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

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

THURSDAY, AUGUST 25, 2005
10:00 A.M.

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

REVIEW COMMITTEE MEMBERS

Mr. Paul Kimsey, Ph.D., Chairperson
Ms. Patricia Lough
Mr. Bruce Lyle
Mr. Paul Sedgwick
Ms. Laura Tanney
Mr. Kenton Wong
Mr. Torr Zielenski

STAFF

Dr. Larry Barrett, Chief, Division of Food, Drug and Radiation Safety
Ms. Goldie Eng, Senior Staff Counsel
Mr. Clay Larson, Chief, Abused Substances Analysis Section
Ms. Cathy Ruebusch, Regulations Coordinator
Dr. Mary Soliman, Chief, Food & Drug Laboratory Services

FACILITATOR

Ms. Selma Abinader

ALSO PRESENT

Ms. Gail Heuer, Senior Staff Counsel, Department of Motor Vehicles
Dr. Nikolas Lemos, Chief Medical Examiner Toxicology Lab, San Francisco

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APPEARANCES CONTINUED

ALSO PRESENT

Mr. Bill Phillips, California Department of Justice
Ms. Halle Weingarten, Forensic Toxicologist
Mr. Jeff Zehnder, Drug Detection Lab of Sacramento

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FOOD, DRUG AND RADIATION SAFETY DIVISION CHIEF

BARRETT: Good morning. My name is Larry Barrett. I'm Chief of the Division of Food, Drug and Radiation Safety of the California Department of Health Services, and I would like to welcome you this morning to the first meeting of the Forensic Alcohol Review Committee.

This Committee was established last year by Senate Bill 1623. It has 8 members. And the members represent various areas, including prosecuting attorneys, law enforcement agencies, defense attorneys, coroners, criminalists, toxicologists, crime laboratory directors, and the Department of Health Services.

I would like to thank each of you for agreeing to participate in this committee. As Committee members you are responsible for proposing changes to the Department's regulations establishing -- for determining blood alcohol concentrations of individuals involved in traffic accidents or violations.

Accurate and reliable blood testing of drunk drivers is important to public health. Each year there are over 1,500 Californians killed in traffic accidents. In addition, another 30,000 are injured. When individuals drive in California they automatically give their consent for testing of blood alcohol levels. Each year there are...
over 200,000 driving arrests in California.

In this State it's unlawful to drive with a blood alcohol level of above .08 percent. At .07 percent it's considered not unlawful. With this in mind, it's critical that we have good laws and regulations in place. California and other states take this very seriously, because we want to ensure that drunk drivers are convicted, but we also want to ensure that someone is not convicted unjustly.

The Department of Health Services is responsible for the regulation of forensic alcohol analysis. The goals of the program are to help ensure the competency of forensic alcohol laboratories, the qualifications of the employees in those laboratories and the accuracy of breath testing procedures used by law enforcement agencies.

As members of the Forensic Alcohol Committee your support for this important public health initiative is appreciated. So thanks again for your participation.

And I would like to now introduce you to Dr. Paul Kimsey who will serve as the Chair for today's meeting.

Thank you.

CHAIRPERSON KIMSEY: Good morning. I'm Paul Kimsey. And I'll introduce myself a little bit and we'll go around the Committee and have you introduce yourselves.

I'm the Assistant Deputy Director for Laboratory
Science in the Department of Health Services. And I'm also the State Public Health Laboratory Director. And as a consequence of being the State Laboratory Director, I have quite a bit of oversight responsibility for this facility, which is new. We just moved into in the last few years and we'll be finished moving here by the middle of September.

As Assistant Deputy Director for Laboratory Science, I oversee the 2 divisions that license both clinical laboratories and environmental laboratories in the state. There are over 16,000 clinical laboratories and a little under 800 environmental laboratories, which we certify and regulate in the state. So I have a bit of a background in laboratory oversight. And that was why the Department has asked me to participate and at least chair this meeting today.

And I'd also, as we go around, I'd like to have us, besides introducing ourselves, a little bit -- sort of talk -- or mention a little bit what you hope to get out of the meeting today and the process.

And myself I hope I'd have, and we all have, a better understanding of what our responsibilities are going to be and have an outline of how we're going to do that work, because this is not an area that I currently am involved with in the Department. And I'm going to be
learning a lot more. So I'm hoping to establish a process
and understanding of what our responsibilities are by the
end of the day.

So, Bruce, would you like to introduce yourself.

COMMITTEE MEMBER LYLE: My name is Bruce Lyle.

I'm the Assistant Chief Deputy Coroner of the Orange
County Sheriff's Coroner's Department. I don't know what
to say about myself. I've been in the field for a long
time. I'm here at the table representing the California
State Coroner's Association. So I'll keep that in mind as
we go, what the interests of the whole state is.

And what I'm hoping to derive from today and
eventually from the whole process is to just ensure that
as an end user as a representative of the end users of
toxicology, and it's not necessarily the breath analysis
but more most post-mortem toxicology. We rely on that
pretty heavily. And our coroner's goals are always for
accuracy, completeness and promptness. And I want to keep
that in mind and make sure that the process ensures those
things.

COMMITTEE MEMBER SEDGWICK: I'm Paul Sedgwick. I
was nominated by the California Association of
Toxicologists. And just a little about myself. I've been
in the business for 35 years plus some time in Indiana.
I'm a Diplomate of the American Board of Forensic
Toxicology. And I'm on the Proficiency Review Committee of the American Society of Crime Lab Directors Laboratory Accreditation Board for toxicology and alcohol.

Among the things that I hope to complete here is I would like to keep the spirit the Title 17 as it was originally written. It was very necessary and it does very good things. I would like to encourage good and hopefully better laboratory practice to give as accurate a result as possible with easy access to all the records that document the analysis.

And keeping in mind that the criminal justice system, as represented by our 2 attorney members, is, has always been and will continue to be the final arbiter of a good result. I would also like to see a reorganization and clarification of Title 17 to assist the attorneys in asking the appropriate questions and to let them know what answers to expect from those questions.

COMMITTEE MEMBER LOUGH: Patricia Lough Supervising Criminalist, San Diego Police Department, now retired. I'm here representing the California Association of Crime Laboratory Directors.

I agree with everything Paul said. The information I'm prepared to talk about today regarding my expectations are maybe pointed in a little bit different direction. It's been about 9 months since the legislation
was in effect, and I would like to see speedy revisions of Title 17 made. It is a concern to crime laboratories. I'd like to target the end of this year. And that probably is speedy, but I think we could do it.

I'd like to see that we complete the intent of the legislation for Senate Bill 1623. I'd like to see the practices updated and approved by the general forensic science community put in place, and eliminate the redundancy of State oversight of forensic alcohol analysis.

And second, as we -- it is on our agenda, at 3:15, to establish how this committee is going to operate. I'd like to establish a rigorous schedule to make sure that we can complete the process as soon as possible and perhaps quickly determine the areas of agreement, so we only have to concentrate on those areas of disagreement.

I'm happy to be here today.

COMMITTEE MEMBER WONG: Hello. My name is Kenton Wong and I represent the California Association Of Criminalists. Patty Lough and I have worked extensively on Senate Bill 1623, and I'd like to echo the same sentiments as Paul Sedgwick and Patty Lough.

I think that these revisions are long overdue. I think there will be many areas of comment around that we agree on, that need amendment and revision. And I agree
with Patty that hopefully there will be minimal areas that we have disagreement on that we can hammer out and move forward.

COMMITTEE MEMBER ZIELENSKI: My name is Torr Zielenski. I am currently a supervising attorney with the misdemeanor trial section in Sacramento. I represent the California Public Defenders Association.

And I, too, echo Mr. Sedgwick's concerns about Title 17. It would be our desire to have accurate and reliable testing, so that the certainty of whatever verdicts come from juries is assured.

Additionally, I'd like to see, if possible, more weight given to the impact of Title 17, because most of the time Title 17 infractions, violations or noncompliance is treated by the Court as just something that is, for the most part, insignificant. Most of the courts will allow the evidence to come in even if there's been a violation of Title 17 and the ruling often time goes to the weight. And to ensure the quality of the process, it would be important, and I'd like to see, that violations of Title 17 actually had some net effect where counsel is important.

COMMITTEE MEMBER TANNEY: Laura Tanney. I'm a Deputy District Attorney in the County of San Diego. I'm a representative here of the California District Attorneys
Association. I've been a Deputy District Attorney for about -- approximately 16 years. I've handled numerous driving under the influence cases as well as vehicular manslaughter cases involving the use of alcohol.

I'm here today -- I'm also incidentally on the Legislation Committee of the California District Attorneys Association and the Legislative Coordinator for the San Diego County District Attorney's Office.

I'm here today to again find out what the responsibilities are of this Committee and how we can best put those responsibilities into practice and develop regulations that do -- that do direct the accurate and reliable testing of forensic alcohol samples. I'm looking for efficiency, but also quality of those results, so that the integrity of the evidence is preserved so that it can be used in the prosecution of cases.

CHAIRPERSON KIMSEY: Thank you. I've gotten a note that Sergeant Ray Cardona is not going to be able to join us today. And before I turn it over to our facilitator, I'd like to talk a little bit about sort of how the building operates.

