are arguing that we do not have the  
22 authority to regulate law enforcement, we do not have the  
23 authority to regulate law enforcement in any way, shape,  
24 or form.

25 If we are going to say, well, but we do regulate

1 them for possession purposes then we regulate law  
2 enforcement, and you're going to have to argue that we  
3 have the authority to do it.

4 I'm sorry. It's either one way or the other.

5 COMMITTEE MEMBER SEDGWICK: This is Paul Sedgwick  
6 again.

7 We have the authority to regulate the bloods and  
8 the urines, their storage, whatever is in regulation now.  
9 We are not specifying whose possession they are in. And  
10 if they happen to not be a laboratory's possession but  
11 rather are put administratively in another section, part  
12 of a police department or a sheriff's office, then we are  
13 still regulating the bloods and urines.

14 MS. RUEBUSCH: This is Cathy Ruebusch. Who -- I  
15 hear you, Paul.

16 Here's the point. Who has the responsibility for  
17 those samples? Is it the law enforcement agency or is it  
18 the forensic alcohol laboratory?

19 COMMITTEE MEMBER SEDGWICK: This is Paul Sedgwick.

20 The person, it seems to me who's responsible for  
21 the samples is the person in who -- who has possession of  
22 the sample. And we cannot --

23 MS. RUEBUSCH: Correct.

24 COMMITTEE MEMBER SEDGWICK: -- tell which agencies  
25 do it each way.

1           For instance, a police department may send a  
2     sample to a private laboratory for analysis for  
3     prosecution purposes. If the laboratory maintains the  
4     sample in their possession, then we are regulating them.  
5     But if they send the sample back to the police agency,  
6     we're still regulating the sample, wherever that may be.

7           MS. RUEBUSCH: Yes. I understand, but we're not  
8     regulating samples. We're regulating forensic alcohol  
9     laboratories.

10          CHAIRPERSON KIMSEY: This is Paul.

11          Maybe if I read this sentence, this is part of the  
12     legislation. "The bill would instead require laboratories  
13     engaging in the performance of forensic alcohol analysis  
14     tests by or for law enforcement agencies on blood, urine,  
15     tissue, breath," etc. But it really does require --  
16     requires laboratories engaging in the performance.

17          So I guess the legal question about what the  
18     statutory -- after the recent bill, what is the  
19     Department's statutory authority to regulate law  
20     enforcement is an unresolved question at this point.

21          COMMITTEE MEMBER TANNEY: I was just going to say  
22     that this is again -- I think since there is no apparent  
23     statutory authority to regulate the law enforcement  
24     agency, this is what I was indicating as a situation where  
25     the laboratory can say, we may not be able to attest to

1 the -- or certify the results after it's been maintained  
2 in the law enforcement possession, unless you follow these  
3 procedures. So you can't -- without it being regulating  
4 in terms of these published regulations, the laboratory  
5 can still set conditions under which they can testify in  
6 court as to the accuracy of the test.

7 CHAIRPERSON KIMSEY: And maybe we could create a  
8 new section to that effect or help to explain that.

9 COMMITTEE MEMBER TANNEY: I don't think you can,  
10 because I don't think you can regulate the law enforcement  
11 agencies.

12 CHAIRPERSON KIMSEY: I'm just thinking --

13 COMMITTEE MEMBER TANNEY: I think the  
14 laboratory -- go ahead, Paul.

15 CHAIRPERSON KIMSEY: I was just thinking that no,  
16 no, we wouldn't regulate -- we wouldn't put in the  
17 regulation that we're regulating the law enforcement folks  
18 but in that we are requiring the laboratory to have  
19 agreements or requirements with the law enforcement  
20 agencies that they work with in this area. And that would  
21 be a new section.

22 MS. RUEBUSCH: Paul, this is Cathy Ruebusch.

23 If you do that, we will have to specify what those  
24 agreements -- you know, what are the components of the  
25 agreement. If you're going to require an agreement, you

1 have to tell them what it has to involve, so that they  
2 know they are complying with the regulation.

3 CHAIRPERSON KIMSEY: And I think we might be  
4 willing to do that, based on what falls out because we  
5 don't have the statutory authority to -- I guess, we will  
6 just put the burden on the laboratory since we can't put  
7 the burden on law enforcement.

8 COMMITTEE MEMBER LOUGH: Patricia Lough.

9 However --

10 MS. RUEBUSCH: This is Cathy --

11 CHAIRPERSON KIMSEY: Go ahead, Patty.

12 COMMITTEE MEMBER LOUGH: Some laboratories return  
13 samples after analysis. They're not -- it could be a  
14 State lab is going to return the samples to a local police  
15 department for keeping. So does that require the State  
16 then has to provide space to start saving those samples?  
17 It also has a different problem if the State lab, for  
18 instance, is in possession of these samples now when they  
19 go to court, the sample's going to have to make its way to  
20 court. And it could be a considerable distance for some  
21 of those State labs.

22 COMMITTEE MEMBER ZIELENSKI: What's the downside  
23 to just simply leaving the language with respect to law  
24 enforcement intact, because there are so many variables  
25 that might actually exist out there that could cause law

1 enforcement to actually be in a capacity of an employee  
2 and/or engaging in the lab or in some way be confined  
3 within the meaning of what laboratory we're contemplated  
4 here.

5           If somebody were to raise an objection about that,  
6 later on down the line, let them do so at that time.  
7 There seems to be a wide number of variables that might  
8 put law enforcement in that -- with that nexus that might  
9 be consistent with what a lab is doing. Because of the  
10 connection between the law enforcement taking samples,  
11 moving them, transporting them, maybe having them tested  
12 and returning them back to a law enforcement facility.

13           So what's the downside of leaving that language in  
14 there, untouched, and then giving it the most expansive  
15 interpretation that might be given. And if somebody later  
16 on is going to object to it, then let them go through and  
17 say, "We don't fall within that criteria."

18           MS. EWING: This is Catherine Ewing. Department  
19 of Health Services.

20           I just wanted to direct your attention 100775. It  
21 does seem to indicate that there's at least a statement  
22 about one activity that's permissible by a law enforcement  
23 agency. Maybe this one was repealed.

24           COMMITTEE MEMBER LOUGH: You mean the last one of  
25 the H&S, 775? That was an error. That was supposed to

1 have been repealed. There was only one county that was  
2 allowed to do that. They haven't done that for decades.  
3 But inadvertently, that got included.

4 MS. EWING: Okay. Thanks.

5 Obviously, I don't know practically what this  
6 means. If you're saying it's only one county, then I  
7 suppose there's not much practicality for it.

8 MS. RUEBUSCH: This is Cathy Ruebusch.

9 CHAIRPERSON KIMSEY: Go ahead.

10 MS. RUEBUSCH: In reference to Torr's question,  
11 if -- why not just leave it there?

12 If you want to leave the language, or "law  
13 enforcement agency," in 1219.2, you must leave it in  
14 1219.1. You can't repeal it in one section, say it's  
15 repealed by operation of law, then leave it in the other  
16 section, and say, "Oh, gee, we didn't mean it here." It  
17 has to be consistent throughout. You know, we can leave  
18 the language as it reads now, but we have to be consistent  
19 in our arguments of why we are doing what we are doing.

20 We will -- the statement of reasons that will need  
21 to be written will have to address the whole premise that  
22 all this is based on. There's always a preamble  
23 introductory section in a statement of reasons that speaks  
24 to the law, the statutory law, and why it is what it is  
25 and why we are seeing it the way we are seeing it.

