

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

DEPARTMENT OF PUBLIC HEALTH
RICHMOND CAMPUS CONFERENCE CENTER
850 MARINA BAY PARKWAY
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RICHMOND, CALIFORNIA

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10:09 A.M.

JAMES F. PETERS, CSR, RPR
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PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

APPEARANCES

REVIEW COMMITTEE MEMBERS

Dr. Paul Kimsey, Chairperson(Richmond)

Ms. Patricia Lough(via teleconference in San Diego)

Mr. Paul Sedgwick(via teleconference in San Diego)

STAFF

Mr. Ricardo de Rama

Ms. Goldie Eng, Senior Staff Counsel(Sacramento)

Ms. Russ Huck, Assistant Chief, Division of Food, Drug & Radiation Safety(Sacramento)

Mr. Clay Larson, Chief, Abused Substances Analysis Section(Richmond)

Mr. Robert Schlag, Chief, Food, Drug & Radiation Division(Sacramento)

Dr. Mary Soliman, Chief, Food & Drug Laboratory Branch(Richmond)

Ms. Marylyn Willis, Office of Regulations(Sacramento)

ALSO PRESENT

Ms. Janet Anderson-Seaquist, Ventura County Sheriff's Department(San Diego)

Mr. Chris Breyer, Los Angeles Police Department(San Diego)

Mr. Terry Fickies, California Department of Justice(Sacramento)

Dr. Nikolas Lemos, San Francisco Office of the Chief Medical Examiner(Richmond)

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APPEARANCES CONTINUED

ALSO PRESENT

Mr. Bill Phillips, California Department of
Justice(Sacramento)

Ms. Jennifer Shen, San Diego Police Department(San Diego)

Mr. Michael Toms, Sacramento County, Laboratory of
Forensic Services(Sacramento)

Ms. Florida Zabala, Staff Counsel, California Department
of Motor Vehicles(Sacramento)

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INDEX

	PAGE
Opening Remarks and Discussion of the Agenda	1
Report from the Subcommittee on the Status of the Draft Regulatory Work Product	9
Committee Review of the Draft Regulatory Work Product	12
Afternoon Session	82
Continued Committee Review of the Regulatory Work Product	82
Scheduling of Future Meetings	164
Adjournment	168
Reporter's Certificate	169

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1 PROCEEDINGS

2 CHAIRPERSON KIMSEY: This is Paul Kimsey in
3 Richmond. I'm think we'll go ahead and get started, since
4 it's 10 o'clock.

5 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

6 I'm not sure San Diego is on.

7 CHAIRPERSON KIMSEY: Can everyone hear me in
8 Sacramento?

9 MR. FICKIES: Yes.

10 CHAIRPERSON KIMSEY: Can San Diego hear me?
11 San Diego?

12 MR. FICKIES: Hello. San Diego, can you hear us?

13 CHAIRPERSON KIMSEY: Why don't we go -- well, let
14 me announce first.

15 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

16 I think that was a question wasn't it?

17 CHAIRPERSON KIMSEY: Did you have a question in
18 San Diego?

19 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

20 I think that was Terry Fickies saying Paul in San
21 Diego, can you hear me?

22 MR. FICKIES: I don't hear San Diego. This is
23 Sacramento.

24 CHAIRPERSON KIMSEY: Well, let me get our
25 technical person here.

1 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

2 They may have to turn it back on.

3 (Thereupon a recess was taken.)

4 COMMITTEE MEMBER LOUGH: Hello. It's 10 o'clock,
5 I see.

6 CHAIRPERSON KIMSEY: Ah, yes. Good. San Diego
7 is with us.

8 COMMITTEE MEMBER LOUGH: Hi, Paul.

9 CHAIRPERSON KIMSEY: Hi. Good morning.

10 COMMITTEE MEMBER LOUGH: Good morning. We're
11 still missing a few people.

12 CHAIRPERSON KIMSEY: Oh. Okay. Well, maybe
13 we'll give it another -- who are you missing?

14 COMMITTEE MEMBER LOUGH: Well, we're missing
15 Jennifer Shen. I think it's important that she be here.
16 She is the one that did a lot of the work on the
17 subcommittee.

18 CHAIRPERSON KIMSEY: Sure. It's just -- that's
19 fine. I agree. We just had heard from some people that
20 they weren't going to make it today. Kenton Wong is not
21 going to make it. Laura Tanney is not going to make it.
22 Bruce Lyle and Torr Zielenski.

23 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
24 And Kevin Davis.

25 CHAIRPERSON KIMSEY: And Kevin Davis. But I

1 would agree that we'll give it another few minutes for
2 Jennifer Shen to show.

3 COMMITTEE MEMBER LOUGH: Okay. It could very
4 easily be a parking issue here. I'm parked way down the
5 street.

6 (Thereupon a recess was taken.)

7 CHAIRPERSON KIMSEY: This is our 9th meeting of
8 the Forensic Alcohol Review Committee. It's a video
9 conference between San Diego, Sacramento and Richmond. We
10 have Jim Peters here in Richmond who is a stenographer,
11 who is taking notes of the meeting.

12 We have an agenda that was sent out. As I
13 mentioned earlier, we've heard most recently that we're
14 not going to have a quorum today. In fact, I think we may
15 only have 3 of the 8 members of the Committee
16 participating. We had a number of last minute people not
17 being able to attend, which I think is disappointing for
18 all of us, but is the reality. So we won't have a quorum,
19 which, to my understanding, means we won't be doing any
20 voting. But I think we can continue with our discussions
21 and -- you know, of the -- and go through the agenda.

22 Some opening remarks on my part. Let's see,
23 there's a number of things going on sort of in the broader
24 world with regards to the forensic alcohol review issue.
25 There's a Crime Lab Task Force that's been meeting here at

1 the State level with the Department of Justice. They've
2 had a number of meetings. I have not necessarily been
3 following any of their proceedings. I don't know if
4 anyone in this group has. If they have, if anyone wants
5 to make some comments on what they know about what they're
6 doing, that's fine. We can make some time for that.

7 There was also a National Academy of Sciences
8 report that came out earlier this year on strengthening
9 forensic science in the United States, a path forward and
10 so that's also out there.

11 There's also some legislation that's been
12 introduced. AB 599, which would directly affect some of
13 the Committee's work. It's pretty brief at this point,
14 but I'll read the one section. We have copies here. So
15 under Section 1, 100700, there would be -- right now, it's
16 proposed as C would be -- and I'll read this sentence.

17 "Laboratories that are accredited in the forensic
18 alcohol analysis discipline or subdiscipline of the
19 American Society of Crime Laboratory Directors/Laboratory
20 Accreditation Board, ASCLD/LAB Review Committee...", i.e.
21 us, "...established pursuant to Section 100703 shall be
22 exempt from the requirements of this section."

23 So the Department is obviously following this
24 bill. We don't know much more about it other than that at
25 this time, but it does, you know, give some more

1 responsibility -- would potentially give more
2 responsibility to this committee with regards to approving
3 other accrediting bodies.

4 Any comments on 599 or the National Academy of
5 Sciences report or the Crime Lab Task Force? Anyone have
6 any other information to contribute?

7 MR. PHILLIPS: This is Bill Phillips.

8 I've been attending the Crime Laboratory Task
9 Force. And they are behind and will issue a report in
10 October. That's the plan date. They were supposed to
11 have issued that report in July. They are probably going
12 to recommend an oversight -- forensic oversight
13 committee -- forensic laboratory oversight committee for
14 the State of California. They are probably also going to
15 recommend certification of criminalists or analysts within
16 the crime laboratory systems throughout the State of
17 California public arena.

18 They meet monthly north, south and usually at the
19 Department of Justice in the northern part of the State.
20 And it's been common to have met at the combined LASO/LAPD
21 crime laboratory. So that's an update.

22 CHAIRPERSON KIMSEY: Okay. Thank you.

23 MR. PHILLIPS: You're welcome.

24 CHAIRPERSON KIMSEY: Any other information on,
25 you know, 599 or National Academy of Sciences Report?

1 Also, just as sort of a housekeeping, I forgot.
2 Why don't we go around, who's there in the room up in
3 Sacramento, you want to go ahead and introduce yourselves.

4 DIVISION OF FOOD, DRUG & RADIATION SAFETY
5 ASSISTANT DIVISION CHIEF HUCK: This is Russ Huck,
6 Assistant Division Chief, Division of Food, Drug and
7 Radiation Safety.

8 DIVISION OF FOOD, DRUG & RADIATION SAFETY
9 DIVISION CHIEF SCHLAG: And I am Bob Schlag the Division
10 Chief up here.

11 MR. FICKIES: Terry Fickies, California
12 Department of Justice, EPAS Program.

13 MR. PHILLIPS: And Bill Phillips with the
14 California Department of Justice criminalist manager and
15 also the President of the California Association of Crime
16 Laboratory Directors.

17 MS. WILLIS: Marylyn Willis and I'm from the
18 Department of Public Health, Office of Regs.

19 CHAIRPERSON KIMSEY: Okay. Down in San Diego.

20 COMMITTEE MEMBER SEDGWICK: I'm Paul Sedgwick,
21 representative on the Committee from the California
22 Association of Toxicologists.

23 COMMITTEE MEMBER LOUGH: Patty Lough. I am on
24 the Committee representing CACLD.

25 MS. ANDERSON-SEAQUIST: Janet Anderson-Seaquist

1 from the Ventura County Sheriff's Department, Forensic
2 Sciences Lab.

3 CHAIRPERSON KIMSEY: Okay. In Richmond, I'm Paul
4 Kimsey. I'm the Department representative to the
5 Committee.

6 THE COURT REPORTER: Jim Peters, the court
7 reporter.

8 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
9 Clay Larson, California Department of Public
10 Health

11 DR. LEMOS: Nikolas Lemos, from the San Francisco
12 Office of the Chief Medical Examiner.

13 MR. de RAMA: Rick de Rama from the Food and Drug
14 Laboratory Branch.

15 FOOD AND DRUG LABORATORY BRANCH CHIEF SOLIMAN:
16 Mary Soliman, Food and Drug Laboratory, Branch
17 Chief.

18 CHAIRPERSON KIMSEY: And Effie Harris from Food
19 and Drug Lab.

20 Okay. Also a reminder, for those on the
21 Committee that we need your Form 700 forms with regards to
22 conflicts of interest. We've gotten a few, but not
23 everyone on the Committee has submitted their forms. I
24 think other than that, those were all the opening
25 comments.

1 Any questions at this point?

2 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

3 I have a question. Hi, Mary. Nice to see you at the
4 meeting. I had submitted a letter of resignation. Do you
5 know where that -- for this committee. Do you know where
6 that stands at this point? And Janet Anderson-Seaquist I
7 believe is supposed to be my replacement for CACLD.

8 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

9 Does Mary want to respond to that?

10 CHAIRPERSON KIMSEY: I know we've received your
11 letter, Patty. And we want to thank you very much for
12 your time and service on the Committee. And I know we've
13 received the nomination. I don't know if we've acted on
14 it yet.

15 FOOD AND DRUG LABORATORY BRANCH CHIEF SOLIMAN:

16 The package is moving up.

17 CHAIRPERSON KIMSEY: The package is apparently
18 going through the system. Do we have any idea when it
19 might be acted on?

20 FOOD AND DRUG LABORATORY BRANCH CHIEF SOLIMAN:

21 Maybe Russ can --

22 CHAIRPERSON KIMSEY: Oh, it's going --

23 DIVISION OF FOOD, DRUG & RADIATION SAFETY

24 DIVISION CHIEF SCHLAG: Paul. This is Bob Schlag. I
25 signed off on that actually about a week ago or maybe even

1 longer than that. There was a little bit of a glitch in
2 it. Actually, I signed off on it long before that. And
3 then there was a little glitch in it. We resubmitted. So
4 it is going through -- so I anticipate that any moment now
5 that that will have been finalized, gone all the way
6 through the Director. I have not heard of the actual
7 appointment yet to replace you though.

8 COMMITTEE MEMBER LOUGH: Okay. Fine. Thank you.
9 I still plan on attending the meetings in the future as a
10 member of the public, but I just wanted to know where that
11 was. Thank you for that.

12 DIVISION OF FOOD, DRUG & RADIATION SAFETY

13 DIVISION CHIEF SCHLAG: It's moving. Thank you.

14 CHAIRPERSON KIMSEY: Okay. Other questions at
15 this point before we move on in the agenda?

16 Real quickly, before we do, I would anticipate
17 we're going to have some discussion on our next meeting.
18 Obviously, we don't have a quorum today. We can't really
19 do any voting. It sort of restricts, you know, things
20 moving forward. It would be my perspective that we want
21 to try and have another meeting where we have everybody,
22 so we can, you know, continue to move this along. It's
23 been 4 years now. And I think, you know, we need to have
24 another meeting fairly quickly.

25 One of the issues that impinges on when we have

1 another meeting is -- I know Jennifer hasn't shown up yet,
2 but maybe you can speak to it Patty, and the group should
3 consider, does the subcommittee need to meet anymore? I
4 got the impression that maybe they didn't or maybe they
5 do. So, you know, if the subcommittee needs to meet
6 again, then obviously the full committee may not meet
7 until after the subcommittee's met. It seemed like there
8 might be a need for one more meeting of the subcommittee,
9 but it wasn't clear to me.

10 COMMITTEE MEMBER LOUGH: Originally, --

11 CHAIRPERSON KIMSEY: Yeah, go ahead.

12 COMMITTEE MEMBER LOUGH: This is Patty Lough.

13 Originally, Jennifer wanted to have another subcommittee
14 meeting. So Terry Fickies, who's present today, and
15 Jennifer and I can go over the materials, but we have
16 them. I think we've all read them now. And I don't
17 really think it's necessary, at this point, to delay
18 further proceedings. I think, Terry, are you happy with
19 what the product is that we're submitting at this time?

20 MR. FICKIES: I agree with that, yes.

21 CHAIRPERSON KIMSEY: Okay.

22 COMMITTEE MEMBER LOUGH: Okay. I think we're
23 fine to continue.

24 CHAIRPERSON KIMSEY: Okay. Well, then that's a
25 good segue way into the next item on the agenda, which is

1 Report from the Subcommittee. And I guess Jennifer hasn't
2 arrived yet. Should we take maybe another 5-, 10-minute
3 break before we get into the discussion or what do you
4 think Patty and Terry?

5 COMMITTEE MEMBER LOUGH: I think we could go
6 ahead and start, because, you know, the first few items in
7 the regulations really, I don't think -- I have just a few
8 things to say about them, but I don't think we're going to
9 have any real issues for awhile.

10 In fact, here she comes right now. If we could
11 just wait just for a minute and let her get situated.

12 CHAIRPERSON KIMSEY: Sure.

13 MR. FICKIES: Paul.

14 CHAIRPERSON KIMSEY: Yes.

15 MR. FICKIES: We have one additional person here
16 too --

17 CHAIRPERSON KIMSEY: Okay.

18 MR. FICKIES: -- who is a participant.

19 SENIOR STAFF COUNSEL ENG: Hi. I'm Goldie Eng.
20 And I'm staff counsel with Department of Public Health.

21 CHAIRPERSON KIMSEY: Welcome, Goldie.

22 COMMITTEE MEMBER LOUGH: Jennifer, we are just
23 starting. We haven't done anything yet, so we were just
24 starting to go over the project.

25 With regard to the subcommittee's work, first,

1 I'd like to thank Terry and Jennifer for participating on
2 the subcommittee. We had several meetings and several
3 members of the public attended as well. And I think we
4 got a lot done. I'd especially like to thank Jennifer for
5 taking the notes from our meetings and coming up with the
6 document that you have in front of you. There was a lot
7 of work involved in this. And I think she did a very good
8 job and I'd like to thank her for that.

9 Paul, if you want to go ahead, maybe, and just
10 start going through the document. I have -- when I
11 reviewed it, I've gone through and made just a couple of
12 notes for discussion as we go along.

13 CHAIRPERSON KIMSEY: Okay. Also to remind
14 folks -- and correct me if I'm wrong Patty, but I think
15 the subcommittee met 3 times?

16 COMMITTEE MEMBER LOUGH: I think so, yes.

17 CHAIRPERSON KIMSEY: Okay. So that's fine.

18 Well, the first obviously is Article 1, which are
19 pretty much the definitions. And in going through it
20 myself, I noticed that there were some changes. One thing
21 I'd point out is that I believe all of this is not the
22 United States Senate, but it's California.

23 COMMITTEE MEMBER LOUGH: Right.

24 CHAIRPERSON KIMSEY: But that's -- anyhow, any
25 comments on, you know, the authority? I believe the bill

1 was --

2 COMMITTEE MEMBER LOUGH: Yeah, I think --

3 CHAIRPERSON KIMSEY: I believe that bill was 1623
4 was Johnson. You might just put Johnson.

5 COMMITTEE MEMBER LOUGH: Yes. Okay. Yeah, we'll
6 take out the United States and you want to just put
7 California.

8 CHAIRPERSON KIMSEY: Sure. Also, under --

9 COMMITTEE MEMBER LOUGH: Is that Chapter 337?
10 Jennifer, do you recall on that Chapter 337, if
11 that was --

12 MS. SHEN: I have all my cites, so I can't --

13 COMMITTEE MEMBER LOUGH: Okay. We'll double
14 check that and that will be just changed. I think we can
15 probably just eliminate that Washington D.C. reference at
16 the end. Just California Senate Bill 1623, Johnson.

17 CHAIRPERSON KIMSEY: Okay. Under 12 --

18 STAFF COUNSEL ENG: Yeah, I can help find the
19 correct citation for that. Usually, when you cite a
20 chapter, there needs to be the year that the statutes were
21 adopted. So all of that, that's easily plugged in.

22 We'll figure that out.

23 COMMITTEE MEMBER LOUGH: Okay. Goldie, I've got
24 your name down there for --

25 MS. SHEN: And I actually have the bill right

1 here in my sights.

2 COMMITTEE MEMBER LOUGH: Do you have the date?

3 MS. SHEN: It says Senate Bill 1623, Chapter 337.

4 COMMITTEE MEMBER LOUGH: Okay. So that way the
5 Governor --

6 MS. SHEN: That would be August 27th, 2004.

7 STAFF COUNSEL ENG: Okay, so that should be
8 Statutes 2004.

9 MS. SHEN: Okay.

10 CHAIRPERSON KIMSEY: I also noticed under
11 1215.1(B) Forensic Alcohol Analysis, that the trained
12 laboratory personnel part, I believe, was deleted.

13 COMMITTEE MEMBER LOUGH: Say it again?

14 CHAIRPERSON KIMSEY: It looked to me like the
15 reference under forensic alcohol analysis, "by trained
16 laboratory personnel", was deleted. Was that true?

17 COMMITTEE MEMBER LOUGH: Oh, 1215.1(b)?

18 CHAIRPERSON KIMSEY: Yeah.

19 COMMITTEE MEMBER LOUGH: I'm ahead of you. I'm
20 on 1215.1(a). I have a note for that one.

21 CHAIRPERSON KIMSEY: Oh, okay. Sure.

22 COMMITTEE MEMBER LOUGH: And at this point, I'm
23 reading the original language and then Jennifer's comments
24 and any changes that she had. We're kind of looking, I'm
25 assuming, at the entire work product at this time.

1 It says under the clarification notes, "This
2 definition will be maintained in its current form as it
3 accurately reflects the definition of alcohol." And I
4 thought we should put something in, "...for the purposes
5 of these regulations."

6 CHAIRPERSON KIMSEY: That seems fine.

7 COMMITTEE MEMBER LOUGH: Okay. All right.

8 CHAIRPERSON KIMSEY: Then on 1215.1(b), there, as
9 I mentioned, seems to -- you've deleted the "by trained
10 laboratory personnel" from the forensic alcohol
11 definition -- analysis definition.

12 COMMITTEE MEMBER LOUGH: Yes. And is there a
13 question on that?

14 CHAIRPERSON KIMSEY: Well, I don't know, is it
15 picked up somewhere else that trained laboratory
16 personnel --

17 COMMITTEE MEMBER LOUGH: It is.

18 CHAIRPERSON KIMSEY: Okay.

19 COMMITTEE MEMBER LOUGH: Yes, it is. So here is
20 just the definition of what the analysis is and not who
21 performs it, but what it is.

22 So let's see. Okay, so we --

23 MR. FICKIES: The last 2 sentences.

24 COMMITTEE MEMBER LOUGH: If you'll look down on
25 the first sub-item. It discusses down there that for this

1 definition, it was restricted to the analysis itself. The
2 personnel are defined elsewhere.

3 As you'll recall, Paul and everyone, that the
4 current Title 17 is not in compliance with the APA. And
5 so we had to go through each item of Title 17 and justify
6 its existence. So a lot of what we're going to see here
7 is us saying it should say or it should be changed or it
8 should be deleted on all of the language.

9 CHAIRPERSON KIMSEY: Okay.

10 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
11 Comment from the public.

12 CHAIRPERSON KIMSEY: Any comments from the
13 public?

14 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
15 Just a note. At some point, this will have to be
16 cast in strikeout and underline notation. And actually --
17 and I realize that's probably a lot of work. Actually,
18 for the benefit of the Committee, it probably would be
19 advantageous to have that sooner rather than later. I
20 mean, in terms of seeing the changes, it's easier to see
21 with that standard notation.

22 COMMITTEE MEMBER LOUGH: Right. It's not in that
23 format at this time. I did do it myself when I reviewed
24 the document. So it might help us maybe as we're going
25 along.

1 MS. SHEN: We have that, don't we?

2 COMMITTEE MEMBER LOUGH: Well, but what has to be
3 is the existing language is written down and then what we
4 want to change it to is written down, but some of it is
5 just like a word or something. So what you have to do is
6 you have to do the stuff you want. Strike-through showing
7 what you want out and then I believe it's underlining the
8 new language that's in there.

9 That's fine. That's actually not too hard a fix
10 now that we have it. Once we decide on what that's going
11 to be, then we can go back and put it in that final
12 format.

13 DR. LEMOS: Another comment.

14 CHAIRPERSON KIMSEY: Another comment.

15 DR. LEMOS: Nikolas Lemos from the Medical
16 Examiner in San Francisco. For 1215.1 and all subsequent
17 sections, does the Committee have an opinion as to whether
18 we should continue -- you should continue using the term
19 "samples", which is a statistical term versus "specimens",
20 which is really more pertaining to toxicology, especially
21 as we are now needed to validate our methods for ASCLD or
22 ABFT using statistical terms of analysis?

23 CHAIRPERSON KIMSEY: Please try and identify
24 yourself before we speak. It's getting a little hard for
25 our stenographer.

1 DR. LEMOS: My comment had to do with the use of
2 the term "samples" versus "specimens" throughout this
3 document. "Samples" is an established statistical term.
4 "Specimens" pertains more to toxicology. When we have to
5 use samples and populations and other statistical tools to
6 validate our methods for ASCLD or ABFT, it may be
7 beneficial to replace the term "samples" with the term
8 "specimens" when you're dealing with biological tissues
9 and other specimens.

10 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

11 I'm thinking we're using the word samples,
12 because it could also be quality control samples. They
13 may not be biological specimens. So the word "sample"
14 seems to be kind of a more generic term and I think common
15 to most laboratories.