A number of you may have seen that there are restrooms. As you go out of the auditorium straight back, there's rest rooms on the right and left. There's a cafeteria to the right. I would recommend that -- we're
actually quite pleased with the cafeteria, a little surprised. But very pleased with the cafeteria. It's food -- and I would recommend that you have lunch there. Getting in and out of security takes some time, and we may be able to have some discussions. There is a couple of sort of small like small cafe and a sandwich shop just directly across the street that you can walk to. There is an Italian restaurant, Saluté, down at the harbor, which is about a mile and a half drive, if you're interested. Obviously, there's a little bit more security here than we've had in some of our other facilities. Be careful which doors you go out, you may not be able to get back in without a badge. So talk to me or an employee if you need to have a cigarette break or you want to walk around outside.

I think that's the majority of the housekeeping issues. We do have some breaks scheduled, but I don't see one before lunch at this point. So we might have a break before lunch, but it's 10 to now, we'll see how it works.

But without any other further announcements, we look forward to having Selma here today to sort of help us walk through the agenda, keep us on time. And I'd like to introduce Selma Abinader. And, Selma, if you'd like to take over.

FACILITATOR ABINADER: Good morning. Welcome
Committee Members, and I'd like to also welcome the public that are here today.

I just want to spend a few moments going over the agenda and talking a little bit about the process today. And it was very helpful to hear what people said what their hope was for the process. Because I think the way that the agenda has been structured, hopefully at the end of the day, we'll be able to really identify what this committee sees as the most important things to focus on in terms of the new law, and really determine a process to move forward on that, so that we're not, you know, spending a lot of time doing things that are already okay or people feel have a lower priority in the whole need to move forward on developing the regulations.

So I think about this meeting agenda today in hoping to achieve 3 different outcomes. One is really making sure that we're all understanding what the process is about developing regulations of this type, and also kind of the legal issues that surround that. So I call this morning's session about laying the foundation, so we all have the common information about the things that really drive and have an impact on the work that you're going to be doing.

Everybody, by the way, has an agenda in their packets, so that's why I'm reviewing at this moment.
We're also going to spend some time this afternoon, after lunch, hearing about what the program currently entails. So there will be a presentation of what the current program looks like, a review of the new law, and then we're going to spend some time in a facilitated session really talking about the implications.

So, hopefully, what we'll be doing is being able to identify the scope of the work together -- our work together and also identifying where you want to focus your efforts as you meet over the next few months, and hopefully by the end of December are able to complete your work as Patty had said in her opening statements.

So if we were to look at the agenda, we're at the session that's called Opening Remarks and Discussion of the Committee Meeting Agenda. We're going to have a presentation by Goldie Eng after I'm done with the review. And she's going to review the legal responsibilities. And then Cathy Ruebusch is going to talk about the regulation development process and standards.

Both these folks will be consultants to this group as you go through your process. So you'll hear information from them today. But as my understanding is, that they'll be available to the Committee throughout the process of developing regulations. So I think that's very fortunate to have both those folks involved.
Then we'll have lunch. As Paul had stated, folks can go to the cafeteria or there's places outside the building to go to lunch, and that will be an hour from 11:30 to 12:30. And then when we come back Mary Soliman, Dr. Soliman and Clay Larson will give us a presentation of the current activities. And you have a worksheet in your folder on the right-hand side in the back that they're going to be using during their presentation that really gives you a nice overview of the current activities and also what the law says in relationship to the activities that are presently taking place.

Then we're going to go into a facilitated discussion, where we're really going to begin to identify what are the implications when we're moving from something what currently is to being able to move toward implementing this new law, what are the implications, what are the priorities, what do we really need to focus our efforts on?

So that will take place as a facilitated activity in the afternoon. And once we're able to identify where you want to prioritize your efforts, then if we have some time we'll get to work. We'll spend some time talking about governance issues. And I think one of you brought up wanting to really know what the process is, the whole issue about how you're going to work together as a
committee. We'll be addressing that during the governance and meeting process section. And then together we'll outline the next steps and schedule the future meetings.

So how does that sound?

Sound good?

All right, great.

And so as the facilitator, I'm really here to do that, facilitate. I'm not the content expert. I'm here to just ensure that the process moves forward and really support your efforts in the afternoon to move forward and identify the way you're going to work together and what you're going to focus on.

Thank you.

CHAIRPERSON KIMSEY: And now we're going to have a presentation from Goldie Eng. She's our Senior Staff Counsel at the Office of Legal Services, Department of Health Services. She's going to review the legal responsibilities.

SENIOR STAFF COUNSEL ENG: Thank you. Good morning. First, I'd like to review the legislation that brought about this Committee. SB 1623 was enacted last year and has been -- as you know, the Bill eliminated the Forensic Alcohol Laboratory Licensing Program. And now the -- and also many of the specific requirements associated with it, such as inspections.
However, the law did require that forensic alcohol laboratories continue to comply with existing regulations until such time as these regulations are revised by the Department. And this Committee is an integral part of that process.

And now the -- with the elimination of the licensing program, the focus of the program is now on the regulations and also the work of this Committee.

I'd like to review the section about 1623, which talks about the Committee. The Legislature required the Department to establish this Committee, and that the Committee would have 8 members with various representatives of different backgrounds in the forensic alcohol area, including Department of Health Services. And the Committee is required to meet once every 5 years or within 60 days of the receipt of a request by the Department from a committee member.

And the Committee is charged with reviewing existing forensic alcohol laboratory regulations, and to determine revisions to those regulations, which will, and I quote, "...limit those regulations to those that the Review Committee determines are reasonably necessary to ensure the competence of the laboratories and employees to prepare, analyze and report the results of the tests and to comply with applicable laws."
Then after it comes up with those revisions, the Committee is required to submit a summary of those revisions to the California Health and Human Services agency, which is the agency above the Department of Health Services. Within 90 days of receiving those revisions, the Health and Human Services Agency may disapprove one or more of those revisions.

After that 90-day period, the Department is required to adopt those regulations, which incorporate the Committee's revisions except those revisions which were disapproved by the agency.

Because this Committee was required to be established by the Legislature and required to meet regularly, it comes under the requirements of the Bagley-Keene Open Meeting Act, which covers state bodies. And those provisions are found in Government Code sections 11120 to 11132, and all of the Committee members should have received copies of the Bagley-Keene Open Meeting Act, along with a copy of the Attorney General's guide to the Bagley-Keene Act.

Basically, the Act requires State bodies to meet 3 requirements in 3 areas. First, is to provide public notice of meetings and to prepare agendas.

Second, to accept public comment.

And third, to conduct meetings in public, except
as allowed to conduct closed sessions in limited circumstances.

Operating under the Bagley-Keene Open Meeting Act requirements can be frustrating and inefficient. But I think we can understand the process better if we consider the value judgments that were made by the Legislature when it required the establishment of this Committee.

If the primary objective of the decision making relating to regulations was efficiency, the Legislature would have assigned this process to the Department of Health Services and let the Director of the Department make the decisions.

But in choosing to create a multi-member committee, the Legislature made a judgment that the decisions revising these regulations would be made by yielding the consensus. And that it specifically created the Committee with 8 members from different backgrounds, different viewpoints, different experiences, and to build this consensus through give and take, debate, deliberation, and it's a more time-consuming process. But that judgment was made that it was worth it. This is what we need to revise these regulations.

And that leads into the importance of the work that the Committee will be doing this afternoon, which will be coordinated by Selma Abinader. I think if we
understand these value judgments, which led up to the creation of this Committee, we'll better understand that the Legislature is mandating that the Government use a consensus building model in terms of decision making instead of the individual decision-making part.

And also by enacting the Bagley-Keene Open Meeting Act and having this Committee be a state body under that Act, when the Committee meets to develop this consensus, there needs to be public participation, there needs to be a seat at the table, so to speak, for the public to allow the public to monitor the decision-making process and to participate in that process.

And I think if we understand these value judgments, we'll be able to accept some of the inefficiencies that this process entails. And we realize that that was a trade off for the benefit of greater participation in government.

Now, I'd like to review some of the highlights of some of the requirements of the Bagley-Keene Act. First of all, the Bagley-Keene Act covers the activities of State bodies, and that is defined as, "A multi-member body created by statute or required by law to conduct official meetings."

And a meeting is defined in the Act, "As any congregation of a majority of the members of the State
body at the same time and place to hear, discuss or deliberate on any item that is the subject matter of the Committee."

And the law prohibits the use by the majority of the members, which is the equivalent of a quorum either by direct communications, meeting, teleconferencing through personal intermediaries or technological devices such as E-mail.

There are several exemptions from this definition of a meeting. And all of these exemptions are provided that the majority of the members do not discuss committee business among themselves. And some of the exceptions are individual contacts or conversations between a committee member and a member of the public, attendance by committee members at a conference where issues of general interest to the public are discussed, open and publicized meetings to address the topic of state concern, open and noticed meetings of another state body or legislative body, attendance at a purely social or ceremonial occasion, and lastly attendance of a majority of the members at an open or noticed meeting of a standing committee of that. That would refer to a subcommittee of this Committee.