1           So we will have to speak to this premise of  
2 regulating law enforcement at that point.

3           CHAIRPERSON KIMSEY: And this is Paul.

4           I think to expand what my concept was, is that if  
5 we assume the Department does not have statutory authority  
6 on the new legislation to regulate law enforcement, we  
7 obviously have clear authority to regulate the  
8 laboratories. We could create a new section. I would  
9 advocate that we remove law enforcement from our  
10 regulations except in a section where we talked to the  
11 laboratories about their relationship and what they need  
12 to require from the law enforcement clients that they  
13 have. That is a suggestion, but that would be consistent  
14 that these regulations would not be on law enforcement;  
15 they would be on the laboratory, and they would be a new  
16 section where we talked about that relationship, the  
17 laboratory has to have with law enforcement.

18           Would that meet the APA, Cathy?

19           MS. RUEBUSCH: This is Cathy Ruebusch.

20           Probably. I just submit to you to think about,  
21 does it matter if you include this language or not, or  
22 these requirements or not? If --

23           COMMITTEE MEMBER TANNEY: Laura Tanney.

24           Sorry.

25           MS. RUEBUSCH: If you include this language or

1 leave it as it is, or you develop this relationship  
2 statement for the purposes of the laboratory, is this  
3 something that has been a problem? We need to address  
4 what's the purpose of requiring this relationship to be  
5 now specified when we did not require this relationship to  
6 be specified in regulation before.

7           If it's necessary, and we see that there's going  
8 to be some sort of problem, that the labs will not have  
9 this, you know, working relationship with law enforcement  
10 agencies, and so therefore we need to be very clear that  
11 they make an agreement or by whatever mechanism we decide,  
12 have this relationship, that's fine. But it would be --  
13 We're going to have to have a reason for doing this. If  
14 it does not exist and it is a problematic -- you know,  
15 it's a problem, then that's a good reason.

16           If it already exists and we're just  
17 operationalizing (sic) something that already exists, the  
18 question becomes, so what? You know, is this a necessary  
19 requirement if it is already managed without regulation?  
20 What makes it necessary to make it law, is the point.

21           COMMITTEE MEMBER TANNEY: Laura Tanney.

22           I understand that what you're saying, Cathy. And  
23 I agree with you to the extent that we're not -- we're  
24 leaving it the same as it exists now and in the other  
25 sections we're not extending it further.

1           So I agree, it's working the way it is now, but  
2 when you're talking about later on, and I realize we  
3 haven't gotten to the later on, the breath alcohol  
4 analysis, but I think we have to keep this in the back of  
5 our minds for when we discuss those provisions. Because  
6 if we're not trying to extend the regulations over the law  
7 enforcement agency, but are merely leaving them as is. I  
8 don't have a problem with keeping that language in there.  
9 Whether it's enforceable or not in a court later on is  
10 another story, but as far as keeping it in there now, I  
11 don't have a problem with that. But to the extent that  
12 we're trying to change things in further -- in later  
13 sections, I think we may have to revisit that.

14           MS. RUEBUSCH: This is Cathy Ruebusch.

15           I agree with that. I was more speaking to the  
16 concept that Paul wanted to specify another -- a new  
17 section that would be saying what -- how labs would have  
18 to have some sort of relationship, however we define that  
19 with -- or specify that, with law enforcement. If we are  
20 adding to the requirements, we need to be very careful on  
21 how we do that.

22           CHAIRPERSON KIMSEY: And I think my -- this is  
23 Paul. I think my suggestion was -- I think we're all on  
24 the same page here, I believe, a bit, in the sense that as  
25 we go through these and we look, see areas that where law

1 enforcement is referenced, and if we do make a  
2 determination that we don't have the statutory authority  
3 to be regulating law enforcement, that this section that  
4 we -- sort of like a parking lot, at the end we sort of  
5 find out, okay, this is what we think the laboratory  
6 should be doing -- their relationship with law  
7 enforcement. Since we can't regulate -- if we decide we  
8 can't regulate law enforcement, that we -- at the end of  
9 the -- going through all these sections, that we determine  
10 that there are things that the laboratory should be doing  
11 with law enforcement, that the regulation, that section  
12 would require it of the laboratory since we cannot,  
13 probably, require it of law enforcement.

14 COMMITTEE MEMBER TANNEY: Laura Tanney.

15 My concern with that, Paul, is that you are still  
16 creating a mandate on the law enforcement agency when you  
17 do that. When you require basically an agreement, you are  
18 requiring both parties to agree.

19 And second after all, with respect -- it's  
20 essentially saying to the laboratory, you're in -- you may  
21 be in noncompliance over something you have no control  
22 over.

23 So that's my other concern. But I think there is  
24 something we can work with there if need be, to try to  
25 come up with some creative solution.

1           CHAIRPERSON KIMSEY: Yeah. And that's why I think  
2 we would have to have some pretty serious discussion on  
3 what those issues are, that we think are that important,  
4 between the laboratory and law enforcement. It may end up  
5 being a blank page. But I think as we go through these  
6 regulations, we're going to see references to "law  
7 enforcement," and it looks like we may just have to remove  
8 those universally.

9           Comment from the public?

10          MR. LARSON: This is Clay Larson.

11          Couple comments. I'm reiterating -- I'm saying  
12 something I said before.

13          Regarding the regulation of law enforcement for  
14 the testing of blood, urine, and tissue samples, I don't  
15 believe there's been any change in the statutes that  
16 changes the Department's authority. So the question  
17 you're raising now is whether the Department, under the  
18 old regulations, overstepped the statutory authority of  
19 the -- and I would reference you to former Section 100710,  
20 which described the requirements of the process for  
21 regulating the analysis of blood, urine, and tissue  
22 systems, is effectively identical to new Section  
23 100700(a).

24          So again, I don't think there's been -- could have  
25 been wrong all along, but I don't think there's been any

1 change.

2           Laura Tanney comments regarding the need for the  
3 labs to certify results. A couple things. None of that's  
4 described in the regulations. It's probably irrelevant  
5 with regards to the analysis of blood, urine, and tissue  
6 samples. In those cases, although the samples are  
7 transferred by a uniformed officer, in some way, to the  
8 lab. The lab does the analysis and reports the results.  
9 So certification is part of the reporting process. It may  
10 have some relevance to the certification of breath  
11 testing, but that's another article.

12           The last point -- not too important -- is  
13 regarding 100775. It doesn't refer to the one county. I  
14 think Ms. Lough was talking about San Bernardino's county  
15 and the requirements for something called sample capture  
16 and the indium tubes. But this actually refers  
17 specifically to the old Breathalyzer 900, which used a wet  
18 chemistry method and required the labs to maintain open  
19 ampules of dichromate, which is a carcinogen. So actually  
20 it referred to the old Breathalyzer 900. It affected  
21 virtually every county since that was the breathalyzer,  
22 but currently no labs are using that instrument.

23           CHAIRPERSON KIMSEY: Okay.

24           So barring our continued discussion about the  
25 ability to regulate law enforcement, back to Section

1 1219.2, can we leave it as is except for our caveat that  
2 we continue to have about law enforcement? How does the  
3 Committee feel?

4 COMMITTEE MEMBER LOUGH: Patricia Lough.

5 Yes, leave it.

6 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

7 Yes.

8 COMMITTEE MEMBER LYLE: Bruce Lyle.

9 Yes.

10 COMMITTEE MEMBER TANNEY: Laura Tanney.

11 Yes.

12 CHAIRPERSON KIMSEY: Paul Kimsey.

13 Yes.

14 COMMITTEE MEMBER WONG: Kenton Wong.

15 Yes.

16 CHAIRPERSON KIMSEY: Okay. 1219.3 --

17 MS. RUEBUSCH: Paul, this is Cathy Ruebusch.

18 You're not allowing two representatives here to  
19 vote.

20 CHAIRPERSON KIMSEY: I'm sorry.

21 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

22 Yes.

23 COMMITTEE MEMBER CARDONA: Ray Cardona.

24 Yes.

25 CHAIRPERSON KIMSEY: I apologize.

1           1219.3 is breath collection. There was a question  
2 about the continuous observation issue but --

3           COMMITTEE MEMBER LOUGH: I would say CACLD is  
4 probably split 50/50 on that, so if it means getting  
5 something through easier and just leaving the terminology,  
6 I would be in favor of that.