16 Is there anyone present from the Committee that
17 has any input on that?

18 MR. PHILLIPS: Patty, I would agree.

19 CHAIRPERSON KIMSEY: Who is that?

20 MR. PHILLIPS: This is Bill Phillips. Sorry.

21 CHAIRPERSON KIMSEY: That's okay.

22 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

23 We have another person who is attending the
24 meeting.

25 MR. BREYER: Chris Breyer, Los Angeles Police.

1 CHAIRPERSON KIMSEY: So the question of whether
2 using it -- the question is whether it was "samples" or
3 "specimens"?

4 I tend to agree with you, Patty, that, you know,
5 testing -- you know, when we talk about samples --
6 although in that case, you know, samples are usually, you
7 know, sort of surrogates for specimens, I mean, to do the
8 proficiency testing. I would defer to the people that are
9 in the field and more experienced with forensic alcohol
10 analysis.

11 MR. PHILLIPS: This is Bill Phillips. It
12 mentions in that same line the use of "breath". And I've
13 never heard of breath being associated with a specimen.
14 It does mention urine and tissue, but it mentions breath
15 as well. It just seems odd to say the word "breath
16 specimen".

17 DR. LEMOS: Nikolas Lemos. To continue on -- I
18 don't understand why breath is actually included in
19 1215.1(b), when there is a -- under forensic alcohol
20 analysis, when 1215.1(c) specifically talks about breath
21 alcohol analysis.

22 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.
23 We distinguished between the 2 because breath
24 alcohol testing is actually something that is performed,
25 can be performed by nonlaboratory personnel. So that has

1 been changed to the word "testing" throughout this. Could
2 you -- I'm sorry, I have forgotten your name and where you
3 are from and who you represent?

4 DR. LEMOS: Nikolas Lemos, from the San Francisco
5 Medical Examiner.

6 COMMITTEE MEMBER LOUGH: Thank you.

7 Breath alcohol testing probably is not something
8 that your laboratory is involved with, I take it. But we
9 are trying to distinguish between the functions strictly
10 performed by forensic alcohol laboratory personnel and
11 those functions that may be performed by non-scientific
12 personnel, which would be, for your purposes, a breath
13 test taken out in the field by an officer.

14 Does that make it more clear for you?

15 DR. LEMOS: It does. I want to -- I'm not sure
16 then that forensic alcohol analysis, the term in quotes,
17 does it include breath or do I have to now refer to a
18 different term called breath alcohol testing for breath?
19 Because based on the description --

20 COMMITTEE MEMBER LOUGH: Right.

21 DR. LEMOS: -- breath is included in both.

22 COMMITTEE MEMBER LOUGH: Right. Patty Lough
23 again, San Diego.

24 The distinction is there are a lot of accuracy
25 and precision tests, preparation of reagents and solutions

1 that are done by scientific personnel as part of the
2 Forensic Alcohol Analysis Program. That is different than
3 a person who operates the breath testing instrument on a
4 person who is being arrested for a DUI charge. They're
5 two completely different things. So one does involve the
6 requirement of scientific personnel and one does not. So
7 we are trying, in these definitions, to clarify those two,
8 which is different from what we're used to seeing perhaps
9 in Title 17, but we think it's really important to
10 distinguish between the two, especially throughout this
11 document.

12 DR. LEMOS: Nikolas Lemos once again.

13 May I propose then that in the new definition of
14 breath alcohol testing in 1215.1(c), the statement that it
15 pertains to non-scientific personnel or tests that are
16 performed in a non-scientific environment by
17 non-scientific personnel may be somehow included in that
18 language to distinguish between the two?

19 COMMITTEE MEMBER LOUGH: I believe that does come
20 later on in later definitions that is described later.

21 DR. LEMOS: Okay. Thank you.

22 COMMITTEE MEMBER LOUGH: Yes, sir. And as we go
23 through it, I think you'll see that it does. And after
24 we've completed our review, if you still have that issue,
25 please bring it up again, in case it's not clear. We want

1 to make sure that it is clear.

2 DR. LEMOS: Oh, I perfectly understand you. I
3 just wish that lawyers who don't have you there to explain
4 it, have the same ability when this is presented in court,
5 and an expert is challenged as to which one it is. Is it
6 1215.1(b) or 1215.1(c) that pertains to breath. And
7 that's a question that is posed.

8 Anyway, thank you very much for your input.

9 COMMITTEE MEMBER LOUGH: Thank you.

10 MR. FICKIES: Paul, we have two more participants
11 in Sacramento.

12 CHAIRPERSON KIMSEY: Okay. Please introduce
13 yourselves.

14 MS. ZABALA: Flerida Zabala from legal affairs
15 Department of Motor Vehicles here in Sacramento.

16 MR. TOMS: And Michael Toms from the Sacramento
17 County District Forensic Laboratories -- Laboratory of
18 Forensic Services.

19 CHAIRPERSON KIMSEY: Welcome.

20 MR. TOMS: Thank you.

21 Okay. Back to, I think we're on 1215.1(c).
22 Again, a little bit of semantics on words. You're talking
23 about will be changed to read "breath alcohol testing".
24 We would be going through the document and changing
25 "breath alcohol analysis" to "breath alcohol testing,

1 because there's a number of different places in the
2 document where we already talk about breath alcohol
3 analysis. So is the proposal to change that out to breath
4 alcohol --

5 COMMITTEE MEMBER LOUGH: That's correct. Yes.

6 CHAIRPERSON KIMSEY: And then again in the bullet
7 under 1215.1, we want to refer to California.

8 COMMITTEE MEMBER LOUGH: Okay, right.

9 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
10 Comment from the public.

11 CHAIRPERSON KIMSEY: Comments from the public?

12 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
13 Yeah. Clay Larson.

14 Under 1215.1(c), I'm not sure I under -- in the
15 first place, there are a number of references to -- word
16 changes in the regulations. We certainly can capture
17 those later.

18 But breath alcohol analysis is a very common term
19 of art. And I'm not sure -- and so is breath testing.
20 Actually, breath alcohol testing, we may just have created
21 a new term. I didn't understand the logic of why analysis
22 is somehow less appropriate here than in the analysis of a
23 blood sample. Obviously, with some possible overlap in
24 terms of personnel performing it, it is normally performed
25 by different people. But I don't understand the logic. I

1 think we have to provide a stronger case for the logic of
2 making this change.

3 COMMITTEE MEMBER LOUGH: Patty Lough.

4 You said it's a common term of art?

5 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

6 Breath alcohol analysis.

7 COMMITTEE MEMBER LOUGH: Well, I think -- I don't
8 recall if we discussed this in the Committee, because it's
9 been such a long process. But certainly in the
10 subcommittee, there were many issues that were discussed
11 regarding the personnel who can perform a breath alcohol
12 test, and that's why we distinguished between forensic
13 alcohol analysis and breath alcohol testing. You'll
14 recall the Committee went through a lot of discussion with
15 that. The attorneys especially had a lot of issues on
16 that, and whether or not we were directing law enforcement
17 to do something, which we did not want this document to
18 do. And it seemed that by just changing the title of
19 this, it very easily let us have the document reflect what
20 our intention is.

21 Did you want to suggest a different title to
22 distinguish those two topics, Clay?

23 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

24 I'm just not sure. There is a rich background
25 there apparently. I'm just not sure changing "analysis"

1 to "testing" captures all the thought that must have gone
2 through the minds of the subcommittee.

3 COMMITTEE MEMBER LOUGH: Well, I think it
4 specifically --

5 MR. FICKIES: If you look at the --
6 I'm sorry.

7 COMMITTEE MEMBER LOUGH: Go ahead.

8 MR. FICKIES: This is Terry Fickies.
9 Subcommittee meetings page 7.

10 Possible breath alcohol definition, about 1, 2,
11 3, 4th paragraph down on those notes.

12 I think Ron Moore brought that up.

13 COMMITTEE MEMBER LOUGH: Where are you reading,
14 Terry? What document?

15 MR. FICKIES: FARC Advisory Subcommittee meeting
16 7-16-08 page 7.

17 COMMITTEE MEMBER LOUGH: Okay.

18 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

19 Yeah, that logic is completely different than
20 what Ms. Lough was describing. And that goes back to a
21 Kathy Ruebusch comment that there is a fundamental problem
22 with including a word being defined as part of the
23 definition. And so she has suggested -- my note that we
24 don't get rid of the word "breath". So we haven't totally
25 avoided that.

1 I think you could solve that by saying "breath
2 alcohol analysis means that..." -- instead of saying
3 "breath alcohol analysis means the analysis of a sample",
4 you could say, "Breath alcohol analysis means the testing
5 of a sample." So making one change --

6 MS. ANDERSON-SEAQUIST: This is Janet
7 Anderson-Seaquist in San Diego. I'm a member of the
8 National Safety Council's Committee on Alcohol and Other
9 Drugs and a member of the Subcommittee on Alcohol
10 Pharmacology, Technology and Instrumentation. So we write
11 regulations and recommendations for the entire country not
12 just the State. And I would have to say the use of
13 "testing" is more consistent with the verbiage in other
14 states and across the country than "analysis" is. So I
15 would support this change.

16 I also reviewed this documentation last night and
17 found that the appropriate changes were made dealing with
18 verbiage throughout the whole document.

19 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

20 As we move along, I'll point out the instances
21 where you failed to do that.

22 COMMITTEE MEMBER LOUGH: Okay. Yeah, thanks,
23 Clay.

24 Anyone on the Committee, not the public at this
25 time, but on the Committee have any -- want to stay with

1 that or just move onto the next --

2 MR. PHILLIPS: A member of the public. This is
3 Bill Phillips.

4 The standard term for the instrument is PEBT. It
5 is alcohol testing device. So I don't see why this would
6 be inconsistent with what is generally used in the
7 scientific community as accepting passive ethanol alcohol
8 testing device, breath testing device.

9 CHAIRPERSON KIMSEY: Okay moving on.

10 Any comments on 1215.1(d), concentration?

11 1215.1(e)?

12 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

13 Comment from the public.

14 CHAIRPERSON KIMSEY: Any comments from the

15 public?

16 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

17 Actually, assuming there's no comments from the

18 Committee members regarding (e)?

19 CHAIRPERSON KIMSEY: Any committee comments

20 first, committee member comments?

21 COMMITTEE MEMBER LOUGH: No. On(e)? No.

22 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

23 Comment from the public. Clay Larson again.

24 We probably still -- and I think Nikolas Lemos

25 kind of pointed this out. There's probably a problem, and

1 the Program has suggested this from the very beginning,
2 with including breath samples as an analytical sample
3 analysis performed by the laboratory. It probably hardly
4 ever happens. The laboratory does have some important
5 roles in breath alcohol analysis, in terms of training of
6 operators, maintenance of instruments and periodic
7 determinations of accuracy of instruments.

8 But I don't know that that is captured -- it's
9 certainly captured in the regulations, but it's certainly
10 not captured in simply a statement that says that, "The
11 laboratory will analyze samples of breath." So we
12 describe an activity that probably never takes place, and
13 we don't capture activities that do take place and are
14 important and are required by the regulations.

15 COMMITTEE MEMBER LOUGH: Well, the regulations
16 are what we're looking at changing, because the
17 regulations are not in compliance right now. There are a
18 lot of issues with the regulations. Is there any comments
19 from a working forensic lab regarding (e) that they see
20 any difficulties with that?

21 DR. LEMOS: Can you define forensic lab, because
22 we all -- I work in a forensic lab and I do all the blood
23 for the County of San Francisco. Nikolas Lemos again. I
24 just don't think that you should put in the new
25 regulations an activity that doesn't happen. The forensic

1 alcohol laboratory, I wish where you can point one of them
2 where you people are driven to the forensic alcohol
3 laboratory for breath testing. I don't think that
4 happens.

5 COMMITTEE MEMBER LOUGH: San Bernardino county.

6 DR. LEMOS: Okay. Very good.

7 COMMITTEE MEMBER LOUGH: And also San Diego city.

8 Both of those organizations have had the criminalists
9 perform the breath testing to assist officers who have not
10 been trained on the instrument. And those are the only
11 two that I know of that I've worked for. So I can only
12 assume it probably occurs in other locations as well.

13 DR. LEMOS: So you're --

14 MR. BREYER: Member of the public, Chris Breyer.

15 CHAIRPERSON KIMSEY: Go ahead.

16 MR. BREYER: Chris Breyer, Los Angeles Police.

17 I have conducted breath tests in the field as a
18 criminalist, at LAPD and also at Huntington Beach at prior
19 employment. It does happen, although not often in those
20 jurisdictions.

21 DR. LEMOS: Nikolas Lemos again.

22 So from what I understand from the two comments
23 that I heard, it happens when there is a training issue
24 with officers in, I guess San Bernardino, if I'm not
25 mistaken, or San Diego, and then it may happen --

1 COMMITTEE MEMBER LOUGH: Not at --

2 DR. LEMOS: Sorry, I may have recalled the wrong
3 labs.

4 COMMITTEE MEMBER LOUGH: Not a training issue.

5 DR. LEMOS: Well, you mentioned that --

6 COMMITTEE MEMBER LOUGH: It's just based on
7 availability.

8 DR. LEMOS: Okay. I thought you mentioned that
9 it happened when the officers had not been trained and you
10 had criminalists do the analysis or assist in the
11 analysis. That's my recollection.

12 COMMITTEE MEMBER LOUGH: Right. A trained
13 operator was not available.

14 DR. LEMOS: So to me, that sounds like -- that
15 sounds like an out-of-the-ordinary situation rather than
16 the norm.

17 COMMITTEE MEMBER LOUGH: Well, we have to
18 consider all possible situations, which is why we came up
19 with this language.

20 MR. FICKIES: Terry Fickies here.

21 MR. BREYER: Chris Breyer.

22 CHAIRPERSON KIMSEY: Go ahead, Terry.

23 MR. FICKIES: Go for it, Chris.

24 CHAIRPERSON KIMSEY: Okay, Chris.

25 MR. BREYER: Sorry, Terry. The option of a

1 criminalist performing a breath test can be very
2 fundamental in the training of a new breath alcohol expert
3 for court purposes, explaining breath testing. It's
4 useful at field check points where evidential breath
5 testers are in use. And it has never been a training
6 issue at LAPD. There is always a surplus of trained
7 officers.

8 It is simply for the criminalist to the
9 inexperienced and to explain the breath test and support
10 the operation of a breath test in the court of law, in my
11 experience.

12 MR. FICKIES: Terry Fickies.

13 While that's true, I don't think when we do the
14 tests in the field, which I have done, I don't think I
15 would call that a forensic alcohol laboratory. Am I
16 missing something here?

17 DR. LEMOS: Nikolas Lemos.

18 May I suggest that instead of saying the
19 "Forensic Alcohol Laboratory means a place at which
20 specialized apparatus, instruments, and methods are
21 used...", you may want to consider replacing that "are"
22 with something less strong, "May be used", because of what
23 we just heard, happening in the field. Certainly, the
24 field is not an extension of the forensic alcohol
25 laboratory.

1 COMMITTEE MEMBER LOUGH: I think we're -- maybe
2 I'm incorrect, but I think what we're talking about is
3 actually what's happening in the laboratory is really
4 basically the science to maintaining and operating the
5 breath instruments, so that they're working properly,
6 versus the testing.

7 DR. LEMOS: So this section actually does not
8 address maintenance. It just addressed the use for
9 criminal proceedings, I understand.

10 SENIOR STAFF COUNSEL ENG: This is Goldie Eng. I
11 think that it's appropriate to keep "forensic alcohol
12 analysis" the same to include "breath", because that is
13 what the statute says. The statute says "breath". And a
14 forensic alcohol laboratory is supposed to have the
15 ability to analyze all of these different types of
16 samples. So if we take "breath" out, I think that would
17 raise a question why it's inconsistent with the statute.

18 COMMITTEE MEMBER LOUGH: So, Goldie, you're
19 saying that (e) should remain as it does with the breath
20 included, as well as (b)? (b) and (e) should remain the
21 same?

22 SENIOR STAFF COUNSEL ENG: Yeah, right. That's
23 my take on it.

24 COMMITTEE MEMBER LOUGH: I agree. I think that
25 the gentleman who has -- you know, or anyone who still has

1 an issue with that, so that we can continue on with our
2 discussion of the document, perhaps you can check with the
3 Committee member that represents your discipline and work
4 with them on that, so that we can go ahead and move ahead.
5 Because as you know, we're not voting on anything today,
6 we're just reviewing it.

7 And medical examiner's office then that would be
8 Dan Lyle represents the medical examiner coroners.
9 Unfortunately, he was not able to be with us.

10 DR. LEMOS: Let me just clarify that in the
11 County of San Francisco, the medical examiner's office
12 does all of the criminal DUI testing. And so although the
13 representative that you mentioned actually does have a
14 part in the work that my laboratory does, I think many
15 more members of this committee are also representative of
16 our work that we do in this county.

17 COMMITTEE MEMBER LOUGH: Then you also have
18 access to the CAT representative, the CAC representative,
19 and CACLD as well.

20 DR. LEMOS: Thank you for pointing that out.

21 CHAIRPERSON KIMSEY: Okay.

22 Moving on to 1215.1(f).

23 Just a quick comment. And this may be for the
24 Office of Regulations or the attorney, but the use of the
25 word "responsible" under forensic alcohol supervisor, is

1 that sufficient? I mean, do we have to talk about what
2 responsibility means or --

3 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
4 We've eliminated that.

5 COMMITTEE MEMBER LOUGH: Patty Lough. What we
6 need to do is distinguish between a forensic alcohol
7 supervisor and a person with a civil service job title of
8 supervisor, section supervisor. And we're trying to do
9 that in this section. It's kind of a misnomer to say
10 forensic alcohol supervisor is responsible for the whole
11 program. That's kind of left-over Department of Health
12 terminology, because it also says "...and for the
13 supervision of personnel." That sounds like it's a
14 section or unit supervisor, which includes writing
15 employee evaluations and that kind of stuff.

16 This is an attempt to distinguish between those
17 two roles. An FAS, the only reason we're keeping that
18 language in is because DMV has requested that. That's
19 what they're used to dealing with is those classifications
20 from Department of Health. They really don't have any
21 other role, other than to have the old language that
22 people are familiar with. So that's what we're trying to
23 do here is distinguish an FAS may not actually be a unit
24 supervisor.

25 And, Goldie, maybe you can tell us how we can

1 better word that.

2 SENIOR STAFF COUNSEL ENG: Well, the term
3 "responsible" is general. And I would read it to mean
4 that the supervisor is knowledgeable and has the
5 decision-making, you know, ability to direct the
6 activities of the people that he or she supervises.

7 COMMITTEE MEMBER LOUGH: That's exactly the
8 problem, Goldie. Let me back up, first.

9 On that word "responsible", we changed that to
10 perform. And that's because, in many laboratories, all of
11 the staff in the laboratory acquire the Forensic Alcohol
12 Supervisor classification. So we needed to document the
13 fact that that person can also be doing that task itself,
14 the analysis itself. But that is the problem, that the
15 Forensic Alcohol Supervisor classification makes it sound
16 like they are directing the activities of the unit and the
17 staff. That is not the case in the majority of
18 laboratories.

19 So we're trying to distinguish between keeping
20 this old language of "supervisor" trying to distinguish
21 that they're not really a supervisor. It's a higher
22 level. But we don't want to change the title, because DMV
23 is accustomed to those titles. And we do have a DMV rep
24 here today as well that can maybe enlighten us. But we
25 have been requested by DMV in the past to keep those 3

1 classifications that are the old left-over
2 classifications.

3 DR. LEMOS: Comment from the public.

4 SENIOR STAFF COUNSEL ENG: DMV, could you
5 enlighten us on why you need to keep this term in here?

6 MS. ZABALA: Well, I think the distinction
7 between an FAS and that one that has a supervision over
8 employees that's required to -- their evaluation and
9 everything. I think what we are concerned about is that
10 if a trainee, as we know, like criminalist trainees, are
11 not afforded the official duty of presumption. Therefore,
12 we have problems if that trainee is not supervised by
13 somebody higher, who has like an oversight of what exactly
14 he or she is doing in compliance with the Title 17
15 requirements.

16 So we would like to know that -- we would like to
17 see that if this trainee is not supervised by somebody who
18 doesn't have the knowledge about the forensic alcohol
19 analysis, then that would be a problem.

20 So we prefer that this trainee is supervised by
21 somebody who has a knowledge of the actual forensic
22 alcohol analysis versus somebody who has just a duty to
23 supervise as regards personnel, maybe like evaluation,
24 inspection - that we would like to focus more on the
25 review of the actual analysis itself. And that is often a

1 problem, if we have a trainee and certifying the report as
2 being in compliance with Title 17 requirements, which is
3 not really, shall we say, legally sufficient, because
4 it's -- he, the trainee, is not afforded the official duty
5 of presumption. And under case law Shea, I think S-h-e-a,
6 versus DMV, we have to prove -- it's our burden upon the
7 DMV, to prove that this trainee was supervised by a
8 forensic alcohol supervisor, who has the knowledge of the
9 actual analysis of the blood sample.

10 Did I get that across?

11 SENIOR STAFF COUNSEL ENG: Yes, I think I
12 understand.

13 MS. ZABALA: Not necessarily somebody who just
14 has supervision over all, in general, as far as personnel
15 duties.

16 SENIOR STAFF COUNSEL ENG: Would it make sense to
17 describe the situation where this forensic alcohol
18 supervisor is only required to be involved in the case of
19 a trainee?

20 CHAIRPERSON KIMSEY: This is Paul Kimsey in
21 Richmond, could --

22 SENIOR STAFF COUNSEL ENG: So that a trainee is
23 not just working, you know, independently and possibly
24 without sufficient training, because they're still -- you
25 know, that's still in process. Is that --

1 CHAIRPERSON KIMSEY: This is Paul Kimsey in
2 Richmond. Can we --

3 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

4 CHAIRPERSON KIMSEY: Could the person from DMV
5 please identify themselves?

6 MS. ZABALA: Flerida Zabala from Legal Affairs
7 DMV.

8 CHAIRPERSON KIMSEY: Thank you.

9 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

10 I think that brings up a good point. We're
11 trying to keep these old classifications from the old
12 Title 17. And correct me if I'm wrong, but a trainee in
13 an accredited lab is not going to be performing casework.
14 They have to be fully --

15 MR. FICKIES: Terry Fickies, somewhere.

16 Anyway, trainees do perform case work.

17 COMMITTEE MEMBER LOUGH: Okay.

18 MR. TOMS: Mike Toms from Sacramento County.

19 Yes, they do perform case work.

20 MR. FICKIES: But they are under supervision of

21 a --

22 MR. TOMS: Analyst or a trainee or a supervisor.

23 CHAIRPERSON KIMSEY: The gentleman from San Diego
24 could you identify yourself again, please.

25 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

1 No, it's Sacramento.

2 CHAIRPERSON KIMSEY: Oh, is it Sacramento?

3 A Tom somebody.

4 MR. TOMS: Michael Toms.

5 CHAIRPERSON KIMSEY: Michael Toms. Thank you.

6 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

7 Comment from the public.

8 COMMITTEE MEMBER LOUGH: We do include in here --

9 Patty Lough -- under the forensic alcohol analyst that
10 that analyst can also supervise a trainee, because that
11 does happen in situations.

12 MS. SHEN: This is Jennifer Shen from San Diego.
13 I think that we'd be best served to change the titles. I
14 mean, we can leave "trainee", so that it's very clear who
15 is actually training. But since the forensic alcohol
16 supervisor and the forensic alcohol analyst can
17 essentially do the same thing, one just has a bit more
18 experience, if we get rid of the supervisor designation,
19 we will lose this area of confusion. So as long as we are
20 able to come up with terms that satisfy the DMV, so that
21 they know a trainee is not performing unsupervised, then I
22 think we should change these titles. They've caused us
23 problems for years.