And the non-committee members, if they do attend that subcommittee meeting, are required to attend only as observers, meaning that they cannot participate in the
subcommittee discussions or ask questions.

A subcommittee, which in the legislation is also referred to as an advisory body, is a body of 3 or more persons created by the governing committee, that is this Committee. And this subcommittee, and it doesn't matter what it's -- what the title is, a subcommittee, task force, workgroup, it's considered a subcommittee. And subcommittees of over 2 committee members are required to comply with the Bagley-Keene Open Meeting Act.

Committees that have less than 3, let's say 2 members, are not covered -- not required to comply with the Open Meeting Act. But if there is a meeting of a subcommittee with less than 2 members, it would -- it should not be attended by more than those 2 subcommittee members. Otherwise, that would push the attendance up to -- beyond 2, and then it would be -- it would trigger the Bagley-Keene Open Meeting Act requirements.

I'd like to talk now about notice. For committee meetings, it requires at least 10 calendar days written notice for each meeting. And the notice must be posted on the Internet. There must be an agenda prepared, which must include all items of business to be transacted or discussed at the meeting, and no item must be added to the agenda subsequent to the provision of this notice. There are some specific exemptions to this 10-day notice.
requirement, but that is the general rule.

However, if the agenda is amended prior to the start of that 10-day period, then there -- that would be acceptable because that 10-day notice period is still being -- requirement is still being met.

And the items which are not on the agenda are not to be -- may not be discussed, even if no action is taken by the Committee. Because even a discussion of those -- of that subject matter is of a concern to -- under the Bagley-Keene Open Meeting Act, because the public has a right to also monitor the discussions and the input that is presented to the Committee.

Areas that -- subject matter that is not on the agenda, but is brought up may be discussed sufficiently to put that item on the agenda for the next meeting. So that is one way to deal with areas that are not on the agenda, either raised by committee members or by members of the public.

Subcommittee meetings are also required to -- are required to provide notice. The timeframe is the same, 10 calendar days. There needs to be a general description of the business to be discussed at the subcommittee meeting and it must be also posted on the Internet. And all of the notices must be made available in appropriate formats upon request by any person with a disability.
There are also provisions for special provisions or special meetings. And special meetings can be called without the 10-day notice for required -- for regular meetings if there is a substantial hardship on the review committee or where immediate action is required to protect the public interest.

An example of areas that could be considered for a special meeting would be pending litigation, proposed legislation or issuance of a legal opinion. Notice for special meetings must be provided as soon as practicable, and it must be made to all committee members and to the media at least 48 hours in advance of that special meeting, and it also must be posted on the Internet at least 48 hours in advance of that meeting.

And at the beginning of that special meeting, the review committee must make a finding in open session that the meeting -- that the 10-day notice requirement would pose a substantial hardship on the Committee and immediate interest or immediate action is required to protect the public interest.

There are also provisions in the Bagley-Keene Act for emergency meetings. And the criteria for an emergency meeting is where there -- there may be an activity which severely impairs public health or safety or both or that there is a crippling disaster that severely impairs public
health or safety.

There are many requirements in the Bagley-Keene Act which talk about procedures for closed sessions. Closed sessions are for very specific purposes. And examples of these would be personnel matters, pending litigation, or for real property contracts. I won't go into these in detail, because I don't anticipate that we would be needing to hold very many closed sessions. And if so, you know, we'll discuss that when the question comes up.

The open meeting laws allow for teleconferencing. That's an option that reduces travel time for the members and the public. The downside of that is that any teleconferencing, and we're talking about teleconferencing where there is a committee member, that location needs to be set up so that the Open Meeting Act requirements are met. So members are not allowed to teleconference from their office or their home or car phone or anything like that, unless their house or their office is open to the public, and there's speaker systems so forth set up to allow for public comment.

Some of the restrictions on the deliberations of the Committee, which might trigger the meeting requirement, which, you know, might -- would be, for example, a conference call where the conference call
includes a quorum of the membership, which is a majority, 51 percent.

Another thing which is not allowed are a series of 1-on-1 telephone calls before -- between the members, where, let's say, a staff member might be contacting various members of the Committee one-on-one, but putting that information together with the meeting with the Committee members would constitute a quorum, and that would be considered a meeting under the Bagley-Keene Act.

Another thing which is not allowed, is serial meetings, where committee members may call, talk to each other -- let's say A phones B, B phones C, C phones D -- that would be aggregated, if that constitutes a quorum, to be considered a meeting, and that would trigger the Open Meeting Act as well.

So basically what the purpose is to prevent deliberations from occurring outside of the public meeting. So if you can't -- if the discussions are you can't do it outside of a public meeting, you can't do it through these processes as well.

Secret ballots are prohibited and no votes may be cast by mail.

As to the public, no person can be required to register or sign-in or to meet any other condition for attending these meetings. But the members of the public
can be required to -- can be asked to identify themselves
for the record when they are making comments for
addressing the Committee.

Items on the agenda may be taken out of order.
The Committee member -- the Committees are
required to provide an opportunity for the public to
address the Committee on each agenda item before or during
the discussion of that agenda item. And public criticism
of policies, programs, services or acts of omissions of
DHS or the agency are allowed.

When writings which are public records are
distributed to all or a majority of the Committee, those
writings must be made available to the public. However,
the records which are exempt from disclosure under the
public records act need not be disclosed. And there are
numerous exemptions under the Public Records Act for
personnel matters, privacy matters, trade secrets, that
kind of thing.

If the documents are prepared by DHS or by a
committee member, those documents must be made available
to the public during the Committee meetings. If they are
prepared by some other person and distributed to the
Committee, they must be made available after the meeting.
The remedies for violation of the Open Meeting
Act include court actions to stop or prevent violations of
the Open Meeting Act, an interested person or district attorney or the Attorney General can bring these actions. An action could also be brought to -- for the court to order that a committee action is null and void and require the Committee to start over. And these actions are required to be brought within 90 days of the Committee's decision.

And there's also a misdemeanor remedy which covers every -- which reads, "Every member of a state body who attends a meeting in violation of the Open Meeting Act, where the member intends to deprive the public of knowledge to which the member knows or has reason to know the public is entitled is a misdemeanor."

And I'd like to ask if there are any questions from the Committee or the public. Committee, do you have any questions?

CHAIRPERSON KIMSEY: I had a couple. Are we allowed alternates? At subsequent meetings can we send someone in our place?

SENIOR STAFF COUNSEL ENG: No, there is no proxy.

CHAIRPERSON KIMSEY: And the voting is basically one member one vote?

SENIOR STAFF COUNSEL ENG: Yes.

CHAIRPERSON KIMSEY: And so a tie vote would mean something does not -- is not approved is that correct, by
the Committee?

SENIOR STAFF COUNSEL ENG: The decision-making process would be by a majority vote.

FACILITATOR ABINADER: What if there is a tie?

SENIOR STAFF COUNSEL ENG: There is no action taken.

FACILITATOR ABINADER: No action taken.

CHAIRPERSON KIMSEY: Other questions?

COMMITTEE MEMBER TANNEY: I have one. I'm sorry. I missed what you said about the notice of the agenda items, and you made some indication that if there's something not on the agenda that you want discussed, how is that accomplished or can it be accomplished?

SENIOR STAFF COUNSEL ENG: The best way to deal with that would be to put the topic on the agenda for the next meeting to get enough information to make a decision, for the Committee to make a decision whether to put that item on the agenda for the next meeting.

COMMITTEE MEMBER TANNEY: Okay. And when you have on the agenda, for instance, proposed regulation revision concepts, for example, and then you have facilitated group discussion. That seems like a very broad category, so how specific does the notice have to be?

SENIOR STAFF COUNSEL ENG: The --
COMMITTEE MEMBER TANNEY: Enough to put a general topic like that?

SENIOR STAFF COUNSEL ENG: Well, the -- that topic I think is more of a process. I think the subject matter is the revisions of all of the regulations. And the subject of the discussion is all of the regulations. And the description of the agenda item is not expected to be long. It should be under 20 words or about 20 words.

CHAIRPERSON KIMSEY: Other questions?

THE REPORTER: Could she identify?

CHAIRPERSON KIMSEY: Yes, could you identify yourself, please?

MS. WEINGARTEN: I'm Halle Weingarten. I'm still not clear about the answer to the last question that was asked, because many of the revisions will be very specific items. And what you said implies to me that there need not be on the agenda a list of those specific items; is that correct?

SENIOR STAFF COUNSEL ENG: The specific items are all the regulations. The Committee is going to be considering all the regulations. And there's no -- it's not like only one regulation is an area -- subject matter area is going to be discussed. All of the regulations are going to be discussed.

FACILITATOR ABINADER: So, for example, if we go
through the process today and the Committee decides next
time they want to talk about licensing, site inspections
and training, for example, we would then be able to
specify that on the agenda. Is that the kind of a thing
that you're looking for?

MS. WEINGARTEN: Yes, to say that we're going
to -- the agenda item is regulations is very, very broad.
And because what will be considered is specific parts of
the regulations. And so the example that Selma gave us
was basically what I had in mind. Would the agenda
include which specific items would be considered?