7           A question I have would be on the sentence before  
8 that: "The quantity of the breathe sample shall be  
9 established by direct volume metric measurement."

10           I'm aware of one lab that makes an attempt to do  
11 that. I believe other labs rely on testing by Department  
12 of Transportation to make that determination. So if it  
13 stays in there, I don't have an objection to it as long as  
14 it doesn't mean the labs have to have a protocol to do  
15 that.

16           CHAIRPERSON KIMSEY: The language, if left, does  
17 say "breath sample shall be established." Doesn't give a  
18 lot of leeway.

19           COMMITTEE MEMBER LOUGH: Patricia Lough.

20           I have a copy of -- that I just received from  
21 Dr. Frank at NHTSA. I haven't read it; I just received it  
22 in the mail. So if it turns out that that's a procedure  
23 that they use in their testing, then I think that would  
24 still be okay. Because it doesn't say -- does it say who?  
25 It doesn't say who establishes that.

1 CHAIRPERSON KIMSEY: Other comments from the  
2 Committee on 19.3?

3 COMMITTEE MEMBER WONG: This is Kenton Wong.  
4 Was the quantity of the breath sample established  
5 previously? Is that required?

6 CHAIRPERSON KIMSEY: Yes. This is being proposed  
7 to be struck.

8 Comment from the public?

9 MR. LARSON: I think the case could be made  
10 that -- that -- I think this is an instrument feature.  
11 And an interesting thing, a case can be made that in  
12 addition to the statutes of the requirement that the labs  
13 somehow require law enforcement to use instruments that  
14 are on the DOT list, and now without that particular  
15 requirement -- which I don't believe is a NHTSA  
16 requirement. There are instruments that just monitor a  
17 flow rate and the time and determine the volume. So I'm  
18 not sure that's a direct volumetric measurement. We're  
19 going down memory lane here. But the old Breathalyzer 900  
20 actually had a bellows, a bell that was raised and so it  
21 did an actual volumetric measurement.

22 Anyway, I think the case could be made, this is an  
23 instrument feature. The new statutes require that labs  
24 employ instruments that have been tested by DOT, and DOT  
25 is now responsible for the testing of those instrument

1 features.

2 So I think it could be a Section 100 change.

3 COMMITTEE MEMBER WONG: Cathy, do agree?

4 This is Kenton Wong.

5 MS. RUEBUSCH: It's Cathy Ruebusch.

6 I don't know. I would have to think about it.

7 It's -- I think it would depend on how you wrote the  
8 statement of reasons. You would have to give -- you would  
9 have to speak to why this is a Section 100, because on the  
10 face of it, it does not automatically say it's a Section  
11 100 change. You would have to explain why it is.

12 And if you could put together a good enough  
13 argument, maybe you could pull it off. I don't know. I  
14 don't know enough about these instruments to be able to  
15 speak to that.

16 CHAIRPERSON KIMSEY: We were also proposing --  
17 underlined it's proposed to adopt "burped or belched."

18 Is that critical?

19 COMMITTEE MEMBER TANNEY: No.

20 CHAIRPERSON KIMSEY: Then it sounds like we could  
21 also have 1219.3 be left --

22 MR. LARSON: Subsection (b).

23 CHAIRPERSON KIMSEY: Hold on a minute.

24 We're proposing down here at the bottom under  
25 yellow, under (b), "For each person tested, breath alcohol

1 analysis shall include analysis of two separate breath  
2 samples that result in determinations of breath alcohol  
3 concentrations which do not differ from each other by more  
4 than 0.02 grams per 210 liters."

5 MS. RUEBUSCH: Paul, this is Cathy Ruebusch.

6 That requirement was moved from Section 1221.4.

7 I would strongly recommend you don't put it here;  
8 leave it in the other section. Address it in the other  
9 section, if you want to amend it.

10 CHAIRPERSON KIMSEY: Okay.

11 COMMITTEE MEMBER LOUGH: Patricia Lough.

12 Agree.

13 COMMITTEE MEMBER LYLE: Bruce Lyle.

14 Agree.

15 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

16 Agree.

17 COMMITTEE MEMBER TANNEY: Laura Tanney.

18 Agree.

19 CHAIRPERSON KIMSEY: Sacramento?

20 COMMITTEE MEMBER CARDONA: Ray Cardona.

21 Agree.

22 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

23 Agree.

24 CHAIRPERSON KIMSEY: Paul Kimsey.

25 Agree.

1 COMMITTEE MEMBER WONG: Kenton Wong.

2 Agree.

3 CHAIRPERSON KIMSEY: So moving on to Article 6,  
4 Methods of Forensic Alcohol Analysis.

5 I think this section is going to have to be  
6 redone.

7 Other comments, though, from the Committee?  
8 Comment from the public here in Richmond.

9 MR. KALCHIK: Mark Kalchik.

10 In the (a) section, it says "each licensed  
11 forensic laboratory."

12 Should that "license" be taken out?

13 CHAIRPERSON KIMSEY: That's one of the reasons  
14 that section's going to have to be rewritten. That could  
15 be -- it's pointed out that could be a Section 100 change.

16 MS. RUEBUSCH: Paul, it's Cathy Ruebusch.

17 CHAIRPERSON KIMSEY: Yes.

18 MS. RUEBUSCH: I think you can just repeat the  
19 term "licensed," and it could just still read as "each  
20 forensic alcohol laboratory shall have on file."

21 We can argue that's a Section 100 change.

22 The other thing that will have to come out is the  
23 phrase in (b) (1) "And shall be available for inspection by  
24 the Department on request," because the Department does  
25 not have authority to inspect. That would be also the --

1 repealed by operational law.

2 COMMITTEE MEMBER TANNEY: Cathy, this is Laura  
3 Tanney.

4 Does that include in current section (b) "on file  
5 with the Department"? You're going to redact that under  
6 Section 100, too; right?

7 MS. RUEBUSCH: I'm sorry. On file with -- yeah,  
8 right. I think so. Yeah.

9 COMMITTEE MEMBER TANNEY: Okay.

10 MS. RUEBUSCH: Okay. "Shall have on file with the  
11 Department."

12 Yes, thank you for pointing that out.

13 CHAIRPERSON KIMSEY: So with those Section 100  
14 actions, this section may not need to be rewritten.

15 MS. RUEBUSCH: This is Cathy Ruebusch.

16 We'll argue it. The more Section 100 changes you  
17 make, the more you're changing -- you can be interpreted  
18 as changing the intent. I think we probably can make the  
19 argument, because we're going to make it all the way  
20 through, that that's what we're doing and that was the  
21 intent of the Legislature, etc., and get away with it.  
22 It's a gamble, but I think we can get away with it.

23 CHAIRPERSON KIMSEY: Well, based on the Section  
24 100 recommendations, I think we would not have to edit or  
25 address this 1220 general section.