24 DR. LEMOS: Comment from the public.

25 CHAIRPERSON KIMSEY: Comments from the public in

1 Richmond.

2 DR. LEMOS: Nikolas Lemos from the San Francisco
3 area again.

4 Perhaps 1215.1(f) could be changed to read that,
5 "A forensic alcohol supervisor is somebody who is
6 knowledgeable in all areas or aspects of the performance
7 on forensic alcohol analysis and meets the
8 requirements...", as the Committee has stated, "...in
9 1216.1(e)(1) and (2).", which actually also talks about
10 interpretation. On page 12 a whole section of what is a
11 forensic alcohol supervisor.

12 Thank you.

13 COMMITTEE MEMBER LOUGH: Patty Lough.

14 Let's take a look at what we put in as the
15 requirements. Let's see what our different requirements
16 are for the supervisor and the analyst.

17 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

18 Before we go down that road. Clay Larson. I'd
19 like to make a comment.

20 I think we've -- stepping back a second. I think
21 we've widdled down the definition of a supervisor so much
22 that rather than changing the terminology, I think we
23 should simply eliminate the classification.

24 For instance, you've added a statement here that
25 the supervisor is a person who can perform all aspects of

1 forensic alcohol analysis. I would ask the rhetorical
2 question, is there some aspect of forensic alcohol
3 analysis that you envisioned that an analyst couldn't
4 perform?

5 You've also added a section that says supervise
6 personnel. You've already given the analyst the
7 authority -- or described the activity wherein an analyst
8 will supervise a trainee. So clearly, this doesn't
9 distinguish. There's nothing left to distinguish the
10 supervisor -- in terms of this section -- the supervisor
11 from the analyst.

12 We've also eliminated the requirement that a lab
13 has to have a supervisor. The labs can function perfectly
14 without ever having a supervisor. We've eliminated the
15 requirement that -- we're proposing to eliminate the
16 requirement -- again in both cases -- that a supervisor is
17 a category of personnel that has to take specific reaction
18 regarding quality assurance phases. That section was
19 changed. So we really have no reason left, at this point,
20 to have a supervisor classification.

21 There is a requirement that the supervisor have a
22 higher level of knowledge associated with years of
23 experience or specific training. But again, we have
24 eliminated the requirement that a lab employee is this
25 knowledgeable person. In fact, in the current form, the

1 regulations permit a lab to operate with an analyst, a
2 person who doesn't necessarily have any experience or any
3 knowledge.

4 Unfortunately, I think that's the way it works.

5 But I think the Committee, again, has widdled the
6 definition of supervisor down so much that it has become a
7 meaningless classification.

8 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

9 When we started the rewrite of this process, we
10 did eliminate the classifications and dealt only with the
11 analysts, the person who is going to be analyzing samples.
12 And it was the DMV request that we maintain those
13 classifications, which is why they are here.

14 Personally, I know of some laboratories that will
15 not allow their analysts to be forensic alcohol
16 supervisors, that classification, just because the lab
17 only will allow 1 or 2 people to do that.

18 But the analysts, who have no requirement on
19 gaining skills and knowledge in the interpretation of
20 alcohol, are, in fact, testifying to that on a routine
21 basis in court. So if we were to take out the term
22 "supervisor", and just had "analyst", if I pose that
23 question to the DMV. An analyst is a person fully
24 qualified in all areas, including the interpretation and
25 take out that 2-year requirement that is the only

1 distinguishing left-over requirement of that.

2 Then we have people who are analysts and we have
3 trainees.

4 MS. ZABALA: Can I say something?

5 I know that there's a distinction --

6 CHAIRPERSON KIMSEY: Please identify yourself.

7 MS. ZABALA: Flerida Zabala, DMV.

8 I just want to clarify that I really didn't know
9 that there was a distinction between a supervisor, who
10 really is not an analyst, who doesn't have the knowledge
11 about forensic alcohol analysis and yet still can testify
12 at the hearing.

13 What is required by case law is that this
14 supervisor has to have supervision over the trainee in the
15 actual analysis of the blood sample. That means, the work
16 product of this trainee has to be subject to the review of
17 this supervisor.

18 Unfortunately, we know now that this supervisor
19 could be just some civil service employee who doesn't have
20 the actual knowledge of forensic alcohol analysis,
21 correct?

22 MR. FICKIES: Oh, you mean. No, the forensic --
23 Terry Fickies, Sacramento.

24 There could be -- there are supervisors who are
25 in charge of forensic alcohol analyst trainees, who don't

1 know anything about the process.

2 MS. ZABALA: That's exactly what I'm saying.

3 MR. FICKIES: However, there always is a forensic
4 alcohol supervisor who does the --

5 MS. ZABALA: Right. But I think, as far as DMV
6 is concerned, I think that it is sufficient that we know
7 that this supervisor is actually involved in the analysis
8 of the blood sample. That this supervisor can testify at
9 the hearing to the supervision, to the actual review of
10 the work-product of this trainee. And that this
11 supervisor could also as well testify like an expert and
12 explain all the theories behind this analysis. So it is
13 not enough --

14 MS. SHEN: This is Jennifer Shen from the Police
15 Department in San Diego.

16 I think you're -- I think that we're not clear on
17 one thing, there are a lot of laboratories that have a
18 supervisor that runs the chemistry section and those
19 supervisors do not testify as experts in alcohol cases for
20 DMV or otherwise.

21 The forensic alcohol supervisor designation that
22 you're talking about only is applicable to trained and
23 qualified personnel. You are not going to get a
24 supervisor to come testify at a DMV hearing that isn't
25 qualified in alcohol. Those are very separate things,

1 which is why we have all this confusion.

2 MS. ZABALA: I'd like to clarify that. We don't
3 get a lot of those trainees that are not yet qualified.
4 But sometimes we have some forensic alcohol reports that
5 are -- the certification was certified by a criminalist
6 and that person turned out to be not qualified to perform
7 the analysis, as the list that came with that forensic
8 alcohol report shows that the trainee was not qualified or
9 maybe he or she has not graduated yet.

10 So in that scenario, under case law, we have to
11 prove that this person was supervised by a forensic
12 alcohol supervisor, forensic alcohol analyst, that that
13 person, that supervisor analyst, was actually involved in
14 the actual analysis of the blood sample.

15 MS. SHEN: This is Jennifer --

16 MS. ZABALA: That person can testify to the
17 actual analysis from the beginning till end of that
18 analysis.

19 MR. FICKIES: Terry Fickies --

20 MS. SHEN: This is Jennifer Shen again.

21 I'm sorry Terry one more thing.

22 You know, that shouldn't happen. And if that
23 does happen, you know, that's unfortunate. But I think
24 that all you really care about is that someone who is
25 qualified has looked at or has worked with the trainee.

1 You don't necessarily care that they're called a
2 supervisor. You just want to make sure that that person
3 is, in fact, qualified in alcohol analysis, is that
4 correct?

5 MS. ZABALA: The DMV we always expect -- our
6 hearing officers always expect the forensic alcohol report
7 to be certified by somebody that is qualified under Title
8 17 to perform the alcohol analysis. That the real
9 thing -- sometimes we have at least a couple cases that we
10 lost, because the attorney for the respondent, the
11 licensee driver, comes up with this document that shows
12 that this criminalist was in fact not qualified. He or
13 she has not graduated yet. So now, they have a problem.

14 To resolve that, they have to -- the hearing
15 officers have to subpoena the supervisor, whether there
16 will be a FAS or FAA. That's the only remedy that the
17 Department can do to challenge the list that this person
18 was not qualified somehow, yet he -- where he certified
19 that he was qualified.

20 So what I'm saying is it didn't happen a lot, but
21 we did see it sometimes. We have at least 1 or 2 cases
22 that we lost because a criminalist turned out to be a
23 trainee who hasn't graduated yet. And the list showed
24 she's not a trainee on the date of actual analysis.

25 MR. FICKIES: Terry Fickies.

1 A question. By having a forensic -- FAA or FAS
2 present, you don't have to be looking over the person's
3 shoulder through the entire analysis process, I believe

4 MS. ZABALA: Now case law -- Florida Zabala.
5 Case law says that this supervisor, whether FAA or FAS,
6 should be able to testify to the details of the actual
7 analysis itself. That the supervisor should be available
8 for consultation by this trainee performing the analysis.

9 So if you remove that requirement, then we lose
10 our case, because that's what the court in Shea versus DMV
11 was talking about. That the supervisor must always be
12 available in case the trainee has some questions about the
13 analysis

14 MR. FICKIES: Okay. And I think that is always
15 true. But that person may not be signing the report.

16 MS. ZABALA: That is a problem. In the scenario
17 where the trainee is not qualified to perform under Title
18 17 and the supervisor is the one signing the report, then
19 that person testifying at the hearing doesn't have
20 personal knowledge about the analysis performed by the
21 trainee who is not yet qualified. That is a problem for
22 the DMV.

23 MR. PHILLIPS: This is Bill Phillips.

24 In truth, the forensic alcohol trainee -- the
25 date of his identification as a forensic scientist -- or

1 forensic alcohol trainee is different than the date of the
2 report, then he's, in fact, not a trainee yet.

3 MS. ZABALA: Right.

4 MR. PHILLIPS: Then that is a different scenario
5 altogether.

6 MR. FICKIES: Well, no. But if the date
7 is -- the date he's a forensic alcohol trainee is prior to
8 the date he becomes a forensic analyst, then you're saying
9 that you have to have somebody available in the laboratory
10 who can testify of how the analysis works, is performed,
11 and is available for consultation. But that person may
12 not sign the report.

13 SENIOR STAFF COUNSEL ENG: Well, I think that if
14 this is a legal problem, this needs to be addressed in the
15 regulations to make it clear to the forensic alcohol
16 laboratories or whoever the people who are reading these
17 regulations, that this is how it should be done. Because
18 if it's not clear, then down the road, we're going to have
19 problems, you know, with DMV. And everything will -- all
20 that work will have been done for nothing.

21 So I think it's understandable that the
22 assumption is that the trainee is a trainee because he or
23 she needs training and they're not capable of doing this
24 by themselves. That person needs to be supervised. And
25 that supervisor really should be identified on the

1 document. And that supervisor needs to be involved in a
2 meaningful way in order for it to stand up in court.

3 So is that consistent with what you're saying?

4 MS. ZABALA: I agree -- Florida Zabala. I agree
5 with Goldie Eng, the supervisor in a case where the
6 trainee who performed the analysis was not qualified to
7 perform the analysis under Title 17, that supervisor has
8 to have had actual involvement in the analysis. So that
9 if that supervisor is subpoenaed to appear at the
10 hearing -- at the DMV hearing, that supervisor should have
11 a personal knowledge to testify about the work performance
12 of the trainee.

13 As you know, the witness is qualified to testify
14 only if that person has personal knowledge.

15 SENIOR STAFF COUNSEL ENG: That's right.

16 MS. ZABALA: So that if a person, FAS, FAA, who
17 doesn't have personal involvement, actual involvement, in
18 the actual analysis of the trainee, that FAA is not
19 qualified to testify at the hearing.

20 MS. SHEN: This is Jennifer Shen. Can we
21 please --

22 MR. FICKIES: Are you saying that you have to
23 stand over their shoulder and watch them?

24 MS. ZABALA: Well under case law, they don't
25 have -- the supervisor doesn't have to stand over their

1 shoulder to watch them all the time. Under case law,
2 they'd have to be available, at that certain moment that
3 the trainee is performing the analysis and that supervisor
4 is available for consultation at any time the trainee
5 needs him in the analysis.

6 MR. TOMS: Michael Toms from Sacramento County.

7 The way that we've handled it, is if we have a
8 forensic alcohol analyst trainee, whoever is the technical
9 reviewer of that work would have been the person available
10 for that person. If a person wasn't available, then they
11 wouldn't be doing the work.

12 So the way that we've handled it is whoever's
13 name is on there, is either the technical or
14 administrative reviewer, that would be the person that
15 would be capable for testifying in a DMV hearing.

16 CHAIRPERSON KIMSEY: I have a comment here in
17 Richmond

18 MS. ZABALA: First of all, I don't want to -- we
19 don't have a lot of those cases. A lot of our cases, I
20 would say over 90 percent, the person who performed the
21 analysis was qualified under Title 17. I would say
22 there's only 2 or 3 that I would find out that this
23 trainee was in fact not qualified yet. And if the hearing
24 officer somehow failed to subpoena the supervisor who
25 supervised that training, then we lose our case.

1 MS. SHEN: Jennifer from the police department
2 again.

3 I think we're going way far afield of discussing
4 just this definition of supervisor. And it concerns me
5 that you continue to say the word "supervisor" when you're
6 talking about the "trainee" being supervised. You know
7 the trainee is only supervised in that a person who is
8 qualified is available to them. And that is not -- that
9 is not necessarily the supervisor. So I think the fact
10 that this conversation we're having seems to be a
11 different issue than what should we call a person with 2
12 years of experience.

13 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.
14 The 2 years experience, that is language that
15 distinguished kind of the two classifications. I'd like
16 to go back to the proposal that we just have an analyst
17 and keep the definition the same as for supervisor, taking
18 away that 2 year limit -- the 2 year experience or the
19 extra classes. Analysts are qualified to perform this.
20 And then you have a trainee that needs to have someone
21 oversee their work but for purposes of DMV. DMV can issue
22 anything they want to a laboratory on how they would like
23 the report signed.

24 That has nothing to do with this document. So if
25 DMV says an analyst did the work, it must be countersigned

1 by someone who can certify that the trainee's work was
2 correct and done appropriate, that's one thing. That's a
3 DMV report that goes to DMV.

4 But for these purposes, we were keeping these
5 titles in for DMV. And I think it just is still
6 confusing. And we should simply have analysts and
7 trainees. And combine the supervisory requirements.

8 As Clay said, throughout this document, we're
9 giving both of them the same duties essentially. And
10 that's because that's what we're trying to do with
11 maintaining these old classifications. So I'd like to
12 propose to the Committee that we just have analysts and
13 trainees.

14 CHAIRPERSON KIMSEY: We have another public
15 comment in Richmond.

16 DR. LEMOS: Nikolas Lemos from the medical
17 examiner.

18 I had one comment. Now, I think I have 4.

19 (Laughter.)

20 DR. LEMOS: Sorry. Firstly, a forensic alcohol
21 analyst is somebody, based on the new definition of
22 1215.1(g), that performs methods of forensic alcohol
23 analysis and who can prove -- who can supervise forensic
24 alcohol analyst trainees. This does not really qualify
25 this person to testify on the effects the pharmacological

1 or other effects, that blood alcohol may -- how alcohol
2 may impair. Just because you can do the analysis, you
3 don't necessarily know what it means.

4 In San Francisco, we've worked now with the DMV
5 for about 25 years. And we have never had a problem,
6 because both of our reports are signed by the person who
7 performs the analysis and the supervisor of the data.
8 Forensic alcohol supervisor countersigns every report.
9 And our district attorney and public defender with the DMV
10 came up with a definition of supervision as meaning direct
11 or indirect supervision, as long as they're available for
12 consultation.

13 So removing the forensic alcohol supervisor and
14 not qualifying the analyst to the extent that they then
15 can actually go ahead and interpret, based on knowledge,
16 what it all means, may be a problem.

17 Thank you.

18 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

19 I appreciate that point. Coming from an agency
20 in my past where the analysts were not allowed to seek the
21 higher classification, those same analysts were doing the
22 interpretations in court. They had to, on their own, come
23 up with the research and training to be able to do that.
24 But that was a, and continues to be, part of their job
25 description as an analyst. So the reality is, these

1 titles -- you know, we're talking about how a sample is
2 analyzed. We are not, in this document anywhere,
3 addressing how a person interprets that data in court, to
4 determine if a person is or is not impaired for the
5 purposes of driving a vehicle.

6 So I think what we're trying to do is clean this
7 up as far as how does something get analyzed. That's what
8 we're talking about. We're not talking about the
9 interpretive part that goes in the court. You have to go
10 back and look at the fact that there is nothing required
11 in the current guidelines that has any requirements that
12 someone have the appropriate biology course work in
13 college, which would be essential, if you were going to
14 talk about the interpretation. It's based on a chemist
15 and a chemistry degree.

16 So I don't think this document is the appropriate
17 document to concern ourselves with the interpretive
18 aspects, even the State exam, when it comes to
19 interpretation as a single question that is outdated, but
20 it has a single question that does not even begin to
21 discuss the questions that are given in court.

22 So I think we need to limit that and limit our
23 scope to the analysis of a sample and not the
24 interpretation of whether someone is impaired.

25 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

1 Comment from the public.

2 CHAIRPERSON KIMSEY: Comment here in Richmond.

3 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

4 Clay Larson.

5 I agree with -- Patty and I agree on something.

6 I agree that we shouldn't eliminate the supervisor
7 classification. I thought I heard her say that we'd
8 somehow capture some of the qualifications and qualities
9 of the supervisor class in the analyst's class. I don't
10 think that would be appropriate. I don't think that you
11 would -- the assumption is with 2 year's experience,
12 you've gained some knowledge of the physiological action
13 that alcohol, the pharmacology and toxicology of alcohol,
14 the correlation of particular alcohol levels and behavior.
15 I think it would be totally inappropriate to simply anoint
16 the analysts with those qualifications.

17 So I think the assumption is that if the lab
18 doesn't absolutely need staff and since we don't require a
19 supervisor, it doesn't absolutely need staff, that
20 necessarily would have that experience and those
21 qualifications.

22 COMMITTEE MEMBER LOUGH: Clay, Patty Lough, San
23 Diego. Yeah, you're discussing the interpretation phase
24 of this work. And as you know because your lab -- your
25 facility has inspected many forensic alcohol laboratories,

1 San Bernardino county for instance, does not allow the
2 staff to get Forensic Alcohol Supervisor classification.
3 But everyone there who is an alcohol analyst is testifying
4 to the effects -- they are interpreting the results they
5 get from the testing and how that affects the person.

6 So we have a distinction here in this document,
7 that it is not realistic to assume that is what's
8 happening in the workplace. There are, on the other hand,
9 laboratories who have analysts that do not ever interpret.
10 They do leave that. So we're kind of caught between
11 different things. I think for this document, because we
12 have not really stressed the academic requirements to do
13 interpretive work, I think we should be eliminating the
14 supervisor title and having analysts. We're talking about
15 what does it take to analyze the sample.

16 Interpretive work has sort of slipped through the
17 system. It's been in the cracks through this system for
18 years. So as a member of the Committee, I recommend, at
19 this time, that we eliminate the supervisor classification
20 and have wherever it says supervisor, just combine that
21 with the analyst. And this 2 years of experience, that's
22 saying that you have 2 years experience, I don't think is
23 sufficient to say that, you know, how are you going to get
24 experience at interpreting. I think we need -- the
25 Committee at a later date can go back and review that 2

1 years experience to see if we need to include that.

2 If that is strictly based on interpretive
3 information, I don't think it's necessary to have in this
4 document at all.

5 DR. LEMOS: Comment from the public here.

6 Nikolas Lemos. Besides the 2 years of experience for
7 forensic alcohol supervisor, you need to pass an
8 examination as you pointed out. But there's also a
9 correlation study that happens. One is every 5 years it
10 seems or longer, where people actually observe people who
11 take known doses of alcohol and how they perform in tasks.
12 Simple tasks, similar to the ones in field sobriety tests.

13 I just don't see how an analyst can have that
14 training just by doing 2 years of bench work. They will
15 need to have additional training maybe continuing
16 education or something else to offer that testimony that
17 they have participated in a correlation study and they
18 have seen it. Just a thought for the Committee.

19 COMMITTEE MEMBER LOUGH: Patty Lough.

20 You're absolutely correct. And that's what I'm
21 trying to make clear, is that the analysts in many
22 counties and cities that are doing the work as analysts,
23 are getting the correlation studies. They are doing all
24 of these things, even though they don't have the
25 classification as supervisor. And they are interpreting

1 in court.

2 So we're working with labels that really don't
3 demonstrate what many of those labs do. And I don't think
4 we should be addressing the interpretation in this
5 document. I think that -- the interpretive aspect of what
6 happens with these, I think probably should be taken out
7 of this document. It's like a toxicologist. A
8 toxicologist it's one thing to analyze drugs in a sample.
9 It's another thing to go to work -- go to court and say
10 how those drugs at that level affect that individual.
11 That's a whole different ball game, and perhaps then
12 requires a whole different set of skills and training.

13 So I'm proposing we leave this as analysis,
14 because that's what we're talking about, the
15 interpretation really is not part of this document. And
16 that should be addressed in the court room, if a person
17 wants to give an opinion as to whether someone is impaired
18 or not.

19 CHAIRPERSON KIMSEY: This is Paul. In the
20 interest of moving things along, there's been a
21 suggestion -- and we're not voting today obviously. But
22 there's been a suggestion to remove the forensic alcohol
23 supervisor category completely. And is there anyone that
24 wants to point out why we should not do that?

25 MR. FICKIES: Comment from the public. Terry

1 Fickies.

2 Are we going -- where will the qualification for
3 the forensic alcohol analyst be set? Will it be set
4 equivalent to the FAS or will they be dumbed down to the
5 FAA?

6 CHAIRPERSON KIMSEY: Sounds like it's going to be
7 dumbed down.

8 MR. FICKIES: I don't like that.

9 CHAIRPERSON KIMSEY: Patty, what do you think?

10 COMMITTEE MEMBER LOUGH: Terry, Patty Lough.

11 Because you represent a large string of
12 laboratories, do you have analysts that do not interpret,
13 that just analyze samples?

14 MR. FICKIES: I can't answer specific -- Terry
15 Fickies. I can't answer specifically. However, most
16 people do interpret. The majority of them do interpret,
17 because you don't want 2 criminalists to go to court for
18 each case.

19 MS. SHEN: This is Jennifer from the San Diego
20 Police Department again.

21 I have 6 analysts, most of them are forensic
22 alcohol supervisors, 2 of them are forensic alcohol
23 analysts. And our training program includes correlation
24 studies, drive alongs. All the work that needs to be done
25 to get yourself ready to interpret in court. It's part of

1 our process to get someone trained as a forensic chemist
2 in our laboratory. So I don't believe that -- there's a
3 lot of things that need to be done to get someone ready to
4 do interpretation in court. And this document doesn't
5 even scratch the surface of covering that. And yet we're
6 trying to force that into our definitions.

7 So I would say that we should concentrate on the
8 forensic alcohol analysts. What do we need to do to make
9 sure this person can absolutely analyze these things
10 correctly and leave the interpretation and how someone
11 gets qualified to do that to the laboratories and to the
12 courts to determine.

13 MR. BREYER: Chris Breyer in San Diego. Public
14 comment, as well.

15 The standards of analysis are much easier to
16 maintain and monitor versus the standards of
17 interpretation in court. Try to go even near at what
18 level you would conclude everybody's under the influence
19 of alcohol, I think it's wise to stay away from the
20 interpretation if possible in this document.

21 COMMITTEE MEMBER LOUGH: That's a very good
22 point. Patty Lough.

23 MR. FICKIES: Comment. Terry Fickies.

24 A question to DMV. Would you accept somebody to
25 testify for a forensic alcohol trainee, who didn't -- who

1 wasn't able to be -- who wasn't able to interpret in
2 court?