SENIOR STAFF COUNSEL ENG: Right. The agenda for
the next meeting could be structured that way, that there
would be a specific item, for example, for proficiency
testing. I can understand that that would allow members
of the public who are more concerned about that area to
attend. And members that are -- and the public that are
not interested in that, you know, attend other agenda
items another time.

FACILITATOR ABINADER: Today is really more to
kind of lay the groundwork for the process and move
forward and identify the focus of the work. I think
that's why you see it more broad.

CHAIRPERSON KIMSEY: Yes.

MR. ZEHNDER: Jeff Zehnder, Drug Detection Lab of
Sacramento. This may be obvious, but I'm going to ask anyway, does the public have a vote?

SENIOR STAFF COUNSEL ENG: No, the public does not have a vote. The only people who vote are the 8 members of the Committee. And only those committee members that are present. And also there needs to be a quorum, which is 51 percent present at the meeting in order to make decisions.

DR. LEMOS: I'm Nikolas Lemos from San Francisco, Medical Examiner. I would like to know who votes, if any, in the case of a member of the Committee being absent, as in today?

SENIOR STAFF COUNSEL ENG: That committee member does not vote, if he or she is not present.

DR. LEMOS: And so he or she would not be able to submit a vote on this specific matter in any other way, by proxy or anything else?

SENIOR STAFF COUNSEL ENG: No, there's no proxy voting.

CHAIRPERSON KIMSEY: My understand if we were on a telecon, that voting is allowed by roll call?

CHAIRPERSON KIMSEY: Any other questions?

Thank you very much.

SENIOR STAFF COUNSEL ENG: Thank you.

CHAIRPERSON KIMSEY: Next on the agenda we have a
presentation from Cathy Ruebusch, who's the Regulations Coordinator at the Office of Regulations, Department of Health Services. Cathy is going to talk to us about the regulation development process and standards.

REGULATIONS COORDINATOR RUEBUSCH: Good morning. I'm not hearing feedback. I'm assuming you can hear me?

CHAIRPERSON KIMSEY: Can everyone hear okay?

REGULATIONS COORDINATOR RUEBUSCH: I just want to point out to you in your packets is a PowerPoint presentation. I am not projecting, but I am putting it together so that you can follow what I am speaking of today.

I'm Cathy Ruebusch. I'm from the Office of Regulations for the Department of Health Services. The Office of Regulations is sort of unique phenomenon in the Department of Health Services, because our purpose is -- because the Department is so huge -- is to help facilitate getting regulations put through for the many, many programs that the Department has.

As a result, we are not subject matter experts. What we are -- except in of what the programs are about. What we are is subject matter experts regarding what's called the Administrative Procedures Act.

And that is the process in the State of California that the Legislature has determined is the
means by which regulations may be promulgated in the state of California.

The Administrative Procedures Act was established in 1979 and has been amended many times since then and has also been amended by court action many times since then. I want to point out that the regulations for the forensic alcohol laboratories were written in 1970. They were amended in 1972, and also in 1975, and then at one other time in 1986.

My point being is the vast majority of these regulations were written prior to the Administrative Procedures Act as we know it in the state of California today. So my point with this being overall is a concept issue, that when we address these revisions that the Committee wishes to address, in terms of these regulations, we will need to meet totally different standards than how the regulations are written today.

The Administrative Procedures Act, the statute that essentially put us here today said we are subject to the Administrative Procedures Act. It gave no exemption to requiring these regulations to be adopted by that process.

I will tell you bottom line in the state of California we have the most difficult process for promulgating regulations in the entire country. It is a
very, very cumbersome process. The process was deliberately made that way so that we do not create frivolous regulations that impact on the public.

The Government Code is where you will find the Administrative Procedures Act. It commences at 11340 and continues quite a ways in there. It's listed as Government Code Title 2, Division 3, Part 1, Chapter 3.5.

The regulations that help define this Act are in Title 1 of the California Code of Regulations.

What the Administrative Procedures Act did, in essence, is create what is called the Office of Administrative Law. They have the final say in terms of approval of the regulations that we will be promulgating for the purposes of regulating forensic alcohol laboratories.

The APA creates a definition for regulations. And that definition says that every rule, regulation, order or standard of general application if adopted by a state agency to interpret, implement or make specific a law that enforces ordinance is a regulation. So anything we put out that is a general rule of application that a laboratory must do must be in regulation.

The APA creates 6 standards that regulations must meet. The first one is authority. What that means is we have to have some statute that tells us we're allowed to
do what we're doing. The statute we will be using
generally speaking will be the one that -- that changed
the amended -- the Health and Safety Code last year.
However, there are also several overriding statutes that
allow the Department to promulgate regulations. We'll be
using those also.

The second is reference. Reference is, again,
some law, statute, regulation, court decision that we will
be implementing, interpreting or making specific. We
cannot just do something because we feel like it. There
has to be a legal basis for it. The third and probably
most difficult is the clarity standard. And the point of
that standard is regulation must be written in such a way
that it can be interpreted in only one way by the affected
public.

The fourth standard is necessity. Again, it's a
difficult standard to meet. And the basis of that is that
a regulation has to be based on evidence. It cannot just
be something we want to do because we like it. There has
to be a basis for it. It can be facts, documents, expert
opinions. There are many things that can be considered
evidence. The bottom line is it has to have a reason to
exist. That it's not just because we felt good about it
today.

Consistency is the 5th standard. And that has to
do with regulations must be consistent with law, with
other regulations, with court decisions, with statutes.
We cannot just do something that contradicts some other
cOMPONENT of the law.

The 6th standard is none duplication. And that
is, again, the whole concept of not putting into
regulations something that is already specified in
regulation or statute elsewhere. That doesn't mean we
cannot do that if -- only under one circumstance that will
be accepted, and that is a circumstance where it is
necessary for clarity. If it makes sense to help the
public understand how they are affected by the
regulations.

So essentially our statute tells us that we're
going to be determining revisions of Title 17, Forensic
Alcohol Laboratory Regulations. And that means we have 3
processes by which we can do that. We can either amend
the regulation as it is now, we can adopt new regulations
or we can repeal regulation. You can do those in any
combination you like.

The critical piece is anything we do must meet
those 6 standards. And as I brought up as my original
caveat, the current regulations as they are written do not
meet those standards. So if we touch any one of those
sections, in any way, we will have to rewrite it and write
it in a manner that meets those standards. It can be
done, but it's just understand that if you truly want to
change something it's going to take some work. I
appreciate you want to get this done quickly, and Lord
Knows, so do I.

However, because I'm going to be working very
closely with you through this process. However, I also
want you to understand these standards can be very
difficult to meet at times. It's going to be my job to
help you get there. So don't feel like it's totally
daunting. But there will be times when I'm going to say
yes, I understand, however we can't say it that way. And
let's talk about how we can say it. So this will be a
deliberative process. It will help you get there.

But at times it might feel like I'm being very
difficult. But the true outcome is, I want you to get
what you want. And I don't want you to get hung up in
something that I know from experience having put together
many, many, many regulations will end this with A
disallowed.

We'll be adopting these regulations by what is
considered the non-emergency regulation process. There is
an emergency regulation process. I'm not going to go into
that here, because we will not qualify for it. There has
to be -- regulations have to be necessary for the

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immediate preservation of public peace, health and safety
or general welfare. And I think we would have a very
difficult time saying that that is indeed the case with
these regulations.

The other component of it is when we adopt the
emergency regulations, they go into effect before the
public process. And I think, as Goldie just pointed out,
public process is considered something very, very critical
to this regulation promulgation process. So we do not
want to bypass the public comment period. I do not think
that would be viewed very well by the Office of
Administrative Law, who will have to rule on whether or
not a regulations truly are emergencies.

Not emergency regulations basically then must go
through all the regulation promulgation processes and that
includes all the public comment component. They go into
effect after that. We file a filing order with the Office
of Administrative Law when we are finished. The Office of
Administrative Law then may -- will do their ruling on it.
And at the end, then they will go to be filed with the
Secretary of State.

We have one year from public notice to completion
of the rule-making process. If we do not complete the
rule-making process in that timeframe, we must start all
over again. So I'll explain it. Let me get one more.
After that period there's a one-month period, where the Office of Administrative Law will then do their review.

Let me give you more information here. And if you've got questions, we'll have questions coming up.

Regulations package components. There must be a, what's called, a transmittal memo. This is the official we-are-creating-regulations-statement. It is usually something made by the Department. In this case, it will be made by the Committee.

We must have what's called the Informative Digest Policy Statement Overview. This is essentially what the public notice is all about. There must be a statement of reasons. This is blow-by-blow. Every regulation must be an evidence-based Statement of Necessity for the purpose of that regulation. This is where we include things that are called documents relied upon. This is our evidence on which we are basing this.

There is a Statement of Determination. The APA requires that we make a statement regarding business and public impact of the regulations we are writing. They must include the regulation text, the actual language. And what we will be doing, because we will be revising, is we will be submitting the actual language as it is written now with strike-out of those things that we are repealing,
underline of those things that we are adopting in the
actual regulation text, so that it is possible to see what
is the current regulation and what are we proposing.