1 Other Committee members?

2 COMMITTEE MEMBER TANNEY: Laura Tanney.

3 I agree.

4 COMMITTEE MEMBER LOUGH: Patricia Lough.

5 Agree.

6 CHAIRPERSON KIMSEY: Sacramento?

7 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

8 Agree.

9 COMMITTEE MEMBER CARDONA: Ray Cardona.

10 I agree.

11 COMMITTEE MEMBER WONG: Kenton Wong.

12 I agree, if Cathy thinks it will fly, then we can  
13 go with that.

14 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

15 I will go along with it. This is a large section.

16 CHAIRPERSON KIMSEY: Well, actually it's only Page  
17 24. We haven't done -- just to .0, I guess. We haven't  
18 talked about .1 yet.

19 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

20 I understand.

21 CHAIRPERSON KIMSEY: Okay.

22 Comment from the public?

23 MR. LARSON: Just one overreaching comment.

24 Is this -- you know, 1623 went through the  
25 legislative process. We heard ad nauseam that the current

1 regulations were an impediment to new technologies that  
2 were burdensome for the lab. So as we go along and retain  
3 every section of the current regulations, that kind of  
4 questions that original purpose of -- of the legislation.  
5 I suspect that will be addressed in the regulatory  
6 promulgation process.

7 I don't also necessarily -- I think, it's  
8 overreaching also to state that the loss of the  
9 Department's, like I say, ability. The old regulations  
10 require the labs were periodically inspected by the -- by  
11 the Department, in some particular section of the Health  
12 and Safety Code. The new regulations have no requirements  
13 that the labs are ever inspected by anybody.

14 But I think it would be a stretch to indicate that  
15 that -- the loss of authority, the loss of requirements to  
16 the Department to inspect the laboratories necessarily  
17 meant that the Department wouldn't have the authority to  
18 inspect a written method description or to require the  
19 written method description was filed with the Department.  
20 I suspect it's the will of the Committee not to do that,  
21 but I'm not sure that's clearly a Section 100 change.

22 CHAIRPERSON KIMSEY: Okay. Other comments?

23 COMMITTEE MEMBER WONG: Kenton Wong.

24 I disagree with Clay. The requirements under  
25 Title 17 for ASCLD requirement are that the laboratories

1 have internal inspections once a year and external  
2 inspections every five years. So there is -- there is --  
3 there is a procedure and protocol for laboratory  
4 inspections.

5 MR. LARSON: And that's great.

6 And as Patty Lough pointed out, there's absolutely  
7 no requirement in the statute that any lab is ever  
8 ASCLD/LAB accredited. It's a voluntary organization, a  
9 fraternal organization, within the community, but there's  
10 no requirement. Every lab could quit tomorrow.

11 So if you achieve a comfort level, that's fine,  
12 but just recognize that the statute does not require  
13 ASCLD/LAB accreditation.

14 COMMITTEE MEMBER LOUGH: Paul, we have some  
15 additional public comment in San Diego.

16 CHAIRPERSON KIMSEY: Okay.

17 Thank you.

18 MS. ANDERSON: Hi. This is Janet Anderson,  
19 Seaquest.

20 I just wanted to make a comment dealing with the  
21 review of the department of methods that are just supposed  
22 to be an file.

23 I would question that the Department ever had the  
24 authority to do that, as Clay is mentioning.

25 CHAIRPERSON KIMSEY: Any other public comment?

1           COMMITTEE MEMBER LOUGH: I believe she's correct.  
2 There are no requirement for approval of written methods  
3 by the Department, currently.

4           CHAIRPERSON KIMSEY: I think the language just  
5 says "on file."

6           But anyhow, I think we can move on to 1220.1,  
7 Standards of Performance.

8           COMMITTEE MEMBER LOUGH: This may require some  
9 consideration since the Vehicle Code law changed and  
10 lowered the limit. That was the intention of changing the  
11 standards in this section. If we want to keep it -- I  
12 think that was one of the original intent was to bring it  
13 in compliance with changes in laws, so I think it would be  
14 a 100 change if we lowered that level.

15          MS. RUEBUSCH: This is Cathy Ruebusch.

16          No, it is not. No, it is not a Rule 100 change.  
17 It can be easily explained, but it's not a 100 change.  
18 The statutes relating in the Vehicle Code do not -- we do  
19 not have direct authority to interpret, implement, or make  
20 specifics, so we need to speak to why we are making the  
21 change. It can be easily said, but if there's a reason  
22 for it, and the argument can be easily made. But it is  
23 not a Rule 100 change.

24          COMMITTEE MEMBER LOUGH: I understand.

25          Thank you.

1           CHAIRPERSON KIMSEY: This is Paul. And so this  
2 20.1, Standards of Performance, we would recommend that we  
3 go ahead and make those changes.

4           Now, do we want to go through this in detail or  
5 sort of continue through sections, determining whether or  
6 not to change them or not? Or do we want to pause here  
7 and work through this section?

8           COMMITTEE MEMBER LYLE: Bruce Lyle.

9           I say we stay on course and go through the rest of  
10 these sections to determine whether they need changes or  
11 not.

12          CHAIRPERSON KIMSEY: Okay.

13          Hearing no other objections, and always looking  
14 for direction, we will move on to 1220.2, Standards of  
15 Procedure.

16          COMMITTEE MEMBER LOUGH: There is a need to change  
17 this and that's to allow laboratories to purchase  
18 standards.

19          CHAIRPERSON KIMSEY: Other comments?

20          COMMITTEE MEMBER LOUGH: But this one may  
21 require --

22          CHAIRPERSON KIMSEY: I'm sorry.

23          COMMITTEE MEMBER LOUGH: That's okay.

24          CHAIRPERSON KIMSEY: Any disagreement with needing  
25 to change this section?

1 Okay.

2 1220.3, Quality Control Program.

3 COMMITTEE MEMBER LOUGH: I think this one would  
4 also require some time to reflect on the language.

5 CHAIRPERSON KIMSEY: Okay. We're proposing then  
6 that that will need some changes.

7 Any objections to that?

8 1220.4, this is about expression of results.

9 COMMITTEE MEMBER LOUGH: Yes.

10 Patricia Lough.

11 On -- that was a change in law.

12 CHAIRPERSON KIMSEY: And that was item (f)? The  
13 removal of --

14 COMMITTEE MEMBER LOUGH: Yes.

15 CHAIRPERSON KIMSEY: Okay. So would that be a  
16 Section 100 change, Cathy?

17 MS. RUEBUSCH: What law was amended?

18 This is Cathy Ruebusch.

19 Patty, which law was amended?

20 COMMITTEE MEMBER LOUGH: The --

21 MS. RUEBUSCH: Do you know what the code is?

22 Okay. This is within ours? Is this our law, our  
23 statute?

24 COMMITTEE MEMBER LOUGH: Vehicle Code.

25 MS. RUEBUSCH: Oh, Vehicle Code. No, it's not a

1 Section 100 change, but it can be explained.

2 CHAIRPERSON KIMSEY: Okay.

3 COMMITTEE MEMBER LOUGH: Okay.

4 CHAIRPERSON KIMSEY: So that will require changes.

5 We're on to Article 7, 1221. This is the whole  
6 requirements for breath alcohol analysis.

7 MS. RUEBUSCH: This is Cathy Ruebusch.

8 I would recommend repeal of this. This is just a  
9 statement of intent. This is obvious; it's not necessary.

10 CHAIRPERSON KIMSEY: Other comments?

11 1221.1, authorized procedures.

12 We're recommending striking out all of 1221 at  
13 this point.

14 Any comments?

15 Public comments?

16 MR. LARSON: Actually, keep in mind, as we race  
17 through this, the program actually prepared a document  
18 called program comments. And there were -- I don't know  
19 50, 60 comments.