3 MS. ZABALA: Florida Zabala, DMV.

4 That's exactly the scenario that I've been
5 telling you, that in that scenario that Terry Fickies just
6 said, we are certainly going to lose that case, but
7 because the substance of case law that is -- that is
8 binding on us, is that it doesn't really have to be a
9 supervisor, who is a section supervisor, who -- the
10 important thing is that this supervisor has knowledge and
11 can interpret the analysis from beginning till end.

12 So as I see here the definition of forensic
13 alcohol analyst, actually provides it. Somebody who can
14 supervise forensic alcohol analyst trainees. So to the
15 recommendation of removing the classification of forensic
16 alcohol supervisor, I don't think that will hurt the DMV,
17 because as I just heard it earlier, there are forensic
18 alcohol supervisors who in fact are just section
19 supervisors and do not interpret and do not have actual
20 involvement in the analysis, right?

21 MR. FICKIES: No. No. There is a section
22 supervisor, who may or may not be qualified in forensic
23 alcohol analysis. And then there's a title, which people
24 have, which is a forensic alcohol supervisor, who can do
25 anything.

1 MS. ZABALA: Flerida Zabala.

2 I think it's the substance. As long as this
3 trainee, who is not qualified, is supervised somebody,
4 hopefully an analyst, who is qualified under Title 17 to
5 perform the analysis, and has actual involvement and
6 direct supervision, and has personal knowledge of every
7 detail of that actual analysis being performed by the
8 trainee, I think that we are going to be in compliance
9 with Title 17. Should we have that scenario, that as I
10 said earlier, we don't have that a lot.

11 Most of our cases, 90 percent above we have the
12 breath or blood analysis, specially performed by somebody
13 qualified. But should we have that scenario where the
14 trainee is not qualified, we have to be -- the lab should
15 be able to be ready in sending somebody who could testify
16 that he was either a supervisor or an analyst, who
17 actually supervised that trainee and has personal
18 knowledge about the actual performance of that trainee in
19 the analysis of the blood sample.

20 If the labs send somebody who has a title of
21 forensic alcohol supervisor and was not actually involved
22 in the analysis, then I think that will be a legal problem
23 for our hearing officers.

24 MR. FICKIES: A forensic alcohol supervisor who
25 is available for consultation is involved in it?

1 MS. ZABALA: The person has to be qualified and
2 hopefully an analyst. But that person under case law, as
3 I said earlier, that person should really have actual
4 involvement. Doesn't have to be actually involved from
5 beginning to end, but that person must be right there at
6 the lab, that day and must be available for consultation
7 should the trainee have questions about the analysis.

8 So if you have a technical reviewer signing off
9 on the FAR and that technical reviewer did not actually
10 participate or was absent that day that the trainee --

11 MR. FICKIES: Cell phone.

12 MS. ZABALA: Well, we don't know, but -- that's a
13 very rare thing.

14 MS. SHEN: This is Jennifer from the police
15 department. I think the problem is --

16 MS. ZABALA: Three factors. I would say
17 knowledgeable about the forensic alcohol analysis so he
18 can testify to the theories of forensic alcohol analysis.
19 Number 2, actual participation. It doesn't have to be
20 from beginning till end, but that person must be there at
21 the lab or shall we say available in cell phone for
22 consultation should the trainee have questions about the
23 analysis. Because as we said in court, the witness
24 qualification is only -- the witness is only competent to
25 testify of that witness's personal knowledge. So if you

1 have a technical reviewer who was absent at the time of
2 the analysis, how could he then testify in court if he
3 doesn't have personal knowledge?

4 COMMITTEE MEMBER LOUGH: This is Patty Lough.

5 SENIOR STAFF COUNSEL ENG: This is Goldie Eng. I
6 have a question for Ms. Zabala about -- I'm not clear on
7 the distinction between the technical performance. The
8 definition that we're talking about for forensic alcohol
9 analysis is a person who performs the technical
10 procedures. But we've also been talking about
11 interpretation, is a person who is qualified to perform
12 the procedures, the same -- you know, does that person
13 also have the ability to interpret and does that need to
14 be folded in or not? Because I hear that there's -- what
15 I'm hearing is that there is some, you know, disagreement
16 about this. That there's -- that these regs should not
17 include interpretation and what I'm hearing from DMV is
18 that that -- the analyst should be qualified to interpret.

19 And I guess the question is well, does the
20 analyst have to be qualified to interpret, or is that
21 interpretation aspect of it something that DMV needs to
22 acquire from a different witness?

23 MS. ZABALA: Florida Zabala, DMV.

24 I thought it is implied that once you have
25 attained a classification of a forensic alcohol analyst or

1 supervisor, that you should be able to interpret the
2 analysis that you have just performed?

3 MR. FICKIES: No.

4 MS. ZABALA: Could somebody clarify that for me.

5 MR. TOMS: Michael Toms from Sacramento County.

6 It seems like there's -- needs to be a
7 distinction made between interpret. I think she's
8 referring to interpret the analysis. You're referring to
9 interpret the effects of the drug or the alcohol. So
10 she's saying that someone has to be able to come and say,
11 this is my analysis and this is not -- they don't
12 have -- they just have the per se burden. They don't have
13 impairment burden. They don't have to say that this
14 person was impaired and here's the field sobriety test.
15 They just need to say the person was over an .08. Was the
16 interpretation of your result that's .08 percent, could it
17 be lower, could it be higher than a .08, in the realm of
18 accuracy, precision and that sort of thing?

19 So they don't need someone who can speak directly
20 to impairment, but they need someone who can speak to the
21 testing and what that means.

22 MS. ZABALA: Florida Zabala, DMV.

23 I agree with what this gentleman just said. The
24 DMV hearings we don't go -- our hearing officers don't go
25 that far. As long as they can -- the actual supervisor or

1 analyst can testify to the actual analysis and I think
2 that's sufficient. They don't have to testify about the
3 facts of alcohol on the person or the correlation or that
4 stuff.

5 That is something that's being done by an expert,
6 a forensic alcohol toxicologist, oftentimes. But it's
7 enough that that analyst supervisor is able to interpret
8 the actual analysis itself. How he came up with that
9 conclusion, and how is it performed. Was it performed in
10 compliance with Title 17? Did he actually supervise the
11 trainee? Was he available for consultation at that time?
12 I think that's all that we need for our DMV cases.

13 CHAIRPERSON KIMSEY: This is Paul --

14 MR. BREYER: Chris Breyer, San Diego.

15 Pardon me, I have a Los Angeles experience that
16 does require some interpretation, but it's a minimal
17 interpretation. It's the 3-hour requirement for a
18 chemical test. Perhaps half of our hearings involve a
19 test that was 3 hours or more after the time of driving.
20 And there is no more .08 presumption. And so then we're
21 given a breath test result, which is often above a .08,
22 yet we're asked our opinion on what the person's level
23 would have been at some time 3 plus hours prior.

24 Now, granted, this is minimal interpretation, and
25 involves retrograde analysis skills that I learned in part

1 in 9th grade trigonometry or in 10th grade. But still
2 there is something beyond analytical that is required in
3 the Los Angeles area. I don't know what other's
4 experiences are.

5 MR. TOMS: Michael Toms from Sacramento County.

6 That's separate though from the analysis itself.
7 A person can still analyze a sample and give the results
8 and then if those issues come up secondly, then the DMV
9 can request another person from the crime laboratory who
10 would be skilled in that area. And that's what's happened
11 in -- at Sacramento county. Basically, I handle all of
12 those or another qualified analyst will handle them if the
13 person whose -- who did the analysis wasn't qualified to
14 speak to that.

15 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

16 I think the comments from our DMV rep have been
17 helpful to me, because I think we've been throwing these
18 terms around and we're all not really clear of what these
19 terms mean. So I think, based on what I've heard, I still
20 am -- I can't make a motion because we don't have a
21 quorum, but I'm still recommending that we remove the
22 Forensic Alcohol Supervisor classification. We only have
23 a forensic alcohol analyst, and we keep our forensic
24 alcohol analyst trainee.

25 I believe that we can put our requirements of the

1 supervisor to be those -- the same ones then that would be
2 required of the analyst. And the difference would be
3 the -- as we go further in the document, where we talk
4 about what is required for the training and knowledge of
5 that person, the 2 year requirement I think can be
6 eliminated. And we say in here that they have to
7 satisfactorily complete a training program at the
8 laboratory where they are employed. In those labs that do
9 not provide interpretation as far as the impairment, that
10 laboratory can decide if they wish not to include those
11 things in there and testing of the analyst on those. The
12 laboratories that will expect the person to testify to
13 impairment issues would beef up their training program and
14 include those things.

15 So I go back to, at least for the purposes of
16 this meeting, let's get rid of that supervisor category
17 that I think was misunderstood and just go back to
18 analysis, and each laboratory would determine the training
19 that's necessary of their person when they're testifying
20 in court.

21 CHAIRPERSON KIMSEY: This is Paul in Richmond.
22 Comments on Patty's proposal?

23 Any disagreements?

24 MR. FICKIES: Terry Fickies, Sacramento.

25 If you're going to just call a person a forensic

1 alcohol analyst, I don't know if DMV is really going to
2 have any feeling over what the qualifications of that
3 person are going to be. It could be no 2-year degree.

4 COMMITTEE MEMBER LOUGH: Terry, we address that,
5 because we have enhanced the qualifications in this
6 document that we're looking at now. Before, the analyst
7 was not required to have a college degree. We have
8 enhanced those, so there really is no difference. It's
9 just on the interpretation part that we really have a
10 difference.

11 So we're requiring it, which is a big upgrade.
12 We are requiring that every analyst here have the
13 appropriate college degree.

14 MR. FICKIES: Okay.

15 DR. LEMOS: Comment from the public here.

16 CHAIRPERSON KIMSEY: Comment from the public in
17 Richmond.

18 DR. LEMOS: Nikolas Lemos from San Francisco
19 again.

20 Has there been any thought as to how -- what will
21 be the impact or how will the forensic alcohol
22 supervisors, that are already certified, will be handled.
23 Will they be allowed to continue using this title or will
24 it be downgraded to the eyes of some private attorneys to
25 forensic alcohol analysts? Any thoughts?

1 COMMITTEE MEMBER LOUGH: Patty Lough.

2 I believe when they -- whenever we get to that
3 point where this Title 17 is rewritten, and has gone
4 through the entire process, by that time this will be the
5 document that they will be required to refer to. And it
6 will show the enhanced academic requirements at the time
7 of the analyst and the person who was a supervisor before.
8 I believe there is something in there that says those
9 people are automatically kind of grandfathered in here.
10 They have prior classifications. There is some
11 language -- we probably haven't got to it yet, that
12 grandfathers in people who have held prior classifications
13 with the Department of Health.

14 CHAIRPERSON KIMSEY: Okay, this is Paul again.
15 Can we move on to 1215.1(i), method.

16 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
17 We're probably on (h).

18 CHAIRPERSON KIMSEY: Did I miss one?

19 We figure we've done (f), (g) and (h) and we can
20 move on to (i)? Or is there any comments more on (g) and
21 (h), which is forensic alcohol analyst and forensic
22 alcohol analyst trainee?

23 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

24 I think we're at a point where we can propose a
25 rewrite to those classifications for a future meeting, and

1 we can go on with our review of Title 17 at this point.

2 CHAIRPERSON KIMSEY: Any comments on 1215.1(i),
3 method definition?

4 1215.1 --

5 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

6 Actually, I have --

7 CHAIRPERSON KIMSEY: Comment here in Richmond.

8 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

9 Comment from the public. Regarding -- I
10 actually -- the proposed redraft here now will read that
11 method means the procedure. I actually saw nothing wrong
12 with the previous language that said method means the
13 steps. Since they are -- typically, a written method
14 description is a series of steps.

15 But more importantly, I think it calls -- it
16 shows the necessity that traditionally we refer to
17 forensic alcohol method and breath alcohol analysis
18 procedures or breath testing procedures or breath alcohol
19 testing procedures, whatever the latest term du jour is.
20 I think the fact that we're now referring to a method as a
21 procedure -- and I think Nikolas Lemos brought this up --
22 I think, at some point, we need to probably define breath
23 alcohol analysis procedures as the steps or the procedures
24 employed by personnel, maybe law enforcement personnel
25 apparently could also be -- not laboratory personnel,

1 but -- as defined here, since a method is limited to
2 forensic alcohol analysts, supervisors or trainees -- and
3 we'll get rid of the supervisors probably -- it clearly
4 generally doesn't refer to breath alcohol analysis, breath
5 testing procedures. I think at some point we need to
6 capture a definition so we can refer to those procedures.

7 CHAIRPERSON KIMSEY: I mean, what was the intent?

8 COMMITTEE MEMBER LOUGH: Patty Lough.

9 So you're only questioning whether it should say
10 procedures or steps, is that what you're saying? Because
11 I think if that's it, we can just maybe circle this and
12 come back to that later.

13 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

14 And the recommendation that we defined a series
15 of steps to -- we have a term that describes the -- a
16 written document actually, steps used to analyze samples
17 by analysts of supervisors and trainees. I think -- this
18 points out the need to have a description of the procedure
19 used by typically law enforcement personnel, to --

20 COMMITTEE MEMBER LOUGH: Well, that's the whole
21 point. Clay, that's the whole reason why we put the -- we
22 specified that classification of people. It does not
23 include law enforcement, so that we can distinguish
24 between those doing the functions required of the educated
25 trained laboratory personnel, versus those things that are

1 done by a law enforcement officer, so that's -- and that's
2 why we tried to keep that language and verbiage throughout
3 the definitions. We are trying to distinguish those 2
4 things as being very different things. So here the method
5 is the procedures by the scientific personnel.

6 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

7 My only point is that we actually have no term
8 that describes the procedures by non-scientific personnel.

9 COMMITTEE MEMBER LOUGH: That comes up later,
10 when we talk about breath testing.

11 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

12 I'm saying, under the definition section, we have
13 no term that describes the procedures performed by
14 non-scientific personnel.

15 COMMITTEE MEMBER LOUGH: All right. Well, let's
16 look for that. I think this is fine as it stands here.
17 And I think we should look as we go through the document
18 for that. If you want to make yourself a note when we get
19 to talking about breath testing to see where we put that.

20 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

21 Well, I would submit we put it under the
22 definitions section, which we're discussing now.

23 CHAIRPERSON KIMSEY: So what would you propose to
24 put in, a definition of breath alcohol?

25 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

1 Breath alcohol analysis procedures or procedures
2 employed by -- but it could be law -- I think, one of the
3 good things about trying to define this is it will -- you
4 have to get your hands around different types of personnel
5 that may do this testing, but it would be something, in
6 effect, that procedures employed by some qualified person
7 to determine the concentration of alcohol in a breath
8 sample.

9 COMMITTEE MEMBER LOUGH: Patty Lough.

10 The thing that we're changing here is we're
11 taking out the word "steps" and putting in something
12 that's a little more meaningful. We're putting in the
13 word "procedures". So that's why it says "procedures" and
14 not "steps". "Steps" is not a very good word in there.
15 And where it said "by trained persons", in this case, we
16 are talking about "methods", and we specifically mean
17 academically trained people.

18 Later on we talk about breath alcohol testing.
19 And later we define who is authorized to do that. It does
20 not need to be part of the definitions. It is defined in
21 the document.

22 DR. LEMOS: Public comment from Nikolas Lemos
23 here. If that argument was to stand, then why did we
24 spend an hour talking about forensic alcohol supervisor in
25 the definitions, when it's actually defined in the actual

1 document? I have to agree with Mr. Larson that a
2 definition, just a 2-sentence or 2-lined definition in
3 this definition section of the document will be useful and
4 will make the difference immediately obvious to everybody.

5 CHAIRPERSON KIMSEY: Well, why don't we have
6 Nikolas and -- let's see -- Lemos and Clay Larson work on
7 a definition maybe for our next meeting that might resolve
8 this and we can consider it.

9 MS. SHEN: This is Jennifer from the San Diego
10 Police Department. What exactly are we defining? I was
11 unclear as to what word we are now going to be defining.

12 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
13 A word that -- well, a series of words that is
14 the equivalent of forensic alcohol method on the breath
15 side. We use the word forensic alcohol method, because --

16 MS. SHEN: So you want to differentiate between
17 method for blood and alcohol -- blood and urine and method
18 for breath? You want to differentiate those?

19 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
20 Yes, but we probably wouldn't use the word -- the
21 fact that you use the term "method" for "breath" suggests
22 some confusion. So I think we may not want to use the
23 word method.

24 MS. SHEN: You know, I'm just trying to get --
25 I'm trying to be clear what you're saying. I'm confused

1 as to what it is you're trying to define. So if you would
2 just be very clear what you want to define, that would be
3 helpful, so I can write that down.

4 MS. ANDERSON-SEAQUIST: I thought it was
5 covered -- this is Janet in San Diego -- down in the
6 definition for breath alcohol testing. And I think that
7 the procedure verbiage here makes the distinction between
8 breath alcohol testing and the analysis done by an
9 analyst.

10 COMMITTEE MEMBER LOUGH: Patty Lough.

11 Also, just keep in mind -- if everyone could just
12 keep in mind that the definition is just supposed to help
13 us if something is not specified or clear in the document.
14 So if we have addressed this somewhere else in the
15 document, it doesn't have to be in the definitions. And
16 I'm not sure. I think the definitions are not really part
17 of the APA, they're just to help the reader.

18 I think there was some -- Goldie, you can
19 probably tell me if that's correct. The definitions are
20 their just to make sure we do have a definition if
21 something is not clear, but it's not -- we're not even
22 really -- as long as we're in definitions, we're not
23 really into the document yet.

24 DR. LEMOS: Nikolas Lemos in San Francisco.

25 SENIOR STAFF COUNSEL ENG: This is Goldie Eng. I

1 can answer that.

2 CHAIRPERSON KIMSEY: Go ahead, Goldie.

3 SENIOR STAFF COUNSEL ENG: I can answer that
4 questions.

5 A definition is a regulation just like the rest
6 of the regulations. And as a regulation, they are
7 covered -- the definitions are covered by APA. But it's
8 more of a -- the definitions do not create a substantive
9 requirement. So, for example, the definition of forensic
10 alcohol laboratory doesn't require anybody to do anything.
11 It's the regulation that references that forensic
12 laboratories need to do A, B, and C. That's where the
13 action is required.

14 But they're all regulations. And I think the
15 definitions are just helpful, where instead of having to
16 define a term over and over again in each reg, you'll have
17 a definition at the beginning of the document that will
18 clarify, you know, that term.

19 CHAIRPERSON KIMSEY: Go ahead.

20 DR. LEMOS: May I just say, isn't it important to
21 define breath testing performed by non-scientists in a
22 non-scientific environment versus breath alcohol analysis
23 done in a lab by laboratorians.

24 COMMITTEE MEMBER LOUGH: Patty Lough. We did
25 distinguish that, when you go into the breath testing

1 section. It's very clear who can perform that task. And
2 it defines there what the responsibilities are. It is not
3 in the definition. It is actually in the document itself.

4 DR. LEMOS: I absolutely agree with that. I just
5 wonder whether or not it would be significant to actually
6 update the definitions to reflect that distinction that
7 you so well defined later in that later section.

8 COMMITTEE MEMBER LOUGH: Patty Lough.

9 The definition does distinguish between breath
10 alcohol testing, on page 2, from forensic alcohol
11 analysis, on page 1. That was an attempt there to show
12 that there are 2 different things. There is no definition
13 about law enforcement officers performing tests, because
14 we cannot write regulations to regulate law enforcement
15 officers. So we don't have them listed here specifically.

16 You know, whoever an agency decides can perform
17 the testing, that's really up to the agencies and how they
18 train those people and use them in their program, which is
19 later defined that minimal standards or acceptable
20 standards are defined in the document later.

21 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

22 Comment from the public.

23 Clay Larson.

24 Just let me see if I can demonstrate for you the
25 conundrum that the current definition produces. "A method

1 is defined as a series of steps or procedures used by a
2 forensic alcohol analyst, a supervisor or a trainee to
3 analyze alcohol concentration in a sample or specimen."

4 So when that occasional forensic alcohol analyst
5 analyzes a breath sample, is he using a method? And if he
6 is and we get to the subsequent definitions of the
7 performance and procedures standards for methods,
8 including the use of a QC sample, secondary standard, et
9 cetera, et cetera, in analyzing a breath sample, on a rare
10 occasion when a laboratory person analyzes a breath
11 sample, must he follow all the standards and procedures
12 that are applied to forensic alcohol methods?

13 CHAIRPERSON KIMSEY: We can think about this over
14 lunch.

15 COMMITTEE MEMBER LOUGH: Yeah.

16 CHAIRPERSON KIMSEY: It is getting close to noon.
17 We have allotted an hour. I would recommend that we try
18 and come back in 30 minutes, unless there's an objection.
19 And is 30 minutes sufficient or --

20 COMMITTEE MEMBER LOUGH: San Diego has no nearby
21 facility.

22 CHAIRPERSON KIMSEY: Okay, that's fine.

23 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
24 Paul doesn't eat at all.

25 (Laughter.)

1 CHAIRPERSON KIMSEY: Well, let's stick to an hour
2 then. We can consider these method definitions over lunch
3 and we'll be back at 1 o'clock.

4 COMMITTEE MEMBER LOUGH: Consider over lunch?
5 Committee members cannot discuss it.

6 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
7 You don't have a quorum.

8 CHAIRPERSON KIMSEY: We don't have a quorum.

9 SENIOR STAFF COUNSEL ENG: I think, as practice,
10 it's a good idea to avoid discussing business. And let's
11 try to keep the discussion within the agenda and the
12 Committee. Well, actually this is not a meeting, so I
13 just thought that --

14 CHAIRPERSON KIMSEY: Yeah, but when -- this is
15 Paul, when you have --

16 COMMITTEE MEMBER LOUGH: But even without a
17 quorum --

18 CHAIRPERSON KIMSEY: Correct.

19 COMMITTEE MEMBER LOUGH: Even without a quorum,
20 you can't have more than 2 people on a committee discuss
21 something outside a committee.

22 CHAIRPERSON KIMSEY: That's correct. And I stand
23 corrected.

24 COMMITTEE MEMBER LOUGH: But I've been told that
25 Paul is not going to join us for lunch, so there is -- we

1 only have 2 committee members, so it doesn't matter here.

2 CHAIRPERSON KIMSEY: Okay. Well, we'll see
3 everyone back here at 1 o'clock.

4 (Thereupon a lunch break was taken.)

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1 someway of actually writing these regulations. I suspect
2 you're going to need to -- the term, as used in the
3 regulations, "instrument or device" are again terms of
4 art. Instrument doesn't mean a trumpet. And the APA
5 requirement is that the regulated public, which apparently
6 can include the defendant, needs to understand these
7 regulations. And I don't think it's a big deal. I think
8 you need to -- I don't think it's appropriate to delete
9 the definition of instrument or device. There's 20 some
10 odd references to instrument in the method. So I think we
11 should maybe tweak it a bit but retain the definition of
12 instrument or device.

13 MS. SHEN: This is Jennifer from San Diego. I
14 would disagree with that. I think instrument and device
15 both of those are very common verbiage. And I don't know
16 that they need to be defined.

17 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

18 And I would say in response, they have a very
19 specific meaning in these regulations. It's not
20 necessarily captured by all the common meanings,
21 especially the word "instrument".

22 MS. SHEN: And I would say to that, that within
23 the context of use within the document, the meaning is
24 quite clear.