If we include any forms or any standards from an
outside group, these will be considered, what are called,
incorporations by reference. They become regulation. If
we do that, this is part of the regulation text. And if
we choose to do that, I will take you through the process
to put that together.

There is also what's required is a Fiscal Impact
Statement. This is the fiscal statement regarding how is
government affected by this. What's the impact on local
government, state government, and federal government.

After we do all this, there are numerous reviews.
They're a standard part of the process. The first is my
review. Now, we're going to be bypassing a lot of that
because I'm going to be working directly with you, so I
will be trying to prevent you from having problems. So my
review will be very limited. The Office of Legal Services
will have a review. They do need to look at it as a total
package. That will be Goldie's responsibility. She will
be assisting us through this process. However, the total
package you need to do a complete review to be sure that
we do not have any issues that could cause legal
ramifications down the line.
The Budget Office must look at it and generate what is called the STD 399. That is a form that speaks to the economic impact and the fiscal impact of the regulations. After all these reviews, these are internal reviews, Department of Health Services reviews, are done it is then sent to Health and Human Services Agency. So Health and Human Services Agency is required to sign the STD 399. So is the Department of Finance. Usually, they do this -- the APA requires the Department of Finance to have put together a process that speaks to a concurrence with the fiscal impact statement from the Department. What this essentially gives them is a veto power. If they do not sign the STD 399, the regulations have to be changed to meet whatever their concerns are.

The Department of Finance -- I just don't how we're going to ever get around not going through them to be perfectly honest with you. Occasionally regulations will not go through the Department of Finance.

The main reason is, regardless of what you do, it is going to change the budget for the Forensic Alcohol Laboratory Overview section. And if there's a change in the budget, from exactly what it is today, the Department of Finance will have to get involved. Now, yes, they do like it when you say we're going to spend less money. They tend to say oh good sign on the dotted line.
If we're going to spend more money, we're going
to have to definitely show some evidence of why we need to
do that. So this is just to give you a flavor for what
we're dealing with.

I'm going to tell you something. Health and
Human and Services Agency has to also sign on the STD 399.
And this is separate from what the statute speaks to and
relation to their disapproval. And to be perfectly honest
with you, there is still some question regarding how
that's all going to work, because this is a unique
phenomenon for the Department of Health Services to
actually have an outside review committee assisting the
Department in writing these regulations.

You know, frequently we have advisory groups that
help us write our regulations, but you have actual
decision making. And that is a different situation. And
then Health and Human Services Agency has a different
disapproval component than is normally the case. So we'll
be somewhat learning as we go along to a certain extent.

The timeline is on this. Now, I appreciated your
statement that you'd love to do this by the end of the
year. And believe me, it's a grand idea. I'll be
surprised if we can pull it off. But if we work really
hard, maybe.

Let me tell you why, because from concept
determination to completion of a regulation package -- and
this is before we get to public notice, before we go
through all our reviews -- I give that at an indeterminate
time. It very much depends on how complex the package is.
The more complex the package is, the harder it is or the
longer it takes to do this. The more resources that are
dedicated to it, it does help.

Obviously, this sections need to get these
regulations out. So we will have resources is my
understanding. I have been dedicated to help deal with
this, so that we can help facilitate this process. But
the bottom line is, the more complex this is, the more
difficult it is. Regulation packages, in the
developmental phase, can take several months to multiple
years depending on how huge the overall is.

Then I'm going to tell you in terms of completed
package through all the reviews, and we're going to try to
streamline some of this, usually takes about 9 months.
Now, again, urgency tends to facilitate things. I'm
speaking of global situations in terms of regulation
promulgation and the State of California.

Hopefully, there's urgency understood on the part
of the various review people that Health and Human
Services Agency does have a time limit based the statute.
Department of Finance however does not. And the
Department of Finance depending on when we get this to them in terms of the State budget cycle, may or may not be interested in taking the time rapidly to get this done. So again, we need to time ourselves and try to get these things to them as rapidly as possible. So I agree with your urgency, and we'll do the best we can to do this as quickly as possible. But understand that as it goes through this, we cannot control the time that the different agencies take.

Then there's always the concern that if other State Departments must concur, and the only one that I can see that possibly might need to concur is California Highway Patrol. I'm glad that there is a committee member from the California Highway Patrol on here. And hopefully certainly they will be here in the future to help us with this.

The bottom line is they're the only ones I'm seeing, at this point in time. But depending on what comes out of the regulations, we may have to have other departments tell us whether or not what we're asking their component to do will work and whether or not it's going to have a fiscal impact on them. But we must address all these things.

When we go to public notice -- after we've done all the reviews, we then go to public notice. It takes
about a month usually to get the public notice published. The Office of Administrative Law has to review our public notice and agree to publish it. It becomes the official announcement of rule-making to the public. It begins the 45-day public comment period. And it begins the official rule-making clock. We have one year from the date of that publication to get it done.

We will hopefully get it done much sooner than that. However, many regulation packages take a good year, and some of them don't make it. But again, we'll try to do everything we can to not have problems occur. It's published in the California Registry Notice Registrar. It's also known the Z Registrar.

When we go to the 45-day public comment period, we mail the public comments and we mail essentially the regulation package to all the public who have expressed any interest in it. Probably the people who are sitting here in this room will be involved in that, because you're obviously expressing an interest at this stage of the game. That's part of why we want to know who you are. You do not have to tell us. However, if you do you become somebody who we contact and be sure hears about these things.

The public has a right to written comment in that 45-day period. And the public has a right to a public
hearing. We do not have to hold a public hearing.

However, if any member of the public requests a public hearing 15 days prior to the close of public comment, we must hold a public hearing. Now, a public hearing in that case is not this kind of thing.

What it is, it's testimony from the public. They get up. They speak to the rule-making process. And their comments go on record. The Department does not respond to those comments at that time. How we respond is what's called post-comment hearing process.

At the close of public comment, we must respond -- the APA requires that the Department and you as the rule-making component of the Department must respond to all public comments, written or oral. We have 2 responses we can make.

One, we can essentially thank them for the comment, but say no, we're not changing anything and why. Or we can thank them for the comment and say that was a grand idea, we are changing it in regards our public -- our regulations in this way, and why. So we can either accept them or reject them. But we must do one or the other. We cannot strictly ignore a comment. We must speak to all, regardless of whether or not we like it.

If we make modifications to the regulations and they are sufficiently related to the original public comment.
notice, and within the scope of the original public notice, we then must go out for a second public comment period of 15 days. This is written only. There's no public hearing required. Again, we will notice the interested bodies, interested persons. They have a right to comment in that timeframe and we must respond to those comments.

If we make no changes, we do not have to go out to the 15-day notice. If we make changes that are beyond the original scope of the public notice, we must make a 45-day comment period. I will do my best to prevent that from happening to help facilitate your process of getting this through.

After we have done all that, we put together what are called the final rule-making documents. We write a transmittal memo, and that is the official memo that speaks to we are promulgating these regulations. And we send that with the packet to the Office of Administrative Law. We must include updated informative digest, policy statement overview. We must include updated regulation text, and a Final Statement of Reasons. And the Final Statement of Reasons must include all of our responses to comments.

And then we put forward the finding order. And that is our official statement to the Office of

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Administrative Law that we are filing these regulations to be accepted as administrative law in the State of California.

OAL has 30 days, and that is working days, to review our packet. If they accept it and approve it, it is then filed with the Secretary of State's Office and goes into effect 30 days after that filing. If they do not accept it, and they make a disallow, they will issue a legal opinion to us. And we have 120 days to respond to that legal opinion and make the necessary changes.

If that happens, we will very likely have to go out to another 15-day comment period. All this can be. It's done all the time. However, it does take time. So as much as I do appreciate your desire to get these things don't rapidly, I also want you to get this thing done once, so that we do not end up with a disallow for the first thing, and secondly that you get in the end what you want.

That's my presentation. I'm open to questions.

CHAIRPERSON KIMSEY: Any questions from the Committee first?

From the public?

Thank you very much, Cathy.

CHAIRPERSON KIMSEY: We're actually quite close to being on schedule. We now have a break from 11:30 to
12:30. Is there any comments or questions before we take that break?

I would encourage everyone to be back at 12:30 so we can get started right on time. Thank you very much.

(Thereupon a lunch break was taken.)
AFTERNOON SESSION

CHAIRPERSON KIMSEY: If I could have your attention. We'll go ahead and get started again. It's 12:30.

The afternoon, we have some -- at least to start off the afternoon, we have some presentations. Dr. Mary Soliman and Mr. Clay Larson are going to give us a review of the current program.

Dr. Soliman is the Chief of the Food and Drug Laboratory Branch, Department of Health Services. And Mr. Larson is the Chief of the Abused Substances Analysis Section, Department of Health Services.

Mary, you can go ahead and start.

FOOD AND DRUG LABORATORY BRANCH CHIEF SOLIMAN:

Hello. I guess you can hear me okay.