20 One of the comments we raced by, under 1221.1, had  
21 to do with the proposal that the regulations actually be  
22 revised to increase the requirements, to require that  
23 laboratories prepare written descriptions of the  
24 procedures for breath alcohol analysis, which includes the  
25 training of operators and the periodic determination of

1 accuracy. It's actually something the Department  
2 required. It was certainly statutorily and regulatorily  
3 (sic) required for the training of operators, since  
4 there's a section that says you have to prepare a summary  
5 and it has to be approved.

6 But just in general, for all the reasons that the  
7 written method description is appropriate and useful in  
8 the area of the analysis of blood, urine, and tissue  
9 samples it provides for continuing management of the  
10 laboratory. It provides, all parties involved in the  
11 judicial process, an opportunity to see how the method  
12 were performed, what the requirements are, what the QA  
13 procedures are. I think it would be similarly appropriate  
14 to include a requirement which was included on the old  
15 Department's program. I don't want to use the word  
16 underground regulations, but it was included under there.

17 I guess I just did.

18 And again, it was totally appropriate with regard  
19 to training procedures. I'm not so sure about  
20 the periodic determination of accuracy. I think it would  
21 be appropriate for the Committee to consider the need  
22 to -- to analogous to the requirements given in the  
23 forensic alcohol -- under the analysis of blood, urine,  
24 and tissue samples, to require labs to prepare written  
25 descriptions of the procedures employed in the breath

1 alcohol analysis.

2 CHAIRPERSON KIMSEY: And was that in 1221.1? Or  
3 where was that previously?

4 MR. LARSON: Well, it's under the general  
5 requirements under Article 6. It's under Article 6 of the  
6 general requirements -- requires that all laboratories  
7 shall actually, in this case, file with the Department a  
8 written description of the methods. Then subsequently,  
9 another subsection under general describes the elements of  
10 those written method descriptions. So I brought it up  
11 under general, because it was under general, under Article  
12 6.

13 CHAIRPERSON KIMSEY: Okay.

14 COMMITTEE MEMBER LOUGH: Patricia Lough.

15 We broke out breath alcohol from blood, urine, and  
16 tissue because of some differences that we have. But if  
17 we're going back to the original Title 17, those article  
18 numbers and such, I believe, would be renumbered anyway  
19 and that would put the breath back under the forensic  
20 alcohol analysis in general section, which says that you  
21 have to have a method.

22 MS. RUEBUSCH: This is Cathy Ruebusch.

23 That's correct.

24 COMMITTEE MEMBER LOUGH: So Cathy --

25 MS. RUEBUSCH: Patty, you are correct.

1 COMMITTEE MEMBER LOUGH: Yes.

2 CHAIRPERSON KIMSEY: Okay. So --

3 COMMITTEE MEMBER LOUGH: So by doing --

4 CHAIRPERSON KIMSEY: Go ahead.

5 COMMITTEE MEMBER LOUGH: By putting 7 back under  
6 6, back to its original format, it should probably take  
7 care of that.

8 MR. LARSON: Actually, I have a comment.

9 This might not make any sense to program. I don't  
10 believe that's correct. We discussed -- I don't believe  
11 that's correct.

12 CHAIRPERSON KIMSEY: Well, putting Article 7 back  
13 under Article 6, what?

14 MR. LARSON: We're not proposing to put Article 7  
15 under Article 6.

16 MS. RUEBUSCH: This is Cathy Ruebusch --

17 CHAIRPERSON KIMSEY: Can you clarify it more,  
18 Cathy?

19 MS. RUEBUSCH: Yeah, I am.

20 Clay, the definition of forensic alcohol analysis  
21 would no longer be eliminating breath. So therefore, any  
22 reference to forensic alcohol analysis, refers to breath  
23 alcohol analysis also. So where in 1220 would that  
24 amendment, where it says there have to be methods for  
25 forensic alcohol analysis, that includes breath alcohol

1 analysis as well as blood, urine, and tissue?

2 MR. LARSON: Okay. Now I guess I understand. So  
3 it's really -- we would have to do -- that would be -- as  
4 a result of a change of the statutes, I think that's going  
5 to create problems. I think that's going to create  
6 problems that Laura Tanney will -- it's going to create  
7 problems.

8 For instance, I believe that would imply that the  
9 requirement that a QC sample be included with each -- with  
10 each -- with each run, that the method be analyzed --  
11 calibrated with secondary standards. There are procedures  
12 that clearly don't apply to breath alcohol analysis. So  
13 lumping them together, I think, it's going to create --  
14 might solve that problem. I'm not even sure about that,  
15 but I think it's going to create lots of other problems.

16 CHAIRPERSON KIMSEY: Well, we can review that once  
17 we get further in our next iterations.

18 But back to 1221.1, is this something that 1221.1,  
19 Authorized Procedures, this can go away? Is that what  
20 you're saying, Cathy, since it's going to be subsumed  
21 under Article 6?

22 MS. RUEBUSCH: This is Cathy Ruebusch.

23 My difficulty mainly with this section is that it  
24 implies regulation of law enforcement, particularly in  
25 subsection (b) and (b) (1) and (b) (2), because it speaks to

1 persons other than, you know, persons who work -- forensic  
2 alcohol laboratory, supervisors, analysts, and analyst  
3 trainees. It's only in such places and persons are under  
4 the direct jurisdiction of a governmental agency or  
5 forensic alcohol laboratory.

6 I don't know. I'm not really sure what the point  
7 of all this is. If you all think you need it, we can  
8 leave it. It's up to you. As long as we don't touch  
9 it -- outside if we can amend a licensed forensic alcohol  
10 laboratory reference other than that.

11 CHAIRPERSON KIMSEY: What's the Committee's  
12 feeling?

13 COMMITTEE MEMBER LOUGH: Looks okay to keep it in.

14 CHAIRPERSON KIMSEY: Okay. Other comments from  
15 the Committee?

16 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

17 I agree that it would be appropriate to leave it  
18 in.

19 CHAIRPERSON KIMSEY: Other Committee members?

20 COMMITTEE MEMBER CARDONA: Ray Cardona.

21 I agree to leave it in.

22 CHAIRPERSON KIMSEY: Paul Kimsey.

23 I will go along with leaving it in.

24 Kenton?

25 We don't have to do this by unanimous vote, you

1 know.

2 COMMITTEE MEMBER SEDGWICK: Go ahead and make it  
3 at least five people. I will go ahead and agree.

4 Paul Sedgwick.

5 COMMITTEE MEMBER TANNEY: Laura Tanney.

6 You know, if you're talking about making a  
7 recommendation, a final recommendation by unanimous vote,  
8 or preliminarily keeping it in, subject to further  
9 reflection, I would like a little more time to reflect on  
10 it before I make a final vote. So I'm a little unclear.  
11 I thought this was sort of preliminary votes.

12 CHAIRPERSON KIMSEY: I'm sure that --

13 COMMITTEE MEMBER LOUGH: Patricia Lough.

14 We are --

15 CHAIRPERSON KIMSEY: Go ahead, Patty.

16 COMMITTEE MEMBER LOUGH: Patricia Lough.

17 We -- I'm assuming we're just coming up with a  
18 draft. This isn't a final vote. Because, you know, we  
19 would like to see it cleaned up and typed up and take  
20 another look at it.

21 CHAIRPERSON KIMSEY: Paul Kimsey.

22 I certainly agree with that.

23 COMMITTEE MEMBER WONG: I totally wholeheartedly  
24 agree with that.

25 (Laughter.)

1 COMMITTEE MEMBER TANNEY: Laura Tanney.

2 I don't have a problem with keeping it in, but I  
3 certainly would like to reflect on it further. But at  
4 this point we can keep it in.

5 COMMITTEE MEMBER LYLE: Bruce Lyle.

6 I agree with Laura.

7 CHAIRPERSON KIMSEY: Okay. I think that was  
8 everybody.

9 Did Sacramento get their voice heard?

10 Okay.

11 1221.2, Standard of Performance.