25 CHAIRPERSON KIMSEY: Are you proposing something

1 different than instrument or device?

2 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

3 Well, what the proposal here, just so that we're
4 all clear, is to eliminate language that's in the current
5 regulations.

6 CHAIRPERSON KIMSEY: Correct.

7 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

8 So I'm proposing basically that we not eliminate
9 it. Basically, we retain the definitions. It wasn't a
10 mistake to include them in the first place.

11 CHAIRPERSON KIMSEY: And we're just saying --

12 COMMITTEE MEMBER LOUGH: Patty Lough. I don't
13 think it -- it's not a mistake, but I think those are
14 common terms and they do need a definition. So as a
15 committee member, I think it's fine to delete it.

16 CHAIRPERSON KIMSEY: And again, this may become a
17 technical issue on whether or not we need it as a
18 definition.

19 1215.1(k), license?

20 Since we don't license anything -- since the
21 Department doesn't license anymore, based on the
22 legislation, I think this obviously needs to be repealed.

23 1215.1(1), sample or specimen?

24 Any comments?

25 Any comments on 1215.1(m)?

1 1215.1(n)?

2 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

3 Comment from the public.

4 CHAIRPERSON KIMSEY: Comment from Richmond.

5 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

6 Yeah, regarding 1215.1(n), I was surprised to see
7 this actually. The proposition is to retain it.
8 Actually, there are no references in the regulations
9 simply to the word "department". In every case -- in only
10 2 cases, to remove the Department's role, almost
11 everything else -- the 2 sections, which will now become 1
12 section, that refer to the grandfathering, spelled out,
13 incorrectly - but that can be changed - the Department of
14 Health Services.

15 So there actually is no shorthand references to
16 the word "department". There's no need to include a
17 definition under the definition section.

18 COMMITTEE MEMBER LOUGH: You're sure it doesn't
19 mention department anywhere, Clay?

20 I thought it did.

21 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

22 It refers to the Department of Health Services
23 spelled out.

24 COMMITTEE MEMBER LOUGH: Throughout the document?

25 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

1 Well, there's only one -- we've removed every
2 other one. There's only one reference left.

3 COMMITTEE MEMBER LOUGH: Oh, I think --

4 MR. PHILLIPS: Patty, Bill Phillips.

5 COMMITTEE MEMBER LOUGH: Yeah, if you look just
6 on page 28, for example.

7 MR. PHILLIPS: Yes, on page 9, it looks as though
8 you had struck this. On page 9 of the Forensic Alcohol
9 Subcommittee meeting, it looks like this (n) had been
10 struck, and maybe you left it in the other document by
11 mistake.

12 MR. FICKIES: Page 9.

13 MS. SHEN: This is Jennifer from San Diego. We
14 actually went back and forth on it. I think our ultimate
15 thought was that we were going to leave it, but we did
16 discuss both ways.

17 COMMITTEE MEMBER LOUGH: Right. And if you do
18 look through the document, you'll see department is --
19 for instance, page 28, 1220(b), it says department,
20 1220(b)(1), it says department. So we're concerned that
21 we do need to define that, we think, throughout the
22 document. It is in the original Title 17 just as
23 "department".

24 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

25 I think if you look a little more carefully at

1 those sections, you said 1220(b)?

2 That was a requirement that you have something,
3 "on file with the Department", but we're striking, "on
4 file with the Department", right?

5 COMMITTEE MEMBER LOUGH: Right, "with the
6 Department detailed", "the Department on request". So
7 each time it says "the Department", we need to clarify who
8 is that department that we are striking.

9 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
10 Well, that's an interesting --

11 MR. FICKIES: Terry Fickies here.

12 Patty, if we're striking "Department" on 1220(b),
13 then we don't need a -- that's not a reason to have that
14 definition then.

15 COMMITTEE MEMBER LOUGH: That would be --

16 MS. SHEN: This is Jennifer. Maybe this is a
17 change we can make later after we've gone through the
18 whole document and we're all satisfied it's not in there
19 anywhere.

20 COMMITTEE MEMBER LOUGH: Yeah, I agree.

21 CHAIRPERSON KIMSEY: Okay 1215.1(o) defining
22 "competency test".

23 COMMITTEE MEMBER LOUGH: I have a comment under
24 the bullet item and for the proficiency test below, to add
25 to that, and distinguish it from a vice versa proficiency

1 test and competency test.

2 CHAIRPERSON KIMSEY: I'm sorry, did you say --

3 COMMITTEE MEMBER LOUGH: That's why we're putting
4 the definitions -- we're distinguishing them.

5 CHAIRPERSON KIMSEY: I'm sorry, did you say vice
6 versa?

7 COMMITTEE MEMBER LOUGH. Yeah. So in the
8 competency test we're defining in under our justification,
9 because we want to distinguish it from a proficiency test
10 for the reader. And in the next one under proficiency
11 test, we want to distinguish that from a competency test
12 for the reader.

13 CHAIRPERSON KIMSEY: Okay.

14 COMMITTEE MEMBER LOUGH: So in the bullet items,
15 which is our justification, I just wanted to add those
16 notes.

17 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
18 Comment from the republic -- from the republic.

19 CHAIRPERSON KIMSEY: From Richmond.

20 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
21 From Richmond.

22 Clay Larson.

23 Yeah, the word "discipline" would have to be
24 defined. Again, it's a common word, but more
25 appropriately just copying this from the ASCLD/LAB

1 definitions probably doesn't satisfy -- doesn't meet the
2 requirements. The only discipline we're going to talk
3 about here -- and it's not really a discipline under
4 ASCLD/LAB. But the only activity we're talking about here
5 is forensic alcohol analysis. So to the extent we think
6 we need this, I think you'd perform work in forensic
7 alcohol analysis. The word "discipline" otherwise would
8 require some clarification in the definition.

9 CHAIRPERSON KIMSEY: So you'd propose --

10 MS. SHEN: This is Jennifer from San Diego. I
11 would say that these are actual definitions of those
12 terms. And again, they would be clarified by the verbiage
13 in the document when they're used. I think that it will
14 become very apparent that competency test would refer to
15 the discipline of forensic alcohol analysis, while you're
16 reading this document, but it is a working definition
17 that's accurate.

18 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

19 I see no need -- there's no other use of the word
20 "discipline". I see no need to make this anymore general
21 than you need to. With a little extra work, we can refer
22 to the -- these regulations aren't going to cover
23 competency tests in any other activity. So I think it
24 would be much more straightforward and I suspect it would
25 be more acceptable to the Office of Regulations to refer

1 to, if you want to call it, "discipline", that these
2 regulations actually pertain to.

3 COMMITTEE MEMBER LOUGH: Just "alcohol analysis"
4 then?

5 Forensic alcohol analysis?

6 CHAIRPERSON KIMSEY: That seems to be more
7 straightforward.

8 COMMITTEE MEMBER LOUGH: Okay.

9 Any other comments on (o), (p) or (q)?

10 MR. FICKIES: Terry Fickies, Sacramento.

11 Comment on (p). Do you need to specify, "in open
12 tests" and "blind tests"? Do you just want to say
13 proficiency test?

14 COMMITTEE MEMBER LOUGH: I think it can be
15 proficiency test. I don't think you need the "open" or
16 "blind".

17 CHAIRPERSON KIMSEY: I would agree.

18 DR. LEMOS: Comment from the public.

19 CHAIRPERSON KIMSEY: Yes.

20 DR. LEMOS: For those who will not be under
21 ASCLD/LAB, but may choose to be under ABFT, which has a
22 section on alcohol analysis, I think you should consider
23 removing the distinction between "open" and "blind"
24 proficiency tests to allow for that flexibility.

25 MR. FICKIES: Well, that's what I was suggesting.

1 DR. LEMOS: Thank you. I support your
2 suggestion.

3 MR. FICKIES: Good man.
4 That was Terry.

5 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
6 What are you saying now?

7 CHAIRPERSON KIMSEY: He agrees.

8 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
9 That we should limit it?

10 CHAIRPERSON KIMSEY: That we should remove "blind
11 test" and "open".

12 DR. LEMOS: Just put "a full scope" after the
13 word "laboratory" and delete the remaining of the
14 sentence.

15 COMMITTEE MEMBER LOUGH: I'm okay with that.

16 MS. WILLIS: This is Office of Regs, can I ask a
17 general question.

18 We're looking at 2 different versions of this.

19 CHAIRPERSON KIMSEY: Marylyn, could you please
20 state your full name.

21 MS. WILLIS: Marylyn Willis from the Office of
22 Regs.

23 CHAIRPERSON KIMSEY: Thank you.

24 MS. WILLIS: And I'm looking at this strikeout
25 and underline version. And then there's another version

1 that has the bullet with the justification. And I think
2 we're all looking at both of them or some are looking at
3 one and some are looking at the other, but they don't
4 always match.

5 So the strike out and underline has that already
6 ending at the end of laboratory and doesn't talk about the
7 blind test. So are these 2 different versions that we
8 have here or which one are we working off of?

9 MS. SHEN: This is Jennifer from San Diego. You
10 need to work off the one with the bullets. The one with
11 the strike-outs and the underlines was a work-in-progress
12 over the phone during our subcommittee. And the actual
13 product is the one with the bullets. And then we can
14 change it as you'd like, but that's what we should be
15 working off of.

16 MS. WILLIS: I just needed to know.

17 Thank you.

18 CHAIRPERSON KIMSEY: Other comments?

19 Any more comments on (o), (p) or (q)?

20 That's Article 1.

21 COMMITTEE MEMBER LOUGH: Okay.

22 Moving on to Article 2.

23 1216(a) or (a)(1), comments?

24 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

25 Comment from the public.

1 CHAIRPERSON KIMSEY: Comment here in Richmond.

2 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

3 Just a note. Under 1216.1, and a number of
4 places, we use the language, "Forensic alcohol analysis
5 shall be performed only by persons who meet the
6 qualifications set forth..." When we got -- later, when
7 we get -- I'll just bring this up later. When we get
8 under breath testing, 1221.4(a)(4), we delete the "meet
9 the qualifications". Probably better to wait until we get
10 to that section to provide some explanation of why we've
11 deleted that phrase in one case and retained it in many
12 other cases.

13 But, again, we'll wait until we get to
14 1221.4(a)(4).

15 CHAIRPERSON KIMSEY: Any other comments on
16 1216(a)(1), (a)(1)(A) or I guess I would say page 7 of the
17 49-page document?

18 COMMITTEE MEMBER LOUGH: Patty Lough.

19 I'm just circling things that have the different
20 classifications in or the use of the word "supervisor" for
21 now as we're going, so we can come back to it.

22 CHAIRPERSON KIMSEY: Okay. Comments on page 8?

23 COMMITTEE MEMBER LOUGH: One moment, please.

24 CHAIRPERSON KIMSEY: Sure.

25 COMMITTEE MEMBER LOUGH: No, I'm fine.

1 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

2 Actually, a comment. Are we doing the whole page
3 8 as a group here?

4 CHAIRPERSON KIMSEY: Yeah. Any comments for page
5 8?

6 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

7 Yeah under 1216.1(a)(3) -- Clay Larson -- a
8 couple of points. We're basically referring to the
9 statutes. Regulations are intended to clarify and make
10 specific statutory requirements. The statutes don't
11 require the lab to have a successful participation in the
12 proficiency test, only that they perform at least one
13 proficiency test a year.

14 So the Committee may want to, again, we brought
15 this up before, consider what constitutes -- I mean,
16 include a requirement that the participation be
17 successful, and therefore describe what constitutes a
18 successful proficiency test.

19 There's also a reference to an external
20 proficiency test in the statutes. And that comes up again
21 later. That's not necessarily a clear term, to the
22 regulated public.

23 You know, to the extent that they have a
24 satisfactory performance -- or if they have an
25 unsatisfactory performance or an unexpected performance,

1 the Committee might want to consider the appropriate
2 corrective action to be taken. The Committee may want to
3 consider -- the regulations require a single test per
4 year. I guess the Committee could consider whether a
5 single proficiency test a year is sufficient. They could
6 also determine whether a lab with 1, 2 or 3 different
7 methods should be required to perform the proficiency
8 tests -- one or more proficiency tests each year for each
9 of the methods.

10 These are things we brought up a long time ago.
11 But the simple reference to meeting the proficiency test
12 requirements, specified in Health and Safety Code Section
13 100702, again the purpose of regulations are to clarify
14 and make specific statutory requirements. It would appear
15 that this particular statute could use some clarification
16 and specificity.

17 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.
18 I think what's significant here, Clay, is the fact that
19 the only reason we have kept any language in here at all
20 was simply to refer the reader to the Health and Safety
21 Code that tells you how a proficiency test program must be
22 operated. This is something that's long since been
23 discussed and over. So we're not hear to change that law.
24 We're just here to remove the -- to be referencing where
25 you can find that, if someone wanted to know where those

1 guidelines are. So I think we've passed that discussion.

2 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

3 Well, my proposal wasn't we change the law. But
4 again, the purpose of regulations is to clarify and make
5 specific statutes. So if the Committee finds that a
6 statute that again doesn't require successful performance,
7 it doesn't require any particular corrective action, it
8 doesn't -- what you're telling me is that you made the
9 determination -- or the Committee will, as we all get
10 together, made the determination that this particular
11 statute is so clear it doesn't require a clarification or
12 specificity, then that would be the decision. But I
13 wasn't suggesting that we revisit the statutes.

14 COMMITTEE MEMBER LOUGH: Right. Patty Lough
15 again. It's been awhile since I've looked the ASCLD/LAB
16 requirements and looked at the Health and Safety Code. I
17 know the ASCLD/LAB guidelines has steps in it, what to do
18 if there is an error or something performed on a
19 proficiency test, what level of error it is, that type of
20 thing.

21 So I think, at this point, we can only refer to
22 where the law talks about proficiency testing. And if
23 anyone feels that there should be more added to that, then
24 I think that needs to be done through the Legislature.

25 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

1 I would disagree with your comments about
2 ASCLD/LAB. Again, keep in mind, there's absolutely no
3 requirement in the regulations that any of these labs ever
4 be a member of ASCLD/LAB. Particularly, ASCLD/LAB
5 Proficiency Review Committee process, which is rather
6 secretive, applies only to ASCLD/LAB approved --
7 accredited labs. It wouldn't apply to labs that aren't
8 ASCLD/LAB accredited. Again, there's no requirement under
9 these regulations that labs ever be ASCLD/LAB accredited.

10 COMMITTEE MEMBER LOUGH: That is true. But the
11 law says you must follow the guidelines of the ASCLD/LAB
12 proficiency testing program.

13 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

14 And clearly you've created a terrible conundrum
15 here, because if you apply that literally - and again,
16 this is why you may need more specificity - that would
17 require that each lab submit the results through the
18 ASCLD/LAB Proficiency Review Committee. I suspect that
19 ASCLD/LAB is not going to want to undergo that extra
20 workload for the 12, 13 labs in California that aren't
21 ASCLD/LAB accredited. And they aren't currently doing it.

22 So there's no way -- again, if you interpret that
23 very literally - the purpose again of regulations is to
24 clarify in specific those -- clarify and make specific
25 those kind a paradoxes and inconsistencies with the

1 statutes, but that there's no way labs can satisfy that
2 literal requirement of the statutes.

3 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.
4 I believe you're incorrect, Clay.

5 Can we move on, please.

6 CHAIRPERSON KIMSEY: Okay, page 9. This is still
7 more of 1216.1(a)(3).

8 Page 10, we get over to 1216.1(a)(4).

9 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

10 I don't think we served the purpose of this
11 meeting by running through those pages that quickly.

12 CHAIRPERSON KIMSEY: Well, if you have a
13 comment --

14 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

15 We're still on page 9. I can't read as fast
16 as -- why don't we do each section.

17 CHAIRPERSON KIMSEY: Page 8, 9 and half of 10 are
18 all one section.

19 COMMITTEE MEMBER LOUGH: Are we on page 10?

20 CHAIRPERSON KIMSEY: We're on Section
21 1216.1(a)(4).

22 COMMITTEE MEMBER LOUGH: I have one comment that
23 I'd like to add in the justification part, that, "Since
24 2005, the Department has discontinued on-site inspections
25 following the change to the Health and Safety Code."

1 "Since 2005 the Department has discontinued
2 on-site inspections, following the change in the Health
3 and Safety Code."

4 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

5 Actually, I'd like to make some more comments
6 then on page 9, but 1216.1(a)(3).

7 I think one of the goals of the subcommittee was
8 to provide language that there would be a statement of
9 reasons for the regulations packet. Actually, I found
10 much of the narrative under this section probably doesn't
11 satisfy that.

12 It did point out some differences in ASCLD/LAB
13 accredited proficiency test providers. And the program
14 that's currently operated by the Department didn't seem to
15 be related to a -- to the proposal that we make some
16 changes. But I would add there are some other
17 differences. And so I think, just for the record, we
18 should describe those.

19 In the first place, there was a comment that the
20 Department doesn't employ pre-distribution testing of the
21 samples. And that's correct, and that's primarily because
22 we have the capability, in-house, of testing the samples
23 ourselves. The Department does include a number of tests
24 of each sample that are not conducted by ASCLD/LAB
25 approved providers, including determinations of

1 homogeneity, microbiological testing, aging testing. We
2 also monitor the samples during the testing period.
3 Again, we have that capability.

4 And I think the other advantages of -- the other
5 characteristics of the Department's program, which is
6 different from some of the commercial programs is
7 ASCLD -- is the Department has the capabilities and the
8 facilities to produce a fairly large volume of samples,
9 such that we can send one set of samples to all the
10 participants.

11 One of the approved providers, Collaborative
12 Testing Services, apparently lacks that ability. And they
13 need to split the samples into 2 and sometimes even 3
14 batches. So as a consequence, that creates some
15 statistical problems in terms of evaluating people with
16 different sets of samples.

17 One of the ASCLD/LAB requirements is absolute
18 confidentiality in reporting the results of the
19 participants. And also a prohibition that they ever
20 evaluate the results. They aren't allowed to make a
21 determination of whether the candidates for sponsors were
22 within acceptable ranges.

23 Obviously, the Department is specifically
24 required to evaluate those results. And since it's a
25 public agency, we're required to make all those results

1 public.

2 So, in general, I would point out that the
3 Department has been conducting proficiency tests for about
4 25 to 30 years. CTS has been doing it for 4 years. So
5 there are some other differences that I don't think are
6 necessarily germane to a statement of reasons, but I
7 didn't find much of the narrative germane. Just for the
8 sake of completeness, I would add those, for the record,
9 to the list of characteristics, the differences between
10 the Department's program and the commercial program.

11 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

12 I'd just like to state that the law requires
13 proficiency testing provided by ASCLD/LAB approved
14 providers. I do not believe the State is an approved
15 provider at this point. If the State would like to be an
16 approved provider, they can do so. But at this point, we
17 have to be in compliance with the law.

18 Can we move on?

19 CHAIRPERSON KIMSEY: Another public comment here.

20 DR. LEMOS: Nikolas Lemos, From San Francisco.

21 On the, "Passing such on-site inspections...",
22 that section we've been discussing. I'm trying to be
23 clear that if a laboratory chooses not to be ASCLD
24 accredited, and there is no inspection by any department
25 that performs any oversight, are you alleging or is the

1 Committee suggesting that the only check for these results
2 or the inspection of these results is that the
3 laboratories, and I read quote -- I quote from the
4 justification there that the "...product must pass
5 scrutiny on all adjudicated cases through the court
6 system."

7 We're going to actually allow for the evidence
8 and the reports of this non-inspected, non-accredited not
9 ever visited laboratory to provide a report to the courts?
10 That's just a thought as I read this paragraph.

11 Thank you.

12 COMMITTEE MEMBER LOUGH: He's on page 10,
13 1216.1(a)(4).

14 MS. SHEN: Oh, we've moved on?

15 COMMITTEE MEMBER LOUGH: Yes.

16 Patty Lough, San Diego.

17 I'd just like to add to your comment, that the
18 Department is no longer doing testing. So whether or not
19 Title 17 gets changed or not, they're not conducting
20 on-site tests at this time. So if your laboratory is not
21 accredited by ASCLD/LAB, I would hope that there is some
22 means, some system that you have set up for regular
23 routine, timely on-site inspections. But we have lots of
24 documentation to show that the inspection program by the
25 Department was not very timely. So if that's what you're

1 depending on for inspections, you might want to look
2 elsewhere.

3 DR. LEMOS: Thank you for that. I wasn't
4 referring to my laboratory, but I was putting together a
5 worst case scenario for a laboratory that doesn't have an
6 ASCLD accreditation, and therefore may not ever be visited
7 by any inspector or may not be subjected to any on-site
8 evaluation. It's something that the Committee may want to
9 consider.

10 COMMITTEE MEMBER LOUGH: I understand your point.
11 And you should know that if you -- you know, if you belong
12 to another accrediting body, because ASCLD/LAB is just a
13 volunteer program. And we know that the majority of these
14 labs that used to be licensed are all accredited through
15 ASCLD/LAB. So other labs who don't have accreditation
16 through ASCLD/LAB, probably have some other agency, I
17 would hope, that they work with to cover these things,
18 since they're not really routinely inspected by the State.

19 Some labs have not been inspected by the State in
20 decades. And so at least ASCLD/LAB provides us a resource
21 for that. And the majority of labs are already
22 accredited, but we are in no way saying through Title 17
23 that a lab has to be inspected through ASCLD/LAB or be
24 ASCLD/LAB accredited. We are not stating that at all.

25 MR. FICKIES: Terry Fickies, Sacramento.

1 MS. ANDERSON-SEAQUIST: Janet from San Diego.

2 Nick, isn't your lab ABFT accredited or certified?

3 DR. LEMOS: We are undergoing the process now. I
4 am actually more concerned about a private laboratory
5 that's operating in the middle of nowhere with a GCFID out
6 of a garage without ASCLD accreditation and without
7 inspection ever by anybody, allowed to produce a report
8 that challenges my accredited laboratory's report in hope
9 that they have undergone an inspection to use that term.
10 I think that might be a problem in the justification.
11 That's all I was asking.

12 MS. SHEN: This is Jennifer from the San Diego
13 Police Department. And that happens all the time. We
14 face that all the time where laboratories that are private
15 that are operating out of their garage with their GCFID,
16 they are not following Title 17. They're not
17 department -- they're not accredited by anyone. They're
18 not inspected by anyone. And yet they still go into court
19 with those results.

20 And it comes down to the court process, the jury
21 and the judge and the evidence as to who prevails there.
22 I don't think that we can try to regulate those kind of
23 laboratories with this document.

24 COMMITTEE MEMBER LOUGH: We can't. It specifies
25 only law -- labs performing this work for law enforcement

1 agencies. That should not be a lab in a garage. And if
2 there was so, then somebody should be bringing that to
3 somebody's attention. Defense laboratories are exempt
4 from all Title 17 regulations.

5 MR. FICKIES: Terry Fickies, Sacramento.

6 Clay, you went over some of your oversight
7 abilities. I ask you a question about that, could you do
8 that again?

9 Clay, we talked about proficiency testing --

10 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

11 Right. I'm trying to think of your question.
12 Your question was in the absence of site inspection, are
13 we doing anything? And I suggested that still, again,
14 under the requirements of Title 17 still qualifying
15 personnel. Laboratories are still required to submit any
16 training -- and procedures of intending to qualify persons
17 under the regulations are still required to submit written
18 method -- written procedure descriptions for their
19 training.