I want to welcome you again to the Department, both the Review Committee members and the public. I also welcome you to our Richmond campus. I want to let you know that I'm here to support and assist the Committee in any which way I can to expedite the process for Patricia's sake.

Let me first start out by giving you a little background on the branch for the Food and Drug Branch and a brief run-through of the organizational chart.

Twenty months ago or so I became in charge of the
Food and Drug Laboratory Branch. Forensic Alcohol Analysis Regulatory program is one of the programs I oversee. I report directly to Dr. Barrett our Division Chief and Clay Larson is the Section Chief of Abused Substances Analysis Section. And he's in charge of the Forensic Alcohol Regulatory Program.

We mentioned Agency and the Department, so I thought I'd give you a little sketch of our org chart.

The Governor's Office has several agencies. One of them is the Health and Human Services Agency, with Kim Belsh as the Secretary. And then under Secretary Belshé, we have several departments. One of them is the Department of Health Services with Sandra Shewry as the Director.

And she is the one who appointed the Committee members.

Sandra Shewry has several other subdivisions. One of them is prevention services. Prevention Services has several divisions, Division of Food, Drug and Radiation Safety with Dr. Barrett as the Chief of the Division is my direct supervisor.

Under the Division of Food, Drug and Radiation Safety, we have 3 branches. One of them is the Food and Drug Laboratory Branch. And the Food and Drug Laboratory Branch has 3 sections. One of them is Abused Substances Analysis Section. That's where the Forensic Alcohol Regulatory Program is being handled.
So I thought that might help.

Earlier this year -- can you still hear me if I move around?

FACILITATOR ABINADER: Yes.

FOOD AND DRUG LABORATORY BRANCH CHIEF SOLIMAN:

All right, great.

Early last year -- early this year I sent out a letter to the Forensic Alcohol Analysis Laboratories with information on the current status of the Department Forensic Alcohol Regulatory Program. Of course, with the new statutes that went into effect January 1st of this year, licensing is no longer required for the labs. And I don't want to repeat what Goldie, Dr. Barrett and Cathy have said already, but basically the labs are not required to be licensed.

However, the Department still retains its general authority to enforce the laws and regulations pertaining to forensic alcohol -- forensic breath alcohol analysis. So the Department has to enforce somehow the law and we'll have to discuss how we can come about doing that.

And, of course, then the statute also required the Department to appoint an 8-member committee. And I thank you for your participation. Then the Committee will review regulations -- the regulations in, I guess group 8 -- I'm the new kid on the block, so I'm not that familiar
with forensic alcohol, because I'm new to the branch. But the regulations are covered in Group 8, commencing with Section 1215 of Subchapter 1 of Chapter 1 of Division -- of Chapter 2 of Division 1 of Title 17 -- I got that one right -- of the California Code of Regulations.

Then the revisions would be submitted to Agency. Agency has 90 days to -- and they may disapprove of one or more of those revisions. I'm a laboratorian and I would like just to mention that revisions are welcome, but I don't want us to lose sight that revisions should still keep competence of laboratories in mind. Quality of the data should ensure the competence of the labs and its employees with training and so forth.

So then once the Agency approves or disapproves of some of the revisions, the Department shall adopt regulations and incorporate the revisions approved by the Agency.

In my opinion, the review committee is playing a vital and very critical role and that translates into keeping some of the existing regulations, but revising others without losing sight of competency of the laboratories.

Also, because the Department still retains its authority to meet the mandate of enforcing the laws and regulations, I'm looking for feedback from the Committee.
as to the means for the Department to meet these challenges. So if you have good ideas, by all means.

I don't want to spend too much time, but I see us as a team with a shared common goal, which is to protect the public from individuals driving under the influence of alcohol. And we can ensure that by having laboratories that are competent, that can report test results that are accurate, reliable, and those results can withstand court scrutiny. So this is an important essential part of laboratory function. And good results would help convict the guilty ones and free the innocent.

I just want to make a comment as a laboratorian that forensic -- most other tests in forensic laboratories are basically qualitative in nature with a present/absent result sufficient to convict or clear an individual. In the case of forensic alcohol, an individual driving with a 0.07 percent blood alcohol content is not considered drunk. That individual has not violated any law. Whereas, someone with -- it is unlawful to drive with a 0.08 percent blood alcohol, and you have violated the law.

So we're looking at a difference of .01 percent. Since you have narrow tolerances, it is important that the laboratories are competent, that the results are sound, good quality work, so they won't be questionable in court. So that's basically the major difference, I see,
between forensic testing, in general, and forensic alcohol
test, where you have a very narrow margin that
differentiate between a non-guilty and a guilty person.

And I just want to make a comment about the
statistics that Dr. Barrett provided this morning. In
California, we have 1,500 deaths due to drunk driving
every year. We have 30,000 injuries in alcohol related
drunk driving crashes on the freeway, and 200,000
arrests -- drunk driving arrests. So the numbers are
huge.

And with September around the corner, I couldn't
help kind of compare in my mind. September 11th we lost
over 3,000 people. And the government waged a war against
terrorism, because we lost 3,000 or more lives, innocent
lives, and rightly so. We want to combat terrorism. But
look at in 2 years California is losing over 3,000 people.
And with sound quality test results from the forensic
laboratories, we can ensure that the guilty ones are
convicted and not out to do more harm, and the innocent
ones are not unjustly punished.

Quality of results, training of employees, and
ensuring that the labs are very competent overall that is
the main focus. I want to just really urge you to make
the revisions that are necessary while maintaining quality
data from the laboratories.
I want to thank you for accepting the nomination and for participating on -- you know, in this Committee. And it's going to be hard work, and I'm sure good results are going to come out of the Committee meetings and so forth. And I want to thank you again and thank the public.

Let me introduce Mr. Clay Larson. Clay is the Section Chief of the Abused Substances Analysis Section. And he is going to cover the Forensic Alcohol Program activities and responsibilities under the current law.

ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

Again, my name is Clay Larson. I'm at the bottom of that list, but I'm also not the new kid on the block. I've been in this program for more than 20 years.

I want to talk about a document that's in your packet. It's the document we put together, Proposed Forensic Alcohol Regulatory Worksheet. It's on legal paper.

FACILITATOR ABINADER: It's on the right side of the folder.

ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

And I'm going to just talk about the first 2 columns. The left most column lists some activities and the next column lists the activities under the current regulations.

I'm also going to refer, I think, to a document
in packet which is a copy of the current regulations. We hoped to get a newer version. This actually is the version we've been sending to the labs for years and maybe that's appropriate. I don't think it's type-written. I think it was a word-process document, but analysis lost the electronic form, so we copied it over and over again.

Two points. One is in the front of that document are the authorizing statutes. And actually that's the old version. That's the version pre-2005. In your packet is another obviously shorter document. It's the Health and Safety Code that we are under now.

So the other quick note is there are references in the authority and history sections of the regulation to refer to Health and Safety Code Sections 436.50. In '95 the Health and Safety Code was recodified it and 436.50 became 100700.

So working from this document first, the first activity is the Development of regulations. Under former Health and Safety Code section 100700, the Department had general authority to adopt and publish regulations. Obviously, that's been changed now. I should add that the version of the Health and Safety Code that you see in this 2-part document, actually was changed a bit in '92. Prior to '92 we had an advisory committee. There was a requirement that the regulations were adopted only
after the Department consulted with an advisory committee with people involved and that were affected by the regulations.

And the makeup of the Committee was fairly similar to the Review Committee. So I think this Committee might want to keep in mind that existing regulations were all written after the Department consulted with them. But then I think the record shows actually it was a pretty good consensus, after the Department consulted with members of groups that are pretty similar to the makeup of the current committee.

Item 2 is licensing. Licensing is under former Health and Safety Code 100720, the Department was authorized to issue licenses. And under Section 100710 all the labs performing that kind of testing were required to have licenses. The licenses were renewable annually.

The format of the former license actually listed those activities for which the Department had given specific approval to the laboratories. So individual forensic alcohol methods were listed. The bottom of the section describes breath alcohol analysis procedures. And laboratories were approved to determine the accuracy and provide training for operators for specific instruments. So the old license provided in a shorthand fashion. The actual activities that the Department had provided
approval.

They also were a convenient -- since the labs had to apply for renewal every year, they were a convenient mechanism by which we knew what labs were doing. The labs were also required to list is to report any changes of the activities. So that was the old licensing scheme. --

Item 3 is site inspections. Site inspections are an important component in most every laboratory and regulatory system to ensure that all laboratory requirements are being met, and ensure that the laboratories are using appropriately trained people and they're documenting the procedures.

Under former Health and Safety Code Section 100735, the Department was required to periodically inspect laboratories. We did conduct those inspections. However, last fall we suspended all inspections except inspections for cause, a complaint lodged against a laboratory or failed PT something like that. During the 3 years prior to last fall, we completed 27 on-site inspections of the laboratories.

Another component of the former and actually current program is proficiency testing. The Department conducts proficiency testing 3 times a year by sending sets of unknown blood alcohol samples to the laboratories. Results are used by the laboratories, as required by the
regulations, to evaluate the accuracy of the laboratory's methods. We also require individuals to qualify under the regulations as analysts and supervisors.