12 COMMITTEE MEMBER TANNEY: Laura Tanney.

13 Now, that -- the statute, do we need this? 10701  
14 of the Health and Safety Code?

15 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

16 Arguably, it's been repealed by the statute, but  
17 it's a restatement of what the statute says.

18 MS. RUEBUSCH: This is Cathy Ruebusch.

19 I would recommend you repeal it so there is no  
20 question what the standard is. The statute specifies the  
21 standard. That negates anything you put here anyway,  
22 unless you repeat the statute. And then the question will  
23 be, why do you need to restate the statute? Because you  
24 are duplicating law.

25 CHAIRPERSON KIMSEY: Thank you for that

1 clarification, Cathy.

2 This is Paul Kimsey.

3 I would vote to repeal it.

4 COMMITTEE MEMBER WONG: Kenton Wong.

5 I would agree with Cathy.

6 CHAIRPERSON KIMSEY: Sacramento?

7 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

8 I agree.

9 COMMITTEE MEMBER CARDONA: Cardona.

10 I agree.

11 CHAIRPERSON KIMSEY: San Diego?

12 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

13 I agree.

14 COMMITTEE MEMBER LOUGH: Patricia Lough.

15 I agree.

16 COMMITTEE MEMBER LYLE: Bruce Lyle.

17 I agree.

18 COMMITTEE MEMBER TANNEY: Laura Tanney.

19 I agree.

20 CHAIRPERSON KIMSEY: Thank you all.

21 We have about ten minutes or five minutes or so  
22 before we take our half-hour break. I think we are going  
23 to need our half-hour break.

24 1221.3, Approved Instruments.

25 COMMITTEE MEMBER LOUGH: Same issue.

1 CHAIRPERSON KIMSEY: I would vote to repeal.

2 COMMITTEE MEMBER WONG: Kenton Wong.

3 I agree.

4 CHAIRPERSON KIMSEY: Sacramento?

5 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

6 I agree.

7 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

8 I agree.

9 COMMITTEE MEMBER CARDONA: Ray Cardona.

10 I agree.

11 CHAIRPERSON KIMSEY: San Diego?

12 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

13 I agree.

14 COMMITTEE MEMBER LOUGH: Patricia Lough.

15 Cathy, we are -- I don't care if it's in or out,

16 but it might clarify.

17 CHAIRPERSON KIMSEY: We had a bit of a blank

18 there.

19 Could you repeat that, please?

20 COMMITTEE MEMBER LOUGH: Yes. We added the

21 reference to the 100701, just for clarification for

22 someone reading these regulations. And that was based on

23 the Subcommittee decision just to do that, not to repeat

24 it, but just for clarification.

25 MS. RUEBUSCH: Patty, this is Cathy Ruebusch.

1           That is essentially duplicating law. We can do  
2 that under the APA by arguing that it is necessary for the  
3 purposes of clarity, but it is totally unnecessary in  
4 terms of enforcement or lack thereof. But bottom line is  
5 in terms of -- it doesn't really matter what we say there,  
6 because the statute says it. My own bias is not to  
7 include it.

8           MR. LARSON: Clay Larson.

9           I --

10          COMMITTEE MEMBER LOUGH: Patricia Lough.

11          That's fine.

12          CHAIRPERSON KIMSEY: Comment from the public?

13          MR. LARSON: I think we should have comments from  
14 the public before we vote, although in this case I would  
15 agree that -- point out that, again, the program developed  
16 some comments. It did make the comment, some  
17 precautionary comment, that the reference in that added  
18 language, if you decided to retain it, and the reason  
19 we're retaining is, it would direct the laboratorian to  
20 look to the Health and Safety Code for specific direction  
21 here. But the reference to calibrating instruments is  
22 actually inconsistent with the definition of "instruments"  
23 under the definitions section, which we decided probably  
24 not to touch. Because an instrument is defined under the  
25 -- under the definitions section is a device that measures

1 alcohol concentration. And calibrating unit, it doesn't  
2 have that capability. It can't measure. It provides the  
3 sample of known alcohol concentration, but it doesn't have  
4 that capability. It's also inconsistent with the word  
5 "instruments," and is inconsistent with the Health and  
6 Safety Code, which refers to reading devices.

7 So it sounds like the sentiment is to remove it  
8 altogether anyway. If you did decide to retain it, it  
9 seems it would create some language problems.

10 CHAIRPERSON KIMSEY: Any other comments from the  
11 public?

12 How does the Committee want to address this one?

13 COMMITTEE MEMBER LYLE: Bruce Lyle.

14 I agree to --

15 CHAIRPERSON KIMSEY: Was that to repeal?

16 COMMITTEE MEMBER LYLE: Yes.

17 COMMITTEE MEMBER TANNEY: Laura Tanney.

18 I agree to repeal.

19 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

20 I agree also.

21 COMMITTEE MEMBER LOUGH: Patricia Lough.

22 I agree.

23 CHAIRPERSON KIMSEY: Paul Kimsey.

24 I agree.

25 COMMITTEE MEMBER CARDONA: Ray Cardona.

1 I agree.

2 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

3 I agree.

4 COMMITTEE MEMBER WONG: Kenton Wong.

5 I agree with Cathy.

6 CHAIRPERSON KIMSEY: The folks in Sacramento need  
7 to sort of let us know when they need to go to their other  
8 meeting, and we will take a break at that point.

9 MS. RUEBUSCH: Cathy and I would like to take our  
10 break now.

11 CHAIRPERSON KIMSEY: I think we're all thankful.

12 Why don't we re-form or get back together again  
13 say at -- want to take -- let's just say 2 o'clock.

14 We'll pat ourselves on the back.

15 Thank you all very much and we'll start up again  
16 at 2 o'clock.

17 MS. RUEBUSCH: This is Cathy Ruebusch.

18 Our meeting is scheduled to go to 2:30, and you  
19 can certainly reconvene. But we won't be back probably  
20 till closer to 2:30.

21 CHAIRPERSON KIMSEY: What's the feeling of the  
22 Committee?

23 Do we want to get back together?

24 MS. RUEBUSCH: You're Doing a great job. You  
25 don't need us.

1           COMMITTEE MEMBER TANNEY: I personally really  
2 appreciate Cathy's input, both of their inputs. So I  
3 would hesitate to take any action without their input.

4           MS. EWING: Well, this is Cathy Ewing.

5           You could save any questions, that you think we  
6 might be helpful with, until we get back.

7           COMMITTEE MEMBER TANNEY: That's fine too.

8           CHAIRPERSON KIMSEY: Yeah. Let's go ahead and  
9 start up again at 2:00, and we may have to revisit some of  
10 them, but let's go ahead and start at 2 o'clock.

11           (Thereupon a lunch break was taken.)

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1           Yes. I think one issue is that this section now is  
2 showing mostly the new wording, and since we're going to  
3 put it back to Article 6, we probably should put back most  
4 of the original wording. There's just a legal change,  
5 that would be an update and an inclusion of using a dry  
6 gas standard, which is -- would clearly change this whole  
7 thing, so it would be a revision.

8           CHAIRPERSON KIMSEY: So instead of repealing this  
9 one, we would agree to revise this.

10          COMMITTEE MEMBER SEDGWICK: Right.

11          COMMITTEE MEMBER LOUGH: Yes.

12          CHAIRPERSON KIMSEY: Any other comment from the  
13 Committee?

14           Any comment from the public?

15           This gets thrown into the basket for revision.

16           Paul Kimsey.

17           I would vote aye on that.

18          COMMITTEE MEMBER WONG: Kenton Wong.

19           Aye also. I also definitely see that this one  
20 needs to be revised. It's got that same issue, the  
21 definition of the forensic alcohol laboratory as a place  
22 or entity, and that whole issue.