20 We still conduct some proficiency tests and we
21 evaluate the proficiency test performances of the
22 laboratories on that single ASCLD/LAB approved commercial
23 providers program. But I think that's it.

24 Since 2005, since we lost kind of a specific and
25 very intrusive authority -- actually, the statutes used to

1 say, we are supposed to periodically inspect the
2 laboratories. They actually give a frequency. That was
3 eliminated. So we're no longer -- but since that's such
4 an intrusive and specific authority, since 2005 --
5 actually, since the bill passed, we haven't done any site
6 inspections.

7 Does that answer your question?

8 MR. FICKIES: Thank you.

9 CHAIRPERSON KIMSEY: Other comments on this
10 section?

11 1216.1(a)?

12 .1(b), (c), (d)?

13 1216.1(d)(1) starts at the bottom of page 11 goes
14 over to the top of page 12.

15 1216.1(e), we're getting into the forensic
16 alcohol supervisor?

17 DR. LEMOS: That section all needs to be removed.

18 CHAIRPERSON KIMSEY: Right. It says it will be
19 left in tact here. So this is one that we've agreed
20 should be removed.

21 COMMITTEE MEMBER LOUGH: Patty Lough. I think
22 that's one that we're going to rewrite. We're going to
23 drop off "supervisor" and then incorporate this training
24 for the analyst. So we'll have to come back and do that.

25 CHAIRPERSON KIMSEY: 1216.1(e)(1), this is the

1 baccalaureate degree or higher.

2 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

3 Clay Larson, Richmond.

4 We can discuss this now. I mean, this same
5 language is included under the analysts. So we can wait
6 till then or discuss it now.

7 You know, at the reference to applied physical
8 science or natural science. In the first place, there's 2
9 kind of sciences. There's social sciences and natural
10 sciences. So physical sciences are actually captured
11 under natural sciences. So it's a little redundant. I
12 was confused, and I think the regulated public might be
13 confused, regarding the term "applied physical". So if
14 you had a pure science physics, maybe even chemistry,
15 these are not applied -- they're not necessarily applied
16 sciences. I don't think the word "applied" adds much to
17 this.

18 I'm not sure we've captured the forensic science
19 discipline, which you might want to capture. So I find
20 some of the wordiness here kind of confusing and off
21 point.

22 MS. SHEN: I don't think we want -- this is
23 Jennifer from the San Diego Police Department. I don't
24 think we want to capture the forensic science degree
25 necessarily.

1 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

2 So you would preclude people with forensic
3 science degrees from becoming analysts?

4 MS. SHEN: Not if they have the appropriate
5 scientific background in that forensic science degree.
6 And that would be, you know, left up to the laboratories
7 to decide.

8 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

9 I think, at some point, we're going to have to
10 have a careful consideration of what's a regulation and
11 what constitutes a regulation. If you have a requirement,
12 I think it has to be fairly easy to interpret. So a
13 physical science degree is qualifying or it's not
14 qualifying. I mean --

15 DR. LEMOS: Comment. Nikolas Lemos.

16 Perhaps you may want to consider using the term
17 "pure" or "applied" natural science. Because the
18 chemistry, of course, is pure, forensic chemistry is
19 applied. And if you actually have pure or applied natural
20 science, that would allow for people with a diverse
21 background to be considered for these positions that have
22 alcohol testing as part of their job duties.

23 Thank you.

24 CHAIRPERSON KIMSEY: I mean, we might want --
25 this is Paul. There may be some -- I mean, in some areas

1 of licensing of personnel and laboratories, they get down
2 to individual courses. I'm not suggesting that. I'm just
3 saying that natural science, I know, ecology gets brought
4 up into that. And, you know, you can go through an
5 ecology course in certain universities without any
6 chemistry. And that's just -- I mean, that may be okay,
7 but I'm just -- we need to think a little bit about
8 specifically what we want these people to have in their
9 course work or at least, you know, as an understanding. A
10 natural science or even a physical science can -- is very
11 general. I mean, what are we after here?

12 MS. ANDERSON-SEAQUIST: This is Janet from San
13 Diego. I think it's actually kind of funny when I say
14 this, but "pure" is very -- I'm having trouble
15 understanding what you're meaning for a pure science. I
16 don't think that should be added.

17 DR. LEMOS: Nikolas Lemos from Richmond.

18 MR. FICKIES: Terry.

19 DR. LEMOS: Sorry.

20 CHAIRPERSON KIMSEY: Go ahead, Nikolas.

21 DR. LEMOS: In the academic arena that I have
22 worked in, there's a very clear set of pure natural
23 sciences, which are directly -- many of these pure
24 sciences sometimes combine to put together an application.
25 And so I think that opening it to any to begin with, that

1 would -- may be problematic, but not having the analytical
2 component may need to be -- perhaps, we need to actually
3 consider including language that allows for somebody who
4 has critical analytical skills as part of their
5 baccalaureate.

6 Thank you.

7 MR. FICKIES: Comment. Terry Fickies,
8 Sacramento.

9 A person who had a degree in mathematics, for
10 example, and that's all, would not be qualified to analyze
11 forensic alcohol samples. And social ecology, yeah,
12 that's -- I've seen those people.

13 CHAIRPERSON KIMSEY: Well --

14 MS. ANDERSON-SEAQUIST: Janet down in San Diego.
15 In the comments, it says applied assumes hands-on
16 experience.

17 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.
18 I have interviewed people who have chemistry degrees, but
19 had never been in a laboratory, because at their
20 university that they attended, they did not have
21 laboratories, but they had a degree in chemistry.

22 CHAIRPERSON KIMSEY: This is Paul again in
23 Richmond, and that's --

24 MS. SHEN: This is Jennifer in San Diego. That's
25 why we want to give the laboratory discretion over looking

1 at an applicant, looking at their degree, looking at the
2 aspects of that degree and making a decision as to whether
3 or not to hire that person. And this allows for a little
4 more latitude in the type of degree you have, as long as
5 it's going to include the things that the laboratory
6 thinks is important to perform this type of work.

7 DR. LEMOS: So in response to this - Nikolas
8 Lemos - why couldn't the original language be left alone
9 and only say, "determined by the laboratory" instead of
10 "the Department"? Chemistry by chemistry or other
11 appropriate disciplines as determined by the laboratory.

12 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.
13 About 3 or 4 years ago when we were going over this same
14 document, we were told by the legal office that we can't
15 use the word "appropriate" and that's where this whole
16 conversation came. I don't know that you've been to any
17 of these meetings before, but we've kind of hashed this
18 over for the last several years. So we were trying to get
19 away from saying "other appropriate discipline", because
20 that was not allowable language.

21 And we don't want to be too specific. We don't
22 want to be too general. So maybe this should be marked
23 and something that should be taken up when the full
24 committee is here. I mean, it's been noted by the members
25 of the public, so that we could go on and get to other

1 areas and see where our issues are. Maybe we should just
2 mark this, and when we have the next full committee
3 meeting, we can go back and revisit that language.

4 SENIOR STAFF COUNSEL ENG: This is Goldie Eng.

5 I just wanted to comment on the appropriate
6 discipline. Yeah, I think it is advisable to avoid the
7 term "appropriate", particularly when it's determined by
8 the laboratory. It's just too vague. And I have some
9 concern about even the language that we're talking about,
10 which is "pure" or "applied" physical or natural science.
11 I think it would be better to have something more specific
12 and less open to interpretation.

13 MR. PHILLIPS: Bill Phillips.

14 I would suggest that we look at other licensed
15 personnel in the clinical field to see what their wording
16 is for baccalaureate degree requirements. And then
17 consider this, because clinical laboratory scientists have
18 a baccalaureate degree, and it's defined. Let's look at
19 what their wording is and go on.

20 CHAIRPERSON KIMSEY: Yeah, this is Paul.

21 COMMITTEE MEMBER LOUGH: Good idea.

22 CHAIRPERSON KIMSEY: That definition gets into
23 very specific course requirements, but, yes, that
24 information is available on line. We can certainly access
25 that. But I also agree that we can move on.

1 1216.1(e)(2).

2 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

3 Comment from the public.

4 CHAIRPERSON KIMSEY: Richmond, comment from the
5 public.

6 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

7 Clay Larson in Richmond. There's still a
8 possibility we're going to eliminate this entire section
9 associated with supervisors. But to the extent that it's
10 still here and being discussed, on line 7, we have a
11 reference to appropriate laboratory personnel making some
12 decisions about the appropriateness of training.

13 So to the extent that the subcommittee wanted to
14 avoid the word "appropriate", they came up short on this
15 one.

16 CHAIRPERSON KIMSEY: Okay.

17 Other comments?

18 Moving on to page 13, 1216.1(e)(2)(a).

19 This is where we get into, "The phrase 'including
20 breath alcohol analysis' was removed as redundant. The
21 term forensic alcohol analysis is defined in 1215.1(b),
22 and includes a reference to breath alcohol analysis."

23 DR. LEMOS: Comment from the public.

24 Is it -- Nikolas Lemos. Is it still the case
25 that it is proposed that 1216.1(e) in its entirety is

1 removed, since the forensic alcohol supervisor's
2 classification will be gone. And therefore, we should be
3 actually focusing on the forensic alcohol analyst. And is
4 the Committee now working this section, modifying it or
5 getting comments in anticipation that it will be included,
6 incorporated in the new forensic alcohol analyst
7 classification?

8 COMMITTEE MEMBER LOUGH: Patty Lough.

9 Yes, we will be looking at that.

10 CHAIRPERSON KIMSEY: Other comments on
11 1216.1(e)(2)(A)?

12 (e)(2)(B)?

13 DR. LEMOS: Comment from the public.

14 CHAIRPERSON KIMSEY: Go ahead.

15 DR. LEMOS: Nikolas Lemos. This probably needs
16 to be deleted if there will be no interpretation or other
17 part of the analyst other than the analysis. This could
18 just be dealt with other parts of the host laboratory's
19 training and production of the right expert to testify on
20 the physiological actions of alcohol.

21 COMMITTEE MEMBER LOUGH: Patty Lough.

22 Yes, we can do that, as well as the pharmacology,
23 those things, whether we want to include those or not.
24 We'll take a look at all of that.

25 DR. LEMOS: Thank you.

1 CHAIRPERSON KIMSEY: Comments on (e)(2)(B),
2 (e)(2)(C), (e)(2)(D)?
3 (e)(2)(E)?

4 MR. FICKIES: Terry Fickies.
5 Comment on (D). You better keep the laboratory
6 methods of forensic alcohol analysis in there no matter
7 what. That's the analytical part.

8 CHAIRPERSON KIMSEY: I think that's the plan.

9 COMMITTEE MEMBER LOUGH: Patty Lough. I think
10 it's just (B) and (C).

11 CHAIRPERSON KIMSEY: So (C) -- let's see, it's
12 (B) and (C) that we're contemplating -- that's being
13 contemplated for deletion and we'll be keeping (A) and (D)
14 so far, is that what I'm hearing?

15 MR. FICKIES: Comment. Terry Fickies. I don't
16 think those should be deleted either.

17 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
18 Comment from the public.

19 COMMITTEE MEMBER LOUGH: Patty Lough. Terry, I
20 don't know that they need to. They could be part -- you
21 know, we may decide to go head and leave them, but that's
22 something I think the full committee can take a look at.

23 MR. FICKIES: Right. I mean, I'm just stating my
24 opinions on them.

25 COMMITTEE MEMBER LOUGH: It's not certifying

1 anyone to -- right, we're not certifying anyone being able
2 to interpret the results, but including some information
3 in those two areas is nice.

4 MR. FICKIES: Only a court can certify a person
5 to testify. But this is stuff that you need to know.

6 DR. LEMOS: To perform the analysis? Nikolas
7 Lemos.

8 MR. FICKIES: Pardon?

9 DR. LEMOS: You need to know about the
10 pharmacology of alcohol to perform the analysis?

11 MR. FICKIES: Not to perform the analysis, but
12 that is general background that someone who is a forensic
13 alcohol analyst, if that's the overall term, I believe
14 they should know that.

15 DR. LEMOS: I respectfully disagree.

16 CHAIRPERSON KIMSEY: Well, we'll take it up with
17 the full committee.

18 MR. FICKIES: And I respectfully disagree.

19 MS. SHEN: This is Jennifer from San Diego.

20 CHAIRPERSON KIMSEY: Go ahead, Jennifer.

21 MS. SHEN: This is Jennifer from San Diego. I
22 think the point is that if we are going to take out the
23 requirement for forensic alcohol supervisor to have -- you
24 know, for a forensic alcohol analyst to have this doesn't
25 necessarily need to be specified in regulations.

1 Although, I definitely agree with what you're saying, that
2 kind of background information is probably part of
3 everybody's alcohol training program anyway.

4 So it just -- we don't need to have it for this
5 regulation, if we're only going to worry about the
6 analysis. But it is something that should be included in
7 a laboratory's training program. So that's kind of where
8 you're left. That's why it looks like we should keep it,
9 but I can see why we wouldn't.

10 MR. FICKIES: If it's a part of your training
11 program, then it shouldn't be a problem to have it in
12 here.

13 CHAIRPERSON KIMSEY: But I'm not sure that
14 regulations need to direct it.

15 MS. SHEN: Correct, but if we were going to take
16 out -- right, if the regulations are directing our
17 training program, then we don't want the regulations to
18 direct our training program.

19 COMMITTEE MEMBER LOUGH: Terry, Patty Lough.

20 I've gone ahead and marked --

21 MS. SHEN: That was confusing. What I meant was
22 if -- these regulations are going to direct our analytical
23 portion of our training program. If they're not going to
24 direct the rest of the training program, then we don't
25 want to have something in here that would, in fact, direct

1 the rest of the training program.

2 Is that better?

3 CHAIRPERSON KIMSEY: Thank you.

4 MR. FICKIES: Yeah. Yes.

5 CHAIRPERSON KIMSEY: Any other comments before we
6 go on to 1216.1(e)(2)(E)?

7 Page 14, (e)(2)(F) and (e)(2)(G)?

8 (e)(2)(H), court testimony?

9 DR. LEMOS: One public comment. In (2)(F) -
10 Nikolas Lemos - who is the student that we're now
11 referring to?

12 CHAIRPERSON KIMSEY: Would it be more clear to
13 say "trainee"?

14 DR. LEMOS: I believe that the terminology there
15 has changed some.

16 CHAIRPERSON KIMSEY: What do you think, Patty,
17 should that -- change that from student to trainee?

18 COMMITTEE MEMBER LOUGH: Well, actually it could
19 also be an analyst. Not everybody starts out as a
20 trainee, so I think --

21 MS. SHEN: I would like analyst.

22 COMMITTEE MEMBER LOUGH: I think analyst is
23 better.

24 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
25 Comment from the public. Clay Larson.

1 That actually is becoming very confusing. We're
2 discussing a section that provided an alternative
3 procedure for qualifying forensic alcohol supervisors. In
4 the first place, the Committee is -- what's left of the
5 Committee, is considering eliminating that classification.
6 So we've kind of morphed this over into some kind of
7 qualifications for the analyst.

8 So it would be actually helpful for someone to,
9 on the subcommittee, to mock this up moving these
10 requirements into the analyst's section before you can
11 have an intelligent conversation about, what was
12 originally described as, a training program that would be
13 offered by a laboratory or an educational institution,
14 that would substitute for the 2 years experience.

15 So I don't believe that the conversation here can
16 be very well thought out, unless we have a clearer -- a
17 clarification of where this stuff is going to go.

18 CHAIRPERSON KIMSEY: So is it 1216.1 --

19 COMMITTEE MEMBER LOUGH: Patty Lough. That's our
20 intention.

21 CHAIRPERSON KIMSEY: Okay. I was just going to
22 say that the section that deals --

23 MR. PHILLIPS: Bill Phillips.

24 CHAIRPERSON KIMSEY: -- with the forensic alcohol
25 supervisor continues on -- let me look here --

1 DR. LEMOS: To the bottom of page 16.

2 CHAIRPERSON KIMSEY: Right, to page 16.

3 MR. PHILLIPS: Bill Phillips.

4 I'd recommend that we move on past all personnel
5 definitions. We don't have a clear direction right at the
6 moment. Let's go onto another article.

7 CHAIRPERSON KIMSEY: Comments to that suggestion?

8 We can go onto Article 3.

9 COMMITTEE MEMBER LOUGH: I agree. Patty Lough.

10 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

11 Comment from the public. I actually think --
12 well, I mean, I think we could discuss the subcommittee's
13 proposed revisions for the analysts and, I guess, for the
14 trainee classifications, since -- so far we haven't
15 considered eliminating the analysts.

16 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

17 You know, in the interests --

18 CHAIRPERSON KIMSEY: Go ahead, Patty.

19 COMMITTEE MEMBER LOUGH: In the interests of time
20 and because it's unclear without rewriting that section in
21 a draft for everyone to look at, maybe we could go ahead
22 and go on to the next articles and see where our next
23 areas of hang up are, so that we can move on, only because
24 its 2 o'clock already.

25 CHAIRPERSON KIMSEY: Okay.

1 MS. ANDERSON-SEAQUIST: Janet from San Diego. I
2 think that's a great idea.

3 CHAIRPERSON KIMSEY: Okay. Article 3, Licensing
4 Procedures starts on page 20.

5 DR. LEMOS: It's proposed that it's all removed.

6 CHAIRPERSON KIMSEY: And it's all removed.

7 So Article 4 is Training of Personnel.

8 DR. LEMOS: That's all removed.

9 CHAIRPERSON KIMSEY: That's all removed also.

10 We're on to Article 5, samples taken for forensic
11 alcohol analysis. This is 1219. We're at the bottom of
12 page 23.

13 DR. LEMOS: Question from the public.

14 CHAIRPERSON KIMSEY: Go ahead.

15 DR. LEMOS: Nikolas Lemos.

16 In 1219 of Article 5, the proposed language talks
17 about forensic alcohol analysis and breath alcohol
18 testing. Is the latter one, the breath alcohol testing,
19 what happens at the side of the road or at the hand-held
20 device or is it actually in a laboratory?

21 COMMITTEE MEMBER LOUGH: Patty Lough.

22 It could be both. It could also be at some other
23 location. It could be at a jail. It could be in a
24 Sergeant's office, a hospital --

25 MR. PHILLIPS: It could be road side.

1 COMMITTEE MEMBER LOUGH: -- wherever an
2 instrument may be. It could be road side. It's not
3 necessarily limited to being in a laboratory, but could
4 be.

5 DR. LEMOS: Thank you.

6 MR. FICKIES: Are we -- question from Sacramento.
7 Terry again.

8 Are we collecting and handling breath alcohol
9 samples?

10 DR. LEMOS: Yes.

11 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
12 You're collecting them certainly.

13 COMMITTEE MEMBER LOUGH: Collecting but not
14 keeping.

15 MR. FICKIES: No. Well, you're passing them
16 through the body, but you --

17 COMMITTEE MEMBER LOUGH: Yes. We captured it for
18 a moment.

19 MR. FICKIES: That's what my -- I kept my
20 butterflies for longer than a moment.

21 (Laughter.)

22 DR. LEMOS: How about replaced -- Nikolas Lemos.
23 How about replacing the word "handled" with "collected and
24 maintained" possibly?

25 MS. SHEN: This is Jennifer.

1 We're not maintaining breath samples either. I
2 mean, it gets to a point of making it difficult to write
3 if you write, you know, "These shall be collected and
4 handled, but these should only be collected." You know,
5 so it's kind of a -- it's a slightly more general
6 statement if --

7 MR. PHILLIPS: So you handle the samples
8 respectively. Use the term "respectively".

9 MS. SHEN: Does that really do anything for us?

10 MR. PHILLIPS: So that they refer to collected
11 the breath alcohol and handled by --

12 MR. FICKIES: Or analyzed.

13 MS. SHEN: And that's my point. I mean, it
14 starts getting difficult to write it in a clear, concise
15 fashion.

16 DR. LEMOS: Nikolas Lemos.

17 If you do insert the word "respectively" after
18 "handled" in commas that actually, I think, should make it
19 clear. Just a suggestion.

20 COMMITTEE MEMBER LOUGH: Can we remove -- Patty
21 Lough. Can we remove the breath from there and have this
22 apply to blood, urine, tissue. And then under breath make
23 a comment about breath there under the breath section?

24 MR. FICKIES: I think so. Terry, Sacramento.

25 COMMITTEE MEMBER LOUGH: And we have chain of

1 custody logs, all kinds of stuff here, because some places
2 use that. And if it's a breath test, they just mark that
3 it's a breath test. Do you want to come back and look at
4 that next time. I'll put a mark on that one?

5 MS. SHEN: This is Jennifer from San Diego. You
6 know what, I can't -- I'm trying to remember -- and one of
7 you will be able to help me with this. If you put in
8 "respectively", are we saying that one applies to one and
9 the other applies to the other or does "respectively" mean
10 in order of the ones that you've just listed? I'm worried
11 that that's not quite the right word. It may be and I
12 can't -- I'm not interpreting that correctly. What do you
13 mean by "respective" exactly?

14 MR. PHILLIPS: That's what we mean is that it
15 means applied to the forensic alcohol blood sample and
16 handled means breath. But if you want to strike breath
17 completely from this section, and describe it some place
18 else that would be fine with me.

19 COMMITTEE MEMBER LOUGH: Patty Lough. So on
20 Article 5, we'll reference that that's for blood, urine
21 and tissue?

22 Does that work?

23 CHAIRPERSON KIMSEY: I think that clarifies.

24 MR. PHILLIPS: It used to be samples taken for
25 alcohol.

1 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

2 Comment from the public. Clay Larson, Richmond.

3 COMMITTEE MEMBER LOUGH: Collection and

4 handling --

5 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

6 A comment from the public. Clay Larson.

7 This whole section, I think at some point, when
8 we review this from the technical regulatory requirements,
9 could be used as kind of a vague statement of intent
10 without much -- you know, without any specificity as to
11 how you maintain identity and integrity. You just -- in
12 general, I think the APA might frown on regulations that
13 just say this would be a good idea without providing any
14 detail of how you accomplish that.

15 COMMITTEE MEMBER LOUGH: That is in the following
16 section, Clay. In the following section.

17 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

18 Perhaps, you can show me where it is.

19 MS. SHEN: Jennifer from the police department.

20 "Shall be" does not give you just it would be a good idea
21 either.

22 MR. PHILLIPS: Bill Phillips.

23 This whole section dealing with collection and
24 handling of samples needs to be reconsidered, because we
25 talk about blood in one area, urine in another, and we

1 don't mention breath. We just kind of, you know, shoehorn
2 it into a couple sentences.

3 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

4 Breath is 1219.3.

5 MS. ANDERSON-SEAQUIST: Janet from San Diego.

6 Isn't breath handled in Article 7?

7 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

8 It's handled under --

9 MR. PHILLIPS: Yeah, why are we dealing with it
10 here?

11 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

12 It's handled here under Section 1219.3.

13 CHAIRPERSON KIMSEY: The very last section before

14 Article 6 on page 28 at the top of the page.

15 MR. FICKIES: Cool. That should be moved to

16 Article 7, was it?

17 MR. PHILLIPS: Yes.

18 COMMITTEE MEMBER LOUGH: Okay.

19 MR. PHILLIPS: So taking this out of here and

20 moving it to 7.

21 CHAIRPERSON KIMSEY: Does that mean we're going

22 to drop breath from page 23?