I'm going to slow down for the stenographer here. Three cups of coffee and no lunch.

Anyway, we also require individuals qualifying under the regulations to complete a proficiency test, also as I mentioned. The laboratories generally performed very well on the tests. But there are occasional unsatisfactory performances. And I'm referring now to actually the results outside the acceptable limits.

During the last 3 years labs have actually failed the Department's proficiency tests on 10 occasions. In each case the laboratories took appropriate corrective action as directed by the Department.

Qualification of appropriate laboratory personnel is the next item on the list. The Department qualifies laboratory staff based on evaluation of education, training and experience. I should say that the actual requirements for lab personnel are described under Article 2, Section 1216.1(e) through (f). The Department evaluates the qualifications in a kind of audit based on their experience and training and education. And we require labs to -- we require candidates to complete a proficiency test and written examination.
It's a fairly intense activity. A check of our records shows that for the past 3 years, we handled about 80 to 90 personnel qualification changes per year. This has slowed down quite a bit this year. In the first 6 months, we processed only 15 personnel qualification changes. I guess it's a bit surprising since the regulations still require that forensic alcohol analysis shall only be performed by people who are qualified by the Department.

The next activity refers to reviews of training procedures. The general authority or general requirements are described under Article 4 of the Regulations, section 1218. The laboratories are required to submit summaries of training programs for breath instrument operators. The Department reviews these summaries to make sure they comply with the regulations.

In general, training procedures cover theory of operation, detailed procedure of operation -- again, this is for breath instrument operators -- use of precautionary checklists, and require practical experience, and there must be a written and/or practical examination included in this.

The Department enforces these requirements by reviewing breath alcohol training procedures submitted by the laboratories. A check of our records shows that for
the last 3 years, the Department's -- the laboratories have submitted 33 breath alcohol training procedures, which we've approved. This again is slowing down a great deal this year. In the first 6 months we've only received and approved 3 procedures.

Again, as we described in our -- we sent an advisory to the labs on December 31st, which described the activities that we would be continuing during this period before we get the new regulations. And one of the activities we are continuing is the requirement that labs submit all training protocols, for people who are required under the regulations, to the Department for review and approval.

And there follows -- not before each one, but there follows a list of 7 items that are kind of housekeeping items that have to do with how forensic and breath alcohol analysis are conducted in the state. So I'm going to look at them and refer to the actual regulations themselves.

So, for instance, the regulations describe collection and handling of samples. There are certain requirements. There are requirements in regards to volume collected, the personnel authorized to collect, for instance, blood samples; use of an aqueous disinfectant; using sterile containers. Those are requirements that are
Another section of regulations, Section 1220, requires laboratories to submit written descriptions of forensic alcohol methods and have them filed with the Department. The Department reviews these written descriptions to make sure that the laboratory's written procedures comply, for instance, with the requirements of collection of handling samples.

During the past 3 years our records shows that we reviewed and approved 70 forensic alcohol methods submitted by the laboratories. But as described in our December 31st advisory, and basically an advisory is received from our office, we're no longer requiring labs to submit forensic alcohol methods. So we're actually no longer doing that activity.

I must say, the labs have been a hundred percent compliant here, because although we continue to receive some breath alcohol procedures, we haven't received any forensic alcohol methods in 2005.

The next item on this matrix is forensic alcohol analysis, standards of performance requirements. Standards of performance refers to requirements for accuracy and precision of methods, non-interference of any anticoagulant or preservatives added to the sample, and obtaining results less than .01 for alcohol free subjects.

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The regulations set standards in each case. We require laboratories to submit experimental data to demonstrate that the method meets those standards of performance. We do that for a new method. We also require at least the precision portion when a laboratory fails a proficiency test, to demonstrate that the corrective action they took was effective.

Now, this is controversial. We also require labs to submit accuracy and precision data when they move. We take a lot of criticism for this. I believe it's actually based on requirements at least in the old regulations, and I think it's actually good laboratory practice. You know, when you move to a new facility, there certainly could be changes in power and water and ambient temperature, and even storage conditions. Any of these could conceivably impact the accuracy and proficiency of the lab. I believe that some redemonstration is appropriate.

We've enforced this requirement for years. It never was much of an issue, but the labs are moving a lot these days. Our records show that we have 10 lab relocations in the past 3 years.

We moved. Actually, we moved in 2000 -- two years ago. And we, as we want to do, we applied the same requirements. So we redemonstrated the acts of precision of all our methods.
I have 5 minutes left. So those are performance requirements. There also are in the regulations Article 6, Section 1220.2, Forensic Alcohol Analysis Standards and Procedures, which is how you perform the tests.

The regulations set standard procedures for calibration in the lab, looks at the blank standards and quality control material, duplicate analysis of samples, routine accuracy checks. Those are all specified in the regulations.

Again, the Department evaluates compliance of that through our reviews of the method description, and also when we do on-site inspections of the laboratories, making sure that those specific standards and procedure requirements are being complied with.

There’s a second regulation, Item 10 here, on the forensic alcohol analysis and quality control programs, Article 6, Section 1220.3. The regulation sets fairly specific requirements for the method quality control, type of sample you can use, the procedures for determining the mean value, the procedures for setting the acceptable limits, and the corrective action you take if you have a result outside of these.

Again, the Department reviews these requirements by method reviews and on-site inspections.

Last couple items. The regulations set forth
requirements for expression of results, the number of figures you express, appropriate truncation of results, conversion of the breath and urine sample results, and even the use of specific reporting symbols and abbreviations. We enforce these requirements also, by reviewing the methods and by on-site inspections.

That takes us -- actually we're half done, in a sense. That takes care of forensic alcohol analysis. There is another article, Article 7, that deals with breath alcohol. A lot of analysis requirements here. But under breath alcohol analysis there are standards of performance requirements. Basically, the labs are required to use instruments that conform with DOT model specifications.

This has been added to the new law, but it's actually existed in California regulations since 1985. Procedures for breath alcohol analysis is pretty much describe in their training programs. And so we review the training programs -- and again which the labs are still required to submit. We review the training programs for compliance with the requirement that they submit the required equipment here DOT list. DOT being the Department of Transportation.

And as with forensic alcohol analysis there are
requirements. The regulations set standards and procedures for testing, including the qualification of instrument operators, duplicate tests and required agreement of results, periodic determinations of accuracy and standards for training instrument operators.

We review these by site inspection -- for compliance with these with our site inspections and for reviews of breath alcohol procedures.

Finally, the regulations set forth requirements for record keeping under Article 8, the last article, 1222.2. It indicates the records that the laboratories and actually the law enforcement agencies must maintain employee records, training records, records of analysis of samples. Last time, we reviewed these compliance requirements by review of methods and procedures and also during our site inspections.

I made it.

All right.

CHAIRPERSON KIMSEY: Questions for Mr. Larson?

Well, I. --

COMMITTEE MEMBER TANNEY: I do have a question.

On the second part of the chart where you have Regulatory Activities Under New Regulations, various sections say no requirements, no specific requirements under the law, you're specifically referring to under the Code of

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Regulations? You've not -- have you cross-referenced these with Vehicle Code and other provisions in the law that may exist with respect to some of these things?

ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:

Two points. One, that's the next segment. Although, I was involved in the preparation of that. It is checked against the -- not the regulations, but the Health and Safety Code. And it's only checked against the requirements of -- and I'm not aware of any vehicle code requirements, except those related to collection of samples which may be should have been included there.

That's a good point actually. A comparison was made with the new versions -- the new Health and Safety Code 100700 to 100775.

COMMITTEE MEMBER TANNEY: Okay.

CHAIRPERSON KIMSEY: And thank you very much, Mr. Larson and Dr. Soliman. The next hour we have a discussion of proposed regulation revisions. And that really relates to the third column on that handout. And I believe maybe there's a grammatical correction here. The top of that column says Regulatory Activities Under New Regulations, that's "Under New Law".

FACILITATOR ABINADER: Right.

CHAIRPERSON KIMSEY: That's what I assumed, but I wanted to -- and so, you know, on the left, you know, we
have basically the 14 areas of regulations, at least in
the Health -- in Title 17 that relate to these programs.

This column basically is an interpretation of how
that law affects the current regulations. And we can go
through that column if you like. That was what we have
time to do. And then we can do that for a period of time.
Then I believe we're going to take a break. And then we
were going to have a discussion about the proposed
regulation revision concepts.

So does that -- I mean, basically what we would
probably do for the next little while is just read through
this third column.

FACILITATOR ABINADER: And then I would like to
take people through a focused conversation before we go on
a break and then come back.

CHAIRPERSON KIMSEY: Does that meet with the
Committee's interest?

Okay. So under development of regulations
basically it's us. We review and determine critical
revisions to the regulations that are necessary to ensure
the competence of the laboratories and employees to
prepare, analyze and report the results of the tests and
comply with the applicable laws." That's a quote from the
law.

"DHS is required to adopt regulations and
incorporate revisions determined by the Review Committee unless Health and Human Services Agency disapproves the revisions."

We've heard that several times.
On the area of licensing. The new law eliminates licensing requirements, but retains DHS's mandate to enforce its regulations. The Review Committee will need to evaluate mechanisms for enforcement to Californians law and regulations and a need for State level, technical and scientific control forensic alcohol analysis."