23          CHAIRPERSON KIMSEY: Sacramento?

24          COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

25           Yes.

1 COMMITTEE MEMBER CARDONA: Ray Cardona.

2 Yes.

3 CHAIRPERSON KIMSEY: San Diego?

4 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

5 Yes.

6 COMMITTEE MEMBER LOUGH: Patricia Lough.

7 Yes.

8 COMMITTEE MEMBER LYLE: Bruce Lyle.

9 Yes.

10 COMMITTEE MEMBER TANNEY: Laura Tanney.

11 That's fine.

12 CHAIRPERSON KIMSEY: Okay.

13 So we're moving on to the bottom of Page 35,

14 1221.4. Again, Expression of Results -- breath alcohol  
15 analysis results.

16 Clay, you made a comment that refers to --

17 MR. LARSON: It should be .5.

18 CHAIRPERSON KIMSEY: Okay. So it is mis-numbered.

19 1221.5 is at the bottom of Page 35. It refers to Section  
20 1220.4.

21 It would appear that this would need some revision  
22 because of the intent to put some language in about what  
23 should be reported as a negative. And also the results  
24 need to be reported to two decimal places.

25 COMMITTEE MEMBER TANNEY: Are you talking about .5

1 on the bottom of 36.

2 CHAIRPERSON KIMSEY: Actually, we're on Page 35 at  
3 the bottom where it says 1221.4. Then it has a little  
4 (e) (6) next to it. We believe that that should be 1221.5.  
5 So it's at the bottom of Page 35.

6 It starts out --

7 COMMITTEE MEMBER LOUGH: Yeah, I'm missing my --

8 CHAIRPERSON KIMSEY: Oh, you're missing Page 35?

9 COMMITTEE MEMBER LOUGH: Yeah.

10 CHAIRPERSON KIMSEY: It's titled Expression of --  
11 and then it has "analytical" crossed out, then "breath  
12 alcohol analysis results."

13 COMMITTEE MEMBER TANNEY: I have a copy of it from  
14 last time's packet, so it's from the last meeting. So  
15 that's fine.

16 COMMITTEE MEMBER LOUGH: I think when we go back  
17 and combine those two articles it will be taken care of.  
18 That will be added back probably where it used to be,  
19 under 1220.4, Expressing Results for Blood, Urine, and  
20 Tissue. And breath will probably go back under there.

21 Cathy will have to go back and put it back in the  
22 original format so we can see what it looked like.

23 CHAIRPERSON KIMSEY: Okay. Yeah, we talked about  
24 making changes in that. So we'll make a note that the  
25 1221.5 will be -- looks like it's going to be moving back

1 to Section 1220.4.

2 I don't think we need to vote on that.

3 We're now on to Article 8, Records, 1222.

4 I think we can ask Cathy, but some of these  
5 general language from the old regulations, she's made  
6 comments, spoke to intent, and really were not necessary.

7 So this may be also one for repeal.

8 COMMITTEE MEMBER LYLE: Bruce Lyle.

9 Especially since it contains the lack of  
10 inspection by the Department.

11 CHAIRPERSON KIMSEY: Why don't we put it --  
12 barring any other comments from the Committee or the  
13 public?

14 Why don't we put a repeal, question mark, Cathy,  
15 next to that one.

16 1222.1, Forensic Laboratory Records.

17 COMMITTEE MEMBER LOUGH: If we go back to the  
18 original language and just take out the "licensed"  
19 reference, it's probably fine. There is another reference  
20 to law enforcement agencies, but I don't think that's a  
21 problem there under the old 6.

22 CHAIRPERSON KIMSEY: All right.

23 Other comments from the Committee?

24 Public?

25 MR. LARSON: Yeah, this section does include a

1 reference to category of qualified personnel -- this is  
2 Clay Larson -- category of personnel forensic alcohol  
3 analyst trainees, which was proposed for deletion under  
4 Article 3 or 2. So that will have to be changed.

5 COMMITTEE MEMBER LOUGH: Patricia Lough.

6 I think we decided to keep the titles in, and we  
7 were going to go back and just look at the requirements  
8 for simplicity.

9 CHAIRPERSON KIMSEY: Other comments?

10 So we have next to us -- we're going back to the  
11 original language and pretty much keeping it as it is .

12 Any other comments?

13 Moving on to 1222.2.

14 MR. LARSON: One more quick comment. There is  
15 also a reference to -- again, this may be covered. Maybe  
16 Patty Lough's response is the same. There's also  
17 reference to records of laboratory performance evaluation  
18 on proficiency tests. And although Cathy pointed out we  
19 may want to retain it, under that -- we deleted that whole  
20 section that described the proficiency test requirements,  
21 under the licensing portion with a proviso -- as I said,  
22 Cathy noted that we want to revisit that. But assuming  
23 that's not retained, and again, under the regulations,  
24 there are no requirements that laboratories complete the  
25 proficiency test. Then the references to "proficiency

1 tests" would need to be changed.

2 COMMITTEE MEMBER TANNEY: Laura Tanney in San  
3 Diego.

4 Health and Safety Code Section 100702 states that  
5 "the laboratories are subject to the requirements of ASCLD  
6 guidelines for proficiency testing." That looks like  
7 regardless of whether they are members of ASCLD. And that  
8 requires proficiency testing. It seems to me that the  
9 regulations can include a provision that they have to keep  
10 records of that proficiency testing. So I don't see a  
11 problem with that language, as it currently exists.

12 MR. LARSON: I suggest we check with Cathy on  
13 that.

14 CHAIRPERSON KIMSEY: Okay. Moving on to 1222.2,  
15 Maintain by Agencies.

16 COMMITTEE MEMBER LOUGH: Patricia Lough.

17 CHAIRPERSON KIMSEY: Yes.

18 COMMITTEE MEMBER LOUGH: I think we added that  
19 because -- I'm not sure -- but there was no requirement of  
20 that in the old regs. So I think we do want to add that.  
21 We want to make sure that those are maintained.

22 You can strike that. I will have to check that.

23 CHAIRPERSON KIMSEY: Okay. So we're thinking that  
24 this may need changes, this section so we should put that  
25 in the basket for review?

1 MR. MOORE: Ron Moore.

2 On 1222.2, in referring to a law enforcement  
3 agency, it goes back to the issue of whether or not the  
4 regulations can regulate a law enforcement agency.

5 CHAIRPERSON KIMSEY: That's a standing question  
6 that we're going to have a get resolved throughout this  
7 whole document. But I do think this has to go in the  
8 basket for changes.

9 Oh, my gosh. That's the last one. I don't think  
10 there's any easy way to review, at least in my notes.  
11 There's no easy way to review.

12 MR. LARSON: I see that the Cathys are back.

13 CHAIRPERSON KIMSEY: Oh. I see your meeting is  
14 over, Catherine and Cathy?

15 MS. RUEBUSCH: Yes, it is. Thank you.

16 Very informative, thank you.

17 CHAIRPERSON KIMSEY: You will have to let me know  
18 what they decided.

19 MS. EWING: Nothing.

20 CHAIRPERSON KIMSEY: Of course.

21 (Laughter.)

22 CHAIRPERSON KIMSEY: Just briefly, to sort of  
23 summarize -- the rest of the Committee can certainly jump  
24 in -- we went through the last three or four, five  
25 sections, and sort of put them either as revisions or to

1 repeal, as we had done previously to lunch.