23 COMMITTEE MEMBER LOUGH: From Article 5.

24 Patty Lough.

25 CHAIRPERSON KIMSEY: Completely, okay.

1 COMMITTEE MEMBER LOUGH: Patty Lough.

2 Article 5 will read, "Collecting and Handling of
3 Blood, Urine and Tissue Samples?"

4 MR. FICKIES: Yes.

5 CHAIRPERSON KIMSEY: Other comments on 1219?

6 Maybe we're on to page 24, 1219.1 and down to
7 (a), (b), (c).

8 Hearing no comments, on to page 25, which is
9 1219.1(d) through -- well, (d) through (e) and (f)? It's
10 all about blood sample collection.

11 DR. LEMOS: Question from the public. Nikolas
12 Lemos.

13 Does Section (d), is it already described in
14 1219.1(a)? And do we have to tell a phlebotomist what
15 they need to use? If they are certified by the Vehicle
16 Code 13354, do we need to specify what they need to use?

17 CHAIRPERSON KIMSEY: Which may change over time,
18 I don't know.

19 MS. SHEN: Yeah, I think that's a great point.

20 DR. LEMOS: Maybe the Committee can consider
21 removing this eventually.

22 CHAIRPERSON KIMSEY: I mean, I think,
23 historically there was difficulty with sample collection
24 obviously with alcohol and volatile organic solvents in
25 the containers.

1 MR. FICKIES: Or cleansing the skin.

2 CHAIRPERSON KIMSEY: Right.

3 COMMITTEE MEMBER LOUGH: Patty Lough.

4 Okay, so the (e) and the (e)(1) you want to
5 revisit those?

6 Do you want to just remove them?

7 DR. LEMOS: I was also referring to (d) for
8 David.

9 MS. SHEN: This is Jennifer from San Diego.

10 So that your point would be that this is
11 redundant?

12 CHAIRPERSON KIMSEY: Well, I'd have to look at
13 the Vehicle Code again.

14 MS. SHEN: The 1219.1(a)?

15 CHAIRPERSON KIMSEY: Right.

16 DR. LEMOS: Yes.

17 MS. SHEN: I think I might have that.

18 MR. FICKIES: Do we need to reference the Vehicle
19 Code?

20 CHAIRPERSON KIMSEY: The Vehicle Code is --

21 MS. SHEN: I have it.

22 CHAIRPERSON KIMSEY: -- referenced in 1219.1(a).

23 MR. FICKIES: And since it changes --

24 CHAIRPERSON KIMSEY: Maybe this is something we
25 should have looked at for our next meeting.

1 COMMITTEE MEMBER LOUGH: I'll make a note for (d)
2 and (e) through (e)(1) that we'll revisit and check the
3 CVC, because I'm not sure the CVC says what you can use to
4 clean the skin, but we can easily revisit that, unless
5 Jennifer finds it before we leave.

6 CHAIRPERSON KIMSEY: Okay. 1219.1(e)(2) and (f)
7 and (f)(1).

8 Moving on to page 26, 1219.1(f)(2)?

9 .1(g), .1(g)(1), .1(g)(2)?

10 DR. LEMOS: Comment from the public.

11 Nikolas Lemos.

12 (g)(1). Please consider replacing, "In coroner's
13 cases" with "in post-mortem cases" to be consistent with
14 the rest of the document and also to acknowledge that
15 there are 2 systems in the State of California.

16 COMMITTEE MEMBER LOUGH: Okay.

17 DR. LEMOS: Thank you.

18 CHAIRPERSON KIMSEY: Other comments on 1219.1(g)
19 (g)(2)?

20 1219.2 and 2(a) towards the bottom of page 26 is
21 about urine collection?

22 Moving on to page 27, 1219.2(b), .2(c), and
23 (c)(1)?

24 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

25 Yeah, regarding --

1 MR. PHILLIPS: Bill Phillips.

2 CHAIRPERSON KIMSEY: Go ahead.

3 MR. PHILLIPS: There seems to be a tissue
4 collection and preservation. Nik, should there be a
5 definition in this section for tissue collection and for
6 preservation analysis of?

7 DR. LEMOS: I think that's a great idea.

8 MR. PHILLIPS: It mentions blood, but not tissue.

9 DR. LEMOS: Right. And there could be other
10 fluids, of course, vitreous humor could be considered one,
11 liver another. And I don't know if the Committee would
12 want to include those examples.

13 COMMITTEE MEMBER LOUGH: Patty Lough.

14 Nik, can you get together with --

15 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
16 Bruce.

17 COMMITTEE MEMBER LOUGH: -- with Bruce Lyle, the
18 representative for the ME's office and work with him on
19 that.

20 DR. LEMOS: Yes.

21 COMMITTEE MEMBER LOUGH: And let him know your
22 concerns, because it would be nice to have something added
23 there.

24 DR. LEMOS: Yes, I will.

25 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

1 Comment from the public, Richmond.

2 Clay Larson.

3 COMMITTEE MEMBER LOUGH: Thank you.

4 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

5 Regarding the changes -- the minor changes made
6 to 1219(c)(1), in which we -- and this -- 1219(c) deals
7 with the collection of urine samples, in which we've added
8 the coroner or medical examiner's office to the list of
9 people that might happen to be in possession of that urine
10 sample.

11 Since under the collection section, we defined
12 urine sample collection as something that takes place with
13 a living individual. It's something you could direct to
14 void the bladder and wait 20 minutes. That's not a
15 corpse.

16 There may be some coroner's labs that do living
17 subject testing, but in which case I guess it's
18 appropriate. But it's not immediately obvious why you
19 need to include the coroner's office as someone who might
20 be in possession of an antemortem urine sample. Coroner's
21 office.

22 DR. LEMOS: Nikolas Lemos, comment. The quick
23 answer would be, in cases where they start as living
24 individuals and then they actually end up as medical
25 examiner's cases, that's one possibility. But I think

1 that we need to specify that this either pertains to
2 antemortem or driving cases specifically, and then have a
3 subsection for coroners. And we also have a situation
4 here where in 1219.1(g)(1), I just realized, we're also
5 saying that we have 90-day retention time for the
6 specimen, so we're now actually talking about retention in
7 the part that we actually talk about collection. So I
8 wonder if that needs to be moved to a different section of
9 the new law.

10 COMMITTEE MEMBER LOUGH: Patty Lough.

11 We will defer to the coroner people. I think it
12 would be nice probably if you had your own -- such a
13 different type of testing process.

14 DR. LEMOS: There may be a possibility for a new
15 section --

16 COMMITTEE MEMBER LOUGH: Then maybe something can
17 be drafted before the next meeting.

18 DR. LEMOS: Yes.

19 CHAIRPERSON KIMSEY: Anything else on Article 5?

20 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

21 Yeah, comment from the public.

22 Clay Larson. As we close --

23 SENIOR STAFF COUNSEL ENG: This is Goldie Eng --

24 CHAIRPERSON KIMSEY: Yes, Goldie.

25 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

1 Go ahead, Goldie.

2 SENIOR STAFF COUNSEL ENG: Oh, I just had a minor
3 suggestion on 1219.2(a), that the word "will" should be
4 changed to "shall", because that's the standard vocabulary
5 that's used for regulations.

6 CHAIRPERSON KIMSEY: There was another comment
7 here in Richmond.

8 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
9 Yeah. Clay Larson, Richmond.

10 As we close Article 5, Section 1219 now, I recall
11 my original comment that in terms of the rather sweeping
12 and conclusionary requirement that you maintain sample
13 identity integrity, I submit that in going through the
14 entire section here, we haven't covered sample identity at
15 all.

16 COMMITTEE MEMBER LOUGH: I think we didn't --
17 Patty Lough. Didn't we reference the CVC?

18 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
19 We did. I don't believe that adequately covers
20 it. I don't have it in front of me.

21 CHAIRPERSON KIMSEY: That's talking about
22 collection.

23 COMMITTEE MEMBER LOUGH: But I think we
24 referenced it.

25 CHAIRPERSON KIMSEY: There's a reference to the

1 CVC on 1219.1(a) on page 24.

2 DR. LEMOS: Nikolas Lemos. I believe that that
3 would not really give us any guidelines on tamper-proof
4 seals, if any, or any other way of labeling the
5 tamper-proof seal or the evidence with the accused
6 driver's identification. So there may be a need for a
7 section with guidelines for that.

8 COMMITTEE MEMBER LOUGH: Patty Lough.

9 Let me look, because I know we did address that.
10 I'm looking here.

11 There was something in -- and Clay had brought it
12 up before.

13 MS. SHEN: This is Jennifer from San Diego.

14 You know, this is something that is, you know,
15 well documented in the ASCLD regulations, where you must
16 have a unique identifier for every sample or specimen or
17 item of evidence that you analyze. And I don't know that
18 I've seen that similar sort of verbiage in this document
19 before we even started changing it. You know something
20 that simple might do. It just has to be uniquely
21 identified.

22 COMMITTEE MEMBER SEDGWICK: Are you still there?

23 We just lost our pictures.

24 CHAIRPERSON KIMSEY: Richmond is here.

25 MR. BREYER: San Diego went dark on the screen.

1 CHAIRPERSON KIMSEY: I can see San Diego from
2 Richmond. Can you hear us?

3 COMMITTEE MEMBER LOUGH: We can hear you.

4 I think if I'm looking back at our draft that the
5 subcommittee had on page 19, we have a note here including
6 references to the uniform standards of collection. I
7 think that's what we're looking for. And we had that
8 under blood, 1219.1. And I think we just -- I'm thinking
9 that it's in the CVC 23158. We need to check and be sure,
10 and apply it to that whole section, not just blood.

11 MS. SHEN: CVC which one?

12 COMMITTEE MEMBER LOUGH: 23158. I believe it
13 mentions the uniform standards of collection in there for
14 venipuncture, but -- so then it never did -- apparently,
15 there maybe never has been anything in here for tissue --

16 MS. SHEN: I don't think there has been.

17 COMMITTEE MEMBER LOUGH: -- or urine. And so
18 it's probably a good place to make sure that that gets
19 added.

20 CHAIRPERSON KIMSEY: Okay.

21 COMMITTEE MEMBER LOUGH: Because that same
22 Vehicle Code Section, I think, also had the reference to
23 who can collect blood samples. It was kind of all lumped
24 into that CVC, like section (c) and (e) or something.

25 CHAIRPERSON KIMSEY: Other comments on Article 5?

1 DR. LEMOS: 1219.2(a) on urine. The new proposed
2 language says, "A urine sample from a living individual
3 will be collected no sooner than 20 minutes after first
4 voiding the bladder." And I think we all, in this meeting
5 today, understand what this is to -- what is to happen to
6 this sample. But taking away approved and not specifying
7 that it's the urine sample that's being used for the
8 forensic alcohol analysis, may be problematic to the lay
9 person trying to read this.

10 So I suggest that maybe this proposal either
11 reconsiders introducing the word "approved" versus a urine
12 sample suitable for forensic alcohol analysis from a
13 living individual will or shall and so on.

14 COMMITTEE MEMBER LOUGH: I think we eliminated
15 the word "approve", because some samples are obtained for
16 other types of violations, other types of crimes. So we
17 didn't want to say "the only". I think we were trying to
18 be general here. That's what we're asking for, that the
19 sample be collected that way, but there will be the times
20 that sample will be analyzed for alcohol for non-driving
21 violations for other violations.

22 DR. LEMOS: Okay.

23 MS. SHEN: This is Jennifer in San Diego.

24 I still think that there should be something in
25 here that if you're just concerned about the identity,

1 there needs to be some reference to that there will be a
2 unique identifier, something to identify this sample
3 differently from any other sample to address that. And
4 when it gets right down to it, a lot of time that's what
5 the big issue is. How do I know this sample came from my
6 person.

7 COMMITTEE MEMBER LOUGH: And that is in that
8 vehicle section. That's why we put that in there.

9 DR. LEMOS: Nikolas Lemos from --

10 CHAIRPERSON KIMSEY: We have a comment here in
11 Richmond.

12 DR. LEMOS: I wonder -- Jennifer, I think. I
13 wonder if by saying that the laboratories that perform
14 this need to follow ASCLD, some members assume that also
15 the phlebotomist who collected and everybody else is aware
16 of that, I don't think that we need to rest on the fact
17 that it's part of the ASCLD recommendations. And a
18 section or subsection should be included in this Chapter 5
19 or Section -- Article 5.

20 MS. SHEN: This is Jennifer.

21 I agree with you completely. I'm just saying
22 that that is something that is very specific to ASCLD.
23 And I'm actually surprised that it's not addressed in
24 these regulations. It's very important that we are able
25 to identify every sample as unique, and that is not

1 addressed here.

2 So my point was that perhaps we should add
3 something in here that says, even something as simple as,
4 "Every sample needs to be labeled in a manner that gives
5 it a unique identity.

6 CHAIRPERSON KIMSEY: Jennifer, this is Paul
7 Kimsey in Richmond. I would --

8 MS. SHEN: I'm not sure where you exactly put
9 that.

10 MR. FICKIES: Comment. Terry Fickies.

11 CHAIRPERSON KIMSEY: This is Paul Kimsey,
12 Richmond.

13 MR. FICKIES: I think that needs to be in there.
14 There's no question about it.

15 CHAIRPERSON KIMSEY: I think we all agree. I
16 think we need to sort of be sure that's not already in the
17 CVC section that we're citing here. But if it's not
18 there, I think we're all in agreement that there needs to
19 be a section or an area here that would talk about it.

20 MR. FICKIES: It really doesn't matter. I think
21 it should be in here anyway.

22 CHAIRPERSON KIMSEY: Comment from the public here
23 in Richmond.

24 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
25 Clay Larson.

1 I'm not sure I understood, Ms. Lough, a reference
2 to violations that didn't involve traffic violations or
3 accidents. The scope of these regulations is clearly
4 limited to analysis of samples from individuals involved
5 in traffic accidents or traffic violations. Maybe I
6 misunderstood you.

7 COMMITTEE MEMBER LOUGH: Patty Lough.

8 The unit that does the alcohol analysis, it's
9 possible that unit will receive a urine sample for a
10 different purpose and use this method to analyze it. It
11 is for non-DUI cases. A rape case, for instance, they may
12 be asked to analyze a urine sample from a rape victim or a
13 rape suspect, which has nothing to do with DUI cases.

14 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

15 Well, then these regulations wouldn't apply at
16 all.

17 SENIOR STAFF COUNSEL ENG: This is Goldie Eng. I
18 just want to quote the statute. Health and Safety Code
19 100700. It's for, "Laboratories which are engaged in the
20 performance of forensic alcohol analysis tests, by or for
21 law enforcement agencies, for the purpose of determining
22 concentration of ethyl alcohol in persons involved in
23 traffic accidents or in traffic violations."

24 MS. SHEN: What was your point, Patty?

25 DR. LEMOS: Nikolas Lemos. Comment.

1 The San Francisco Medical Examiners, we have
2 exactly a case that is described here, where we have a
3 date-rape treatment center where a victim of alleged rape,
4 her urine or his urine will be submitted to the laboratory
5 for analysis. And what they actually now do is they give
6 us the void of the urine for drug testing or any other
7 determinations. But they actually submit a second
8 specimen 20 minutes later -- at least 20 minutes later for
9 forensic alcohol analysis, because they are now clued
10 that, based on that second forensic specimen, one can
11 actually correlate it to blood alcohol, and then maybe
12 even if there are behaviors exhibited by this person as a
13 result of that alcohol that is present.

14 But this title, of course, pertains only to
15 driving. But other sections of our crime investigations
16 benefit from this section and this ability to do this
17 determination.

18 COMMITTEE MEMBER LOUGH: Patty Lough.

19 I think that's why we did that. We didn't want
20 it to say "the only approved", because that brings up a
21 question. So we just wanted to say, the sample should be
22 collected, you know, no sooner than 20 minutes after
23 voiding the bladder, and not go into other detail by
24 putting "the only approved". I mean, we're suggesting it
25 needs to be 20 minutes after the void is what we're

1 putting in there. And we're not really specifying a case
2 where maybe you don't get the second sample.

3 There are cases that it's a DUI case, San
4 Bernardino, for instance, collects the first sample, the
5 void sample and they collect the second sample, the A and
6 the B sample. And there are times they are asked to go
7 back and analyze one. And it's there and they do it.

8 So by saying "the only approved", it kind of
9 sounds like they're doing something they're not supposed
10 to, but sometimes the court wants that information.

11 I can only imagine it happens in other places.
12 Or if you collect the first sample and the person says
13 they can't provide the second sample, all you have is the
14 first sample. And that may provide information to the
15 court and it may be analyzed. So I don't think we want to
16 use -- that's why we took out the terms "the only
17 approved", and we are suggesting that it will be done in a
18 certain way, but we must understand, in the real world,
19 that there are exceptions to that case, and that is dealt
20 with in the court, on case-by-case basis.

21 CHAIRPERSON KIMSEY: Other comments?

22 DR. LEMOS: So the final comment - Nikolas Lemos
23 - is that, it is my understanding now, that the last part
24 of this Article 1219.3, which actually pertains to breath,
25 will now have its own separate section just like the

1 postmortem samples or a new article will be formed?

2 CHAIRPERSON KIMSEY: I think it's going to go
3 over into Article number 7 on page 38, which starts right
4 now with 1221.

5 So moving on --

6 COMMITTEE MEMBER LOUGH: Yes, it will be moved to
7 Article 7.

8 CHAIRPERSON KIMSEY: Moving on to --

9 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
10 Well, actually, comment from the public.

11 1219.3, is it appropriate to discuss 1219.3 now
12 or are we going to --

13 CHAIRPERSON KIMSEY: Do you have a comment?

14 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
15 Yeah. I brought this up before. The word
16 "continuous observation", I think there's ample record to
17 show that this has confused the courts. I mean, there's
18 been some confusion over what "continuous" means. And it
19 would be -- and we had some suggestions for amended
20 language from the California Association of Criminalists.
21 I still think it would be appropriate for the Committee to
22 consider what's meant by that confusing requirement.

23 CHAIRPERSON KIMSEY: What did the criminalists
24 recommend?

25 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

1 CHAIRPERSON KIMSEY: Go ahead.

2 COMMITTEE MEMBER LOUGH: That was discussed
3 extensively in full committee and there was no agreement
4 among the criminalists. It was about 50/50. And it
5 really made a difference in some jurisdictions and it was
6 decided to keep that in there in full committee. So we
7 would be going backwards now, but we did discuss that for
8 quite a long time and it was decided to keep that in.

9 I'm not saying it has to be in. I'm just saying
10 it was decided in full committee a couple of years ago.
11 So if we want to go back now and take a look at it, you
12 know, if we want to revisit it, I can mark it. But we did
13 really discuss that for quite awhile.

14 CHAIRPERSON KIMSEY: Okay. Anything --

15 COMMITTEE MEMBER LOUGH: And I think our
16 attorneys, who are not present today, had an issue with
17 that. And that's part of why it was left in.

18 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
19 Who were those individuals?

20 MR. FICKIES: Question. Terry Fickies.

21 Clay, what do you suggest? Do you suggest taking
22 that out entirely?

23 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

24 That actually was the proposal. There were some
25 good ideas regarding -- from the California Association of

1 Criminalists that would specify how that observation would
2 occur.

3 I don't want to try -- I don't recall the exact
4 language, but I think -- there are clarity issues. And I
5 think there's history here to show that this is not a
6 clear regulation.

7 CHAIRPERSON KIMSEY: This is Paul. Why don't we
8 go ahead and mark it. I agree, Patty, that we had quite a
9 bit of discussion on this. And I think I did sort of come
10 down to some attorneys discussing it amongst themselves.
11 But I think maybe we need to bring it up again. So let's
12 go ahead and mark it, please for the full Committee.

13 COMMITTEE MEMBER LOUGH: It is so marked.

14 Thank you.

15 CHAIRPERSON KIMSEY: Anything else on Article 5?
16 Article 6, Method of Forensic Alcohol Analysis,
17 page 28.

18 1220(a), (b) and (b)(1)?

19 1220(b), (b)(2), 1220.1, Standards of
20 Performance.

21 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

22 I just wanted to remind everyone on the Committee
23 that besides looking at how we have rewritten and made
24 changes to the regulations, that we need to carefully be
25 reading the comments, the justifications and such

1 underneath, because that is going to be what's going to
2 support our changes.

3 So if you haven't done it before now, you want to
4 make sure that you do -- make sure that we have included
5 everything you think is necessary.

6 CHAIRPERSON KIMSEY: Comments on page 29,
7 1220(b)(2), 1220.1, 1220.1(a), .1(a)(1)?

8 Moving on to page 30?

9 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
10 Did we do (a)(2) and (a)(3)?

11 CHAIRPERSON KIMSEY: The bottom of my page 29 is
12 1220.1(a)(1).

13 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
14 I'm sorry.

15 CHAIRPERSON KIMSEY: Moving on to page 30,
16 .1(a)(2) (3), (4) and (5)?

17 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
18 Comment from the public.

19 The qualifier ethyl alcohol was struck out
20 elsewhere in the procedures, which was defined alcohol as
21 ethyl alcohol. We have the word "appropriate" again here,
22 "...adequate and appropriate for traffic law enforcement."

23 That's the existing language. And there are some
24 problems. I don't think there's --

25 COMMITTEE MEMBER LOUGH: Yeah, but we should just

1 remove "appropriate". Even "adequate and appropriate" are
2 kind of vague.

3 CHAIRPERSON KIMSEY: How about if we put a period
4 after alcohol? I mean, we're talking about traffic law
5 enforcement.

6 COMMITTEE MEMBER LOUGH: Patty Lough.

7 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

8 "The method shall be capable of the analysis of
9 alcohol..."

10 COMMITTEE MEMBER LOUGH: The "adequate and
11 appropriate" are both vague.

12 CHAIRPERSON KIMSEY: I mean, if you drop
13 "adequate and appropriate", and we know it's for traffic
14 law enforcement, basically we're left with, "The method
15 shall be capable of the analysis of alcohol." I mean,
16 that's seems a little --

17 COMMITTEE MEMBER LOUGH: No, we want specificity.
18 We can -- maybe a statement that we're talking about
19 specificity with those other volatile organic compounds
20 that would be in an ambulatory person?

21 DR. LEMOS: Nikolas Lemos, comment.

22 How about, "The method shall be capable --

23 COMMITTEE MEMBER LOUGH: Yes, Nikolas, help us.

24 DR. LEMOS: I was going to say that it has to
25 differentiate ethyl alcohol from other compounds. So

1 perhaps you can say, "The method shall be capable of
2 specifically detecting or analyzing alcohol." Bring
3 specificity in the front part, or differentiating ethyl
4 alcohol from other related compounds.

5 COMMITTEE MEMBER LOUGH: "Specifically detects
6 alcohol from other related compounds." And we defined
7 what alcohol was in the first, so does that work? "The
8 method shall be capable of specifically detecting alcohol
9 from other related compounds"?

10 MS. SHEN: Specificity that differentiates
11 alcohol from other compounds.

12 DR. LEMOS: I think one of those versions, once
13 it's appropriately tweaked, will be perfect.

14 MS. SHEN: We'll to have work on that.

15 MR. FICKIES: Comment. Terry.

16 I think you should add something in there about
17 body of living person.

18 DR. LEMOS: Nikolas Lemos.

19 The same methods are employed in postmortem
20 alcohol analysis.

21 COMMITTEE MEMBER LOUGH: Okay.

22 MR. PHILLIPS: How about traffic enforcement
23 purposes, because that's what this regulation is about,
24 traffic enforcement purposes.

25 MS. SHEN: For traffic enforcement purposes. All

1 right, I got it. I'm good.

2 COMMITTEE MEMBER LOUGH: Okay. We'll come up
3 with a draft.

4 Jennifer will.

5 CHAIRPERSON KIMSEY: Okay 1220.1 (a)(1), (a)(3),
6 (a)(4) and (a)(5), anything else there?

7 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
8 Comment from the public. Clay Larson.

9 Under (a)(3) the "should" should be "shall" or
10 the "should" shall be "shall".

11 COMMITTEE MEMBER LOUGH: Okay. I am highlighting
12 these, just so that you know, so we can draft it up.

13 CHAIRPERSON KIMSEY: Any comments on 1220.1(b)?

14 DR. LEMOS: Well, coming from the public, removal
15 of "forensic alcohol supervisor" in the proposed language.
16 It would probably be that proficiency test results are
17 reviewed by a quality assurance officer in every
18 laboratory or some other person, lab director or his or
19 her designee.

20 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
21 Comment from the public. Clay Larson.

22 Under 1220.1(b), I would hope -- I would believe
23 that we would want to set forth some criteria for this
24 evaluation of the ability of methods, especially since the
25 statutes don't require that the labs actually have a

1 successful performance.

2 I mean, are we going to give any indication to
3 the staff as to how to analyze these results? What
4 criteria to apply?

5 COMMITTEE MEMBER LOUGH: Patty Lough.

6 Proficiency test programs, if I'm correct, the
7 information can be obtained through the Public Records Act
8 and part of the discovery in court; is that correct?

9 DR. LEMOS: Yes.

10 COMMITTEE MEMBER LOUGH: Because then I think as
11 long as it's not tucked away hidden information, that will
12 come out. I mean, this document is saying you have to
13 have a documented proficiency test program and you'd have
14 to provide that to the court, if asked.

15 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

16 This particular section doesn't refer to the
17 proficiency test program. It refers to a requirement
18 imposed on staff to evaluate the ability of the method.
19 Are you saying that should be based on the reports
20 received from the PT organization?

21 COMMITTEE MEMBER LOUGH: I believe what it's
22 saying is that you would be using a proficiency test
23 program to determine if you're getting good results. It's
24 just kind of referencing that.

25 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

1 It doesn't say that. And let me point out --

2 COMMITTEE MEMBER LOUGH: And we already have law
3 that --

4 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

5 Right. Let me point out an instance where that
6 doesn't work at all. One of the approved test providers
7 is the College of American Pathologists. And they do,
8 even though ASCLD/LAB prohibits it, they are approved test
9 providers. And they do provide acceptable ranges for the
10 results.

11 But they base those acceptable ranges on the
12 clear requirements for general toxicological analysis. And
13 actually, there's specifically a requirement for the
14 analysis of alcohol. And that requirement is plus or
15 minus 25 percent.

16 So any result obtained from -- on a capped
17 sample, and we participate in those tests, that's within
18 plus or minus 25 percent of the peer group mean is deemed
19 an acceptable performance by CAP.

20 Now, I would suggest that those are probably not
21 appropriate limits. They may be very appropriate limits
22 for ER, emergency room, you know, tests for alcohol.
23 They're not appropriate limits for the California's
24 forensic alcohol testing.

25 So that would be an instance where the evaluation

1 by the ASCLD/LAB approved provider was not very helpful to
2 the staff in evaluating their performance.

3 COMMITTEE MEMBER SEDGWICK: Clay, this is Paul
4 Sedgwick from San Diego. CAP does not evaluate ASCLD/LAB
5 results. They give those guidelines out for other
6 purposes. The ASCLD/LAB Toxicology and Blood Alcohols
7 Review Committee does review those results.

8 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
9 I was responding -- that's good. I was
10 responding --

11 COMMITTEE MEMBER SEDGWICK: And they do not have
12 that big of a window.

13 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
14 Right. I was responding to and it's very
15 secretive. I'm always unable to tell what the window is.
16 Can you tell me, by the way? I contacted ASCLD/LAB the
17 Committee and I was unable to learn that.

18 But I was responding to Ms. Lough's comment that
19 we'd simply rely on the provider's evaluation of the test
20 results.

21 COMMITTEE MEMBER SEDGWICK: Let me answer your
22 question. You probably will not be able to find -- this
23 is Paul Sedgwick again -- find an acceptable window,
24 because there are so many different laws in so many
25 different states requiring different analytic procedures,

1 different analytic techniques and every state is a little
2 different.

3 ASCLD/LAB, if I'm -- back when I was on the
4 Committee, which was before I retired, decided that they
5 were going to let the states' various windows prevail,
6 which is only appropriate, because every state is a little
7 bit different.

8 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

9 So I would think the --

10 COMMITTEE MEMBER SEDGWICK: Or many of them are
11 different, I should say.

12 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

13 I would think then the regulations are an
14 appropriate venue for the State to express that window.

15 DR. LEMOS: Nikolas Lemos. I think that, Paul,
16 what you just said really allows for this document to set
17 a plus or minus window of acceptable range, even if the
18 CAP results, which are approved by ASCLD, have a greater
19 window nationwide.

20 COMMITTEE MEMBER SEDGWICK: Paul Sedgwick again.

21 Nikolas, the CAP results, the results themselves, are
22 essentially inspected or accredited by ASCLD/LAB
23 Proficiency Review Committee, but their window is not.
24 It's their business entirely and has nothing to do with
25 ASCLD/LAB.

1 COMMITTEE MEMBER LOUGH: Patty Lough. If there's
2 an issue with CAP as an approved test provider, maybe we
3 want to highlight that at this point, and come back to it,
4 because this is the FARC, and it is our responsibility to
5 make sure that we're comfortable with those things. So is
6 that something that we'd want to get some more information
7 on and come back to?

8 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

9 Sure, but then I think we would to our
10 concerns --

11 MR. PHILLIPS: This is Bill Phillips.

12 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

13 We would add to our concerns, the concern over
14 CTS, Comprehensive Testing Services, which provides no
15 evaluation.

16 COMMITTEE MEMBER LOUGH: CTS?

17 MR. PHILLIPS: This is Bill Phillips.

18 Hello?

19 CHAIRPERSON KIMSEY: Go ahead, Bill.

20 Go ahead

21 MR. PHILLIPS: Yes. ASCLD/LAB ISO is now
22 requiring measurement of uncertainty for alcohol. And
23 each laboratory will have to determine that for its own
24 purposes.

25 Within that consideration, we should be looking

1 at what laboratories are defining, not what this
2 regulation defines.

3 MS. SHEN: This is Jennifer from San Diego.
4 Well, that would make the verbiage of this particular
5 section appropriate then, because that would be the
6 laboratory. And the quality assurance manager or lab
7 director and his or her designee would be the ones trying
8 to determine whether or not we are, in fact, following
9 within our uncertainty of measurement realm.

10 So it says essentially the same thing. It's just
11 putting the onus on the laboratory to make sure it's
12 working well, instead of the Department.

13 MR. PHILLIPS: I agree, Jennifer.

14 CHAIRPERSON KIMSEY: So at this point -- this is
15 Paul. At this point, we don't feel putting sort of a
16 window here is important, at this point? We'll leave that
17 up to the laboratories?

18 MS. SHEN: I would agree. This is Jennifer.

19 CHAIRPERSON KIMSEY: Anything else on 1220.1(b)?
20 1220.2? .2(a), .2(a)(1), .2(a)(1)(A)?

21 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

22 Where do I start?

23 Comment from the public?

24 1220.2(a)(1). In the first place, this is a
25 somewhat easy one here. The statement is, "The instrument

1 shall be calibrated with standards which are water
2 solutions of alcohol." The literal interpretation would
3 mean -- and I think it's fine -- but would mean that you
4 had to run more than one standard.

5 There is a -- the next 3 sections -- and the
6 program may prepare for the next meeting a written
7 response to this, because it's very complicated. I mean,
8 it's a bit complicated, in that it refers at various times
9 to purchase secondary standards without any
10 qualifications, to NIST traceable, whatever that means,
11 standards and then to actual NIST standard reference
12 materials.

13 So, again, there's a lot of complicated issues
14 here. I don't know if you want to take all this time to
15 discuss them. But I think, for that reason alone, this
16 particular -- these particular 3 sections weren't very
17 clear.

18 There was a discussion about the justification
19 for eliminating the current requirement or at least
20 providing alternatives to the current requirement that
21 labs determine the concentrations of the secondary
22 standard by an oxidimetric method employing a primary
23 standard.

24 And one of the arguments was that the, you know,
25 assessment that the error rate for the oxidimetric method

1 may be excessively high, maybe as much as 5 percent.

2 I would disagree. I would disagree that the
3 Department every said that. But it's pretty clear that a
4 method which used some kind of NIST standard to qualify
5 and determine the concentration of another standard that
6 was using a GC method, for instance, which does have a
7 nominal plus or minus 5 percent performance limits, would
8 be an example of setting the concentration of the standard
9 based on the method with an error -- with a regulatory
10 error of plus or minus 5 percent.

11 Although, I think the capabilities of the
12 oxidimetric procedures, which still exist as an option
13 here, are much, much greater than 5 percent, substituting
14 an indirect method in creating something called a tertiary
15 standard, which I think needs to be defined, would
16 introduce an error of about 5 percent.

17 MR. FICKIES: Comment. What is a tertiary
18 standard?

19 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

20 Well, the word tertiary standard was added to
21 these new regulations. I have an understanding of what it
22 means, but the fact that you've asked that question
23 suggests that it should be clarified in the regulations.

24 Basically, it's a standard that's -- a primary
25 standard is a material who's -- of high -- has certain

1 characteristics, has very high molecular weights, is very
2 stable, can be weighed, you produce a solution that -- a
3 highly accurate solution. It's a very stable solution.

4 You then prepare secondary standards from that
5 material. If you evaluate another standard, based on the
6 secondary standard, you have tertiary, quaternary go up
7 the line. So that would be my understanding of what the
8 meaning --

9 MR. FICKIES: My vague recollection from
10 quantitative analysis is that there was no tertiary
11 standard. Everything was a secondary.

12 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

13 Well, the word tertiary standard is added to
14 these new procedures -- to these new regulations. If you
15 look under the Section 1220.2(a)(1)(A), it refers to "Such
16 alcohol solutions are secondary standards, or are tertiary
17 standards, having concentrations which have been
18 established using a purchased --

19 MR. FICKIES: I would --

20 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

21 Sorry? Go ahead.

22 MR. FICKIES: I would think -- I'm not sure about
23 this. But I'm not sure if tertiary standard is something
24 that's commonly used.

25 DR. LEMOS: Nikolas Lemos.

1 Perhaps the Committee wants to include
2 definitions of what they defined as secondary standards
3 and tertiary standards is a new term now that's being
4 introduced, so that we're all clear and we're all working
5 on the same definition.

6 MR. FICKIES: Well, a secondary standard is very
7 clear, but I'm not sure what a tertiary standard is.

8 DR. LEMOS: Yes, I hear you.

9 COMMITTEE MEMBER LOUGH: Patty Lough.

10 I'll make a mark on that, so we can come back to
11 that.

12 CHAIRPERSON KIMSEY: On the last bullet on page
13 32 talks about tertiary standard. It says a "standard
14 that has a concentration established by using secondary
15 standard, could introduce a higher error rate."

16 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
17 But that's not regulations.

18 CHAIRPERSON KIMSEY: Right, that's not the
19 regulations.

20 Further discussion on 1220.2(a)(1)(A)?

21 MR. FICKIES: If we include a tertiary standard,
22 I believe that we should include a definition.

23 CHAIRPERSON KIMSEY: I agree.

24 COMMITTEE MEMBER LOUGH: Maybe we should.

25 CHAIRPERSON KIMSEY: 1220.2(a)(1)(B) on page 33?

1 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

2 Comment from the public.

3 You haven't heard from me before have you?

4 Clay Larson.

5 The reference, I think, to NIST traceable
6 standards needs a definition. If you check with NIST,
7 they don't have any formal procedures for defining
8 traceable secondary standards. They purchase -- they
9 produce reference materials -- standard reference
10 materials, which could function as secondary standards.
11 But the claim NIST traceable standards is pretty much a
12 claim made by the vendor, which has very little standing.
13 I mean, it doesn't mean a lot. Restech, for instance -- I
14 contacted Restech. They make NIST traceable secondary
15 standards. And the traceability is based on the fact that
16 they use NIST Class 1, Class A weights to weigh the
17 alcohol.

18 I think the lab could probably be expected to
19 weigh alcohol as well as some technician working for
20 Restech. So I think the term NIST traceable doesn't have
21 any specific -- it sounds good. It sounds really -- but I
22 don't think it has much meaning, and it should be defined.

23 COMMITTEE MEMBER LOUGH: Patty Lough, San Diego.

24 It means more than just that. They also have to
25 document their sources of where they got their solutions

1 from or whatever that they're working with.

2 But there is an added section down below on the
3 bottom of this page, where those secondary alcohol
4 standards are run concurrently with a NIST standard. It
5 no longer says traceable, so that put in that extra step
6 that we don't even have now in our programs. And to me,
7 it's a powerful addition to this document.

8 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

9 And I would add --

10 COMMITTEE MEMBER LOUGH: This allows the
11 laboratory to use -- if I may finish. It allows the
12 laboratory in much of its day-to-day work to use the
13 traceable secondary standards, but very specifically
14 requires the laboratory to use NIST standards, which, of
15 course, are considered the highest standards in the world.
16 So I think it's just a good thing to add here, a good
17 insurance.

18 CHAIRPERSON KIMSEY: This is Paul. Maybe it just
19 sounds like we need some clarification on the definition
20 of NIST traceable. I mean, it seems like the word
21 traceable -- I understand we're talking about being able
22 to -- you know, it's based on a NIST standard, but there
23 would appear to be some confusion. Maybe a definition
24 would help. A clarification.

25 COMMITTEE MEMBER LOUGH: Okay.

1 CHAIRPERSON KIMSEY: Anything else on 2(a)(1)(B)?
2 2(a)(1)(C) at the bottom of the page, 33.

3 COMMITTEE MEMBER LOUGH: Yeah, I had on
4 (a)(1)(B). The 1, 2, 3 -- oh, the part of the
5 justification in there, we didn't address that the United
6 States National Bureau of Standards has been replaced by
7 NIST. So I just want to make sure that gets added in that
8 bullet as justification.

9 MR. FICKIES: Comment on that. Also, if we're
10 talking about dichromate, and we want to include NIST
11 ethanol water standards, why don't we just put that in
12 that section?

13 CHAIRPERSON KIMSEY: Is it pretty much limited to
14 dichromate and alcohol that -- I mean, are there other
15 samples?

16 MR. FICKIES: Pretty much. Well, I don't know if
17 there are. I'd like to know.

18 CHAIRPERSON KIMSEY: Or we could use the term
19 NIST standard reference material and just leave it open
20 for future -- I mean.

21 MR. FICKIES: That phrase sounds good to me at
22 the moment.

23 (Laughter.)

24 MR. FICKIES: This is Terry Fickies.

25 CHAIRPERSON KIMSEY: It is after 3 o'clock.

1 COMMITTEE MEMBER LOUGH: Patty Lough. I'm
2 running out of steam. What did you want to put?

3 CHAIRPERSON KIMSEY: We were talking where it
4 says NIST potassium -- "such as NIST potassium dichromate"
5 under .2(a)(1)(B), the italicized paragraph.

6 COMMITTEE MEMBER LOUGH: Yes.

7 CHAIRPERSON KIMSEY: Okay. "Such as NIST
8 potassium dichromate" maybe substitute "a NIST standard
9 reference material."

10 COMMITTEE MEMBER LOUGH: And take out the
11 potassium dichromate?

12 CHAIRPERSON KIMSEY: Yeah. It was either that or
13 add alcohol. And then you start thinking is there
14 something else. No one knows of something right now, but
15 maybe in the future. So just more generic would be "a
16 NIST standard reference material."

17 COMMITTEE MEMBER LOUGH: Impose a NIST standard
18 reference material.

19 CHAIRPERSON KIMSEY: Right.

20 ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
21 You could -- NIST makes tire rubber standards.

22 COMMITTEE MEMBER LOUGH: Okay.

23 CHAIRPERSON KIMSEY: Which we won't be using.

24 Okay, on to page 34.

25 MR. FICKIES: No. No. Comment, Terry Fickies

1 here. We're talking about a direct oxidimetric method.

2 MR. PHILLIPS: It has to be potassium dichromate.

3 CHAIRPERSON KIMSEY: Okay.

4 MR. FICKIES: No, I'm sorry. The first part of
5 it will include NIST. How about just NIST standard
6 reference alcohol standards. Take out traceable
7 secondary.

8 CHAIRPERSON KIMSEY: Well, I'm totally --

9 COMMITTEE MEMBER LOUGH: Because -- yeah, maybe
10 we should, it's getting late. Because there you're using
11 them -- they're traceable. They're less expensive, when
12 you're double checking to see how your finished product
13 is, you are, at that point, using a NIST standard down
14 below. So you don't have to go through the expense of
15 using a NIST standard in that preparation process. You
16 will check it against a NIST standard when you're all
17 done. That's why there's two different ones.

18 MR. FICKIES: It is getting late, isn't it?

19 COMMITTEE MEMBER LOUGH: Yes, it is.

20 CHAIRPERSON KIMSEY: Well, I was thinking if
21 we've clarified this. At a minimum, since we've been
22 going for 2 hours since lunch, we should take at least a
23 10-minute break.

24 COMMITTEE MEMBER LOUGH: Okay.

25 CHAIRPERSON KIMSEY: So let's do that and then

1 we'll come back and talk about the rest of our hour -- 40
2 minutes or so.

3 So 10 minutes. We'll be back at 3:20.

4 (Thereupon a recess was taken.)

5 CHAIRPERSON KIMSEY: This is Paul Kimsey.

6 This is Paul Kimsey in Richmond. Why don't we go
7 ahead and get started again.

8 I think frozen may describe part of my brain at
9 the moment. I would --

10 (Laughter.)

11 CHAIRPERSON KIMSEY: We have scheduled another 40
12 minutes. It's probably going to take at least 10 minutes
13 to discuss our next meeting and some closing comments. So
14 we can continue on or we can end at 3:30. It's really up
15 to the group. How mentally fresh do you feel?

16 MR. FICKIES: 3:30.

17 COMMITTEE MEMBER LOUGH: I think maybe the
18 housekeeping and end at 3:30.

19 CHAIRPERSON KIMSEY: I'm hearing a bit of a
20 consensus for 3:30.

21 DR. LEMOS: Can I make a comment from the public?

22 CHAIRPERSON KIMSEY: Sure. A public comment.

23 DR. LEMOS: Nikolas Lemos.

24 Can I recommend that at the next meeting the
25 Committee considers starting at this point where you all

1 left off and finish the entire Title once. And then
2 perhaps not start at the very beginning again at the next
3 meeting, please.

4 CHAIRPERSON KIMSEY: I think we can certainly
5 consider --

6 COMMITTEE MEMBER LOUGH: Yes, that's what we
7 normally do.

8 DR. LEMOS: Okay. Thank you.

9 CHAIRPERSON KIMSEY: That's a good
10 recommendation.

11 With regards to our next meeting, I think we
12 ought to try and meet -- and we'll also work again on
13 having a quorum. We thought we were going to have a
14 quorum for this meeting, but that did not materialize.

15 But I would recommend we try and meet again in a
16 month, in 30 days. And I have something written down
17 here, the second or third week of May.

18 Go ahead, is there a comment?

19 MR. FICKIES: Comment from Sacramento. Can we
20 have it not on a Monday or a Friday, but somewhere in the
21 middle, so we can have a long weekend, if we desire it?

22 CHAIRPERSON KIMSEY: Okay. So we're looking at
23 maybe a -- Tuesdays don't work for us at the State very
24 much, because of some other standing meetings. So a
25 Wednesday or a Thursday, the second or third week of May.

1 I don't have a calendar with me here.

2 DR. LEMOS: Can I comment please that the week of
3 May 11th is the California Association of Criminalists San
4 Bernardino meeting that whole week. That's the second
5 week of May. So the first week of May is May the 4th,
6 Monday, May the 4th.

7 CHAIRPERSON KIMSEY: What's the third week?

8 DR. LEMOS: Starting the 18th.

9 CHAIRPERSON KIMSEY: So Wednesday and Thursday
10 would be what?

11 MR. FICKIES: So Wednesday or Thursday would be
12 the 5th or the 20th or the 21st.

13 CHAIRPERSON KIMSEY: Yeah, the 20th or 21st.
14 Does anyone have -- I mean, obviously we're going to have
15 to send out a notice to the whole Committee.

16 COMMITTEE MEMBER LOUGH: Patty Lough.
17 Right. I will not be available until the 25th.

18 CHAIRPERSON KIMSEY: Until the 25th. So maybe
19 Wednesday the 27th or 28th?

20 MR. FICKIES: Yes.

21 COMMITTEE MEMBER LOUGH: Yes, tentatively.

22 MR. FICKIES: Tentatively.

23 CHAIRPERSON KIMSEY: You have 4 more people.

24 Let's see, the week of the 11th is out. How
25 about the latter part -- how about. Well, that's a little

1 too soon. I'm just trying to think if it was worth trying
2 to find some more dates --

3 MS. ANDERSON-SEAQUIST: What about May 27th?

4 CHAIRPERSON KIMSEY: Yeah, that's one of the ones
5 we're proposing.

6 DR. LEMOS: Would May the 7th, a Thursday, would
7 be too soon? It's about 4 weeks from now?

8 CHAIRPERSON KIMSEY: How about May the 7th or 6th
9 and 7th?

10 MR. FICKIES: That could be done.

11 CHAIRPERSON KIMSEY: We'll put that in the pot
12 also. If not, then we're moving into June. And I just as
13 soon do something sooner than that. So we'll propose the
14 6th and 7th or the 27th and 28th to the rest of the
15 Committee members and see what we come up with.

16 Other suggestions on how to run the next meeting?
17 We've had the suggestion to go ahead and continue from
18 where we are now and finish it before we restart.

19 I think it's worth, you know, and we'll put this,
20 I guess, out to the Committee members that are
21 representatives of organizations that they try and be sure
22 that they've got their organization's, you know, backing
23 on some of these, you know, proposed changes or at least
24 an understanding of what they're getting their -- you
25 know, representing their organizations for.

1 Other comments?

2 Other items to bring up?

3 Well, if not, then we're --

4 MR. FICKIES: Everybody is frozen.

5 CHAIRPERSON KIMSEY: Yes, I see that.

6 Mentally as well as visually.

7 Well, if there's nothing else, I want to thank
8 you all for your day. We got a lot done. And it was a
9 great deal of work on our part. So I want to thank you
10 all for your time. And we'll see you in about a month.

11 (Thereupon the Forensic Alcohol Review
12 Committee meeting adjourned at 3:27 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, JAMES F. PETERS, a Certified Shorthand
3 Reporter of the State of California, and Registered
4 Professional Reporter, do hereby certify:

5 That I am a disinterested person herein; that the
6 foregoing California Department of Health Services,
7 Forensic Alcohol Review Committee meeting was reported in
8 shorthand by me, James F. Peters, a Certified Shorthand
9 Reporter of the State of California, and thereafter
10 transcribed into typewriting.

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

14 IN WITNESS WHEREOF, I have hereunto set my hand
15 this 4th day of May, 2009.

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