2 We have just sort of finished up. There were a  
3 couple of notes of questions for Cathy, but now actually  
4 just as you walked in, I believe, we had finished up on  
5 Page 37 with 1222.2. And that pretty much, unless we want  
6 to -- somebody on the Committee wants to review some  
7 aspect of this, that sort of brings us to the end of the  
8 agenda that we had scheduled for today.

9 And is there any other business that the Committee  
10 would like to take up before we have some discussions  
11 about how this format is working and maybe rescheduling  
12 and next steps? Is there any other review of the  
13 Subcommittee's work product that we want to contemplate  
14 this afternoon?

15 MR. LARSON: Didn't we have two questions for  
16 Cathy?

17 CHAIRPERSON KIMSEY: Yeah, they will be in the  
18 transcript.

19 How do people feel that the format of the meeting  
20 went, this video conferencing format? Sacramento?

21 COMMITTEE MEMBER ZIELENSKI: Torr Zielenski.

22 I thought it went well.

23 COMMITTEE MEMBER LOUGH: Patricia Lough.

24 I agree. It was very convenient, and it works out  
25 well.

1 COMMITTEE MEMBER TANNEY: Laura Tanney.

2 I agree.

3 I do want to indicate for those of you in  
4 Sacramento, that there is some delay, so where it appeared  
5 to you that we may have been interrupting some of your  
6 comments, that was because of the delay and when there was  
7 a pause by you and somebody started speaking, it came on  
8 your side as if it was in the middle of your sentence. So  
9 I just wanted to make that comment so that you realize  
10 that there is a delay.

11 But I like the format.

12 CHAIRPERSON KIMSEY: This is Paul.

13 I think it has worked well. Obviously, we have  
14 spoken over each other occasionally, but I think that  
15 shortcoming is offset by the lack of travel and planes and  
16 taxis and delays and that sort of thing.

17 So I would certainly advocate for doing this --  
18 using this format again in the future. Which comes to the  
19 next question of when would the Committee like to meet  
20 again? There's obviously some workload on the part of the  
21 Department. We would probably be trying to pull together  
22 another version of the Subcommittee's work product to  
23 review. And we can certainly talk with Cathy Ruebusch and  
24 Catherine Ewing about how much time that might take, and  
25 also the program. But just to throw out on the table, is

1 two months from now too quick to try to meet again?

2 MS. EWING: If I could interrupt for a minute.

3 This is Catherine Ewing.

4 I don't think that we have the resources in our  
5 office to do the drafting or to do the amendments to the  
6 draft.

7 MS. RUEBUSCH: This is Cathy Ruebusch, Office of  
8 Regulations.

9 I concur with Cathy Ewing's statement. With my  
10 current workload, there is no way this is going to happen  
11 of me doing it. I am happy to consult. I am happy to  
12 discuss, but I am not going to be able to put the time in,  
13 given where I am, what's going on in my workload right  
14 now.

15 MS. EWING: But I realize, Paul, that's something  
16 that if Dr. Barrett wants to talk to our boss about.

17 CHAIRPERSON KIMSEY: Sure.

18 MS. EWING: Or you talk to our boss about.

19 CHAIRPERSON KIMSEY: We can sort of leave it open.

20 How does the Committee feel?

21 Obviously we could -- maybe the Department can get  
22 back to the Committee on what we think might be a  
23 reasonable time that we can actually get the workload  
24 accomplished. It looks like -- it would not be in two  
25 months. We can have some electronic communication with

1 the Committee, but it looks like it might be the end of  
2 the summer before we might have something to review again,  
3 which would be sort of in the August, September timeframe.

4 Comment from the public?

5 MR. LARSON: Yeah, because we did discuss this a  
6 bit. One question just for pro forma, is there anyone on  
7 the Committee that wants to volunteer to redraft the  
8 regulations? Before it gets assigned to me I want to make  
9 sure.

10 (Laughter.)

11 COMMITTEE MEMBER TANNEY: Laura Tanney, San Diego.

12 If somebody else on the Committee wants to work  
13 with me and another Subcommittee to come up with another  
14 proposal, based on the comments made today, I can work  
15 with somebody, and then we can submit it and have the  
16 Department and Cathy Ruebusch and Catherine Ewing -- I'm  
17 sorry. I don't know if I'm getting your first name right  
18 or not. Is it Catherine or Cathleen?

19 MS. EWING: Catherine, thank you.

20 COMMITTEE MEMBER TANNEY: Sorry.

21 And but it's going to take me some time also  
22 because of my workload. So I don't mind being involved in  
23 the process, but I will not be available at all the month  
24 of July.

25 COMMITTEE MEMBER LOUGH: Patricia Lough.

1           If Cathy Ruebusch could e-mail me the Title 17  
2 before we make those changes, I could go over it and get  
3 kind of a draft of that made and get that to Laura and  
4 work with Laura on it.

5           MS. RUEBUSCH: This is Cathy Ruebusch.

6           As Clay has so delicately pointed out to me  
7 several times, that draft that I have on electronic copy  
8 is not accurate.

9           I can -- we can get a copy. It's just going to  
10 take me a little bit to do that. But yes, we can e-mail  
11 it to you.

12          COMMITTEE MEMBER TANNEY: All right. Thank you.

13          That would help.

14          CHAIRPERSON KIMSEY: Is there anyone else on the  
15 Committee that would like to help Patty and Laura in this  
16 effort?

17          MS. EWING: This is Catherine Ewing.

18          If you keep it, you don't have the Bagley-Keen  
19 problem.

20          CHAIRPERSON KIMSEY: That's true. Thank you for  
21 reminding us.

22          Then why don't we do that. Then why don't we  
23 proceed along as outlined. We will try and get a clean,  
24 accurate copy of Title 17 to Patty. And we'll sort of  
25 leave it to Patty and Laura to work out some timing on

1 when they can work together and then just let the  
2 Department know through, you know, Mary Soliman and/or  
3 myself and we'll go ahead and schedule another meeting  
4 based on when that's feasible. But it probably won't be  
5 until, you know, late summer, early fall.

6 COMMITTEE MEMBER TANNEY: I agree.

7 CHAIRPERSON KIMSEY: Other comments from the  
8 Committee?

9 COMMITTEE MEMBER LYLE: Bruce Lyle.

10 That's fine with me.

11 CHAIRPERSON KIMSEY: Thank you.

12 COMMITTEE MEMBER LOUGH: Patricia Lough.

13 That's fine.

14 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick.

15 Sounds okay.

16 CHAIRPERSON KIMSEY: Okay.

17 Comments from the public?

18 Then unless I have forgotten something, I think  
19 we're going to be signing off pretty soon.

20 Any last-minute comments?

21 Hearing and seeing none, I would like to thank  
22 everybody for their time and participation in this effort  
23 today, and I think we've made some good progress.

24 Thank you all very much.

25 //

1           (Thereupon, the Forensic Alcohol Review  
2           Committee meeting adjourned at 2:40 p.m.)

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## 1 CERTIFICATE OF REPORTER

2 I, KATHRYN S. KENYON, a Certified Shorthand Reporter  
3 of the State of California, do hereby certify:

4 That I am a disinterested person herein; that the  
5 foregoing Forensic Alcohol Review Committee meeting was  
6 reported in shorthand by me, Kathryn S. Kenyon, a  
7 Certified Shorthand Reporter of the State of California,  
8 and thereafter transcribed into typewriting.

9 I further certify that I am not of counsel or  
10 attorney for any of the parties to said meeting nor in any  
11 way interested in the outcome of said meeting.

12 IN WITNESS WHEREOF, I have hereunto set my hand this  
13 5th day of June, 2006.

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KATHRYN S. KENYON, CSR

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Certified Shorthand Reporter

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