Under site inspections, the new law "...eliminates the requirement for lab inspections by DHS or any other organization. The Review Committee will need to evaluate mechanisms for oversight of forensic and breath alcohol analysis in the absence of any requirement for site inspections."

Under proficiency testing, the "New law requires laboratories to follow ASCLD/LAB proficiency testing guidelines by participating in one annual external proficiency test obtained from ASCLD/LAB approved test provide. There is no requirement that laboratories must successfully complete the test, but each individual laboratory must have written procedures describing a review of proficiency test result and the corrective action taken when results are inconsistent with the
expected results."
Continuing under the proficiency testing, "Each 'examiner' must successfully complete a proficiency test each year."

FACILITATOR ABINADER: Now, it's working.

CHAIRPERSON KIMSEY: Right. I'll start over.

"Each 'examiner' must successfully complete a proficiency test each year. However, according to ASCLD/LAB guidelines, this requirement can be satisfied about an 'internal' proficiency test, i.e. samples prepared by the lab itself or retests of case samples passed around among the analysts. Moreover, ASCLD/LAB defines 'successful completion' as either obtaining the correct response or taking corrective actions in accordance with laboratory policy.

"The Review Committee will need to evaluate mechanisms for oversight of laboratories' performances on proficiency test."

Qualification of laboratory personnel. "No specific personnel qualification requirements under the law. Requirements for qualification of laboratory staff to be determined by the Review Committee."

Reviews of Training Procedures. "No specific training program requirements under the law. The Review Committee will evaluate the need for state-level oversight"
and approval of training procedures in particular, those
for breath instrument operating operator training."

Selection and handling of Samples. "No specific
requirements under the law. Regulations for the
collection and handling of samples to be determined by the
Review Committee."

Under forensic alcohol analysis standards of
performance. "No specific requirement under the law.
Regulations covering method standards of performance to be
determined by the Review Committee."

The same with the forensic alcohol analysis
standards of procedures. "No specific requirement under
the law. Regulations covering method standards of
procedures to be determined by the Review Committee."

Same for the forensic alcohol analysis quality
control program. Same for the expression of analytical
results.

The breath alcohol analysis standards of
performance. New law requires each lab to ensure that
breath instruments in calibrating devices are listed on
the conforming product lists published by NHTSA, which is
the National --

DR. LEMOS: -- Highway Traffic Safety
Administration, NHTSA.

CHAIRPERSON KIMSEY: Thank you. "The regulations
must be updated to specifically list the current
publications containing the NHTSA lists."

Breath analysis standards of procedure. "No
specific requirement under the law (the added NHTSA
instrument requirements do not set standards of
procedure.) Regulations covering standards of procedure to
be determined by the Review Committee.

And then record keeping. "No specific
requirements under the law. Regulations covering record
keeping to be determined by the Review Committee."

I think this -- I find that this chart is quite
helpful, because it really does sort of layout sort of the
purview of the Committee with all the various regulations,
which I found helpful.

Any comments on what was mentioned under the
regulatory activities under the new law?

FACILITATOR ABINADER: We are going to go through
a process of discussing this. So if we can keep our
questions brief now, and then go into a more focused
conversation, that would, I think, be helpful.

CHAIRPERSON KIMSEY: So have we -- have I zipped
through the -- I mean, the hour, should we go ahead and
start?

FACILITATOR ABINADER: We should start with the
focused conversation. But I just want to make sure that
as we -- we want to move forward from here and really
discuss kind of the implications of the new law in terms
of what it really says and where you really want to focus
your activities and your energy over the next months that
you're together writing these new regulations.

But I just want to make sure that in Column 3, the Regulatory Activities Under The New Law, if people
have any questions for clarification, you know, before we
get started in our conversation? I just want to make sure
people are comfortable with the interpretation that's here
and if there's any questions that we'll make sure that
we're all on the same page about what's written here and
that it truly reflects what people understand about the
law?

CHAIRPERSON KIMSEY: So we would be going through
these at some point then one by one?

FACILITATOR ABINADER: Yes. I will be going
through them as part of this, yes.

COMMITTEE MEMBER LOUGH: Some of our
organizations, I can't speak for everyone, but I can speak
for CACL, we've been active in revising the regulations
on how we, as a group, feel. And if some of the others
have done that as well, instead of going through these one
by one, which could take a very long time, maybe if each
organization had this type of information and we could
disseminate it to each of the members, we might be able to nip a lot of these in the bud. If we go through it one by one, it would take a very long time to go through it. But some of us -- my organization is pretty much prepared to bring a tentative proposal forward.

COMMITTEE MEMBER TANNEY: And I wasn't clear whether you were inviting at this time comment about the interpretation of the law --

FACILITATOR ABINADER: No, not during --

COMMITTEE MEMBER TANNEY: -- or during the focus?

FACILITATOR ABINADER: During the focus.

COMMITTEE MEMBER SEDGWICK: If we need a second on that, I think Patty's proposal is an excellent idea.

FACILITATOR ABINADER: So let me talk a little bit about this focused conversation and tell you about what the intent of it, and see if it will get us to where we need to go today.

Because what I heard this morning from when we asked the question what do you hope from this process, it sounded to me like folks really wanted to make sure that you respected and were able to come out with a set of regulations that addressed and ensured the continued competence of labs and employees to prepare, analyze and test results and comply with the applicable laws.

What I also heard is that you want to make sure
that your time together is really focusing on the areas of
the law that really need to be addressed. And that you're
really maximizing the efforts and the energy in this room.

And I also understood that we -- that maybe
there's differing opinions around the table about really,
okay, this is what the law says, let's talk about how it
goes into regulation. And that may be different, people
may have different perspectives about that.

So this whole idea about a focused conversation,
which I'd like to take you through looks at, through a
series of questions we begin talking about what the
implications of the new law means, really mean. We have a
-- Clay did a good job of laying out these are the DHS
activities under the current regulations. And Paul went
over very quickly what the new law is saying. Okay, so
when we're moving from something old to kind of these new
needing to develop new regulations, it might -- we might
benefit from really having a conversation together where
we're raising what we see are the key issues and
implications of this change from one set of regulations to
another. That way we can begin identifying where the
priorities are for folks to focus their energy.

So that's the whole idea, because a lot of this,
as you see, as Paul went through it, a lot of this stuff
isn't really determined. It really isn't -- there isn't
much direction given to us in law. So what you have to really work on, I believe in this Committee, is really the issues around authority, accountability, assurance and those kinds of issues. So really getting at where are those issues really important to address, and what are some concepts to address in the concepts that you're talking about Patty that you bring to the -- might bring to the table next time. That's what this conversation will help generate.

So I would like us to go through -- it will take about 30 minutes -- a focused discussion where we explore and reach a common understanding of the issues and questions that we have around the table about the work that we have to do, moving toward defining the scope and a process for accomplishing it.

And a process could include, okay, we've identified these areas as the most important things to address. Next time around we want concepts -- we invite concepts from different folks to bring to the table, and then we'll look at those.

So this is really more a conversation to ferret out a scope of work for this group. Does that sound like a good way to proceed?

CHAIRPERSON KIMSEY: Is that okay to do that before you make your proposal, I guess --
COMMITTEE MEMBER LOUGH: Well, I didn't want to bring my proposal forward, because I think every organization may have one, or if they don't, they might want to just look at what we have as a draft and make their marks on it or something like that. But that would have to be disseminated and people would have to do their homework on it.

FACILITATOR ABINADER: So why don't we go through this conversation and see what it yields for us in terms of helping us identify where we want to focus the energy of this Committee and what you see as the important next steps in the process. And then talk about kind of how do we go from concept to phase, and what's the mechanism we want to use to introduce those concepts at the table.

Does that sound good?

Okay. All right. So I will be asking a series of questions. I'm going to invite everybody to participate. So at the beginning I'm going to just kind of do a round robin so that everybody's opinion and perspective can be heard. And then we'll just open it up and generally. But if I don't hear you talking, I may ask you to -- ask you for your opinion, because I want to make sure that, you know, we get everybody's perspective out on the table.

So we've just heard a presentation of the new

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regulations. And this morning we heard a presentation on
the legal responsibilities and a process for revising the
regulations. I don't know if you guys were overwhelmed by
that, but I was like, "Oh, My God".

Okay, based on these presentations that you've
just heard, what aspects of the law do you call for the
greatest change in the current program? From your
perspective, when you heard what Paul said, when you
heard, you know, Clay's presentation, what do you feel --
what aspects of the new law do you feel are going to
require the greatest change in the current -- the way
things are currently done? Laura do you want to start?

COMMITTEE MEMBER TANNEY: Well, I think the
greatest aspect in the new law, which calls for a change,
is the fact that there is no DHS oversight, so the
procedures clearly have to be changed with respect to what
is going to ensure the competency of the laboratories.

But I do have some concerns about some of the
background information that has been provided. And I
don't know if you want to address that now or not. I
think before we even begin to draft some -- or discuss
something, we need to know -- there needs to be some
research done with respect to what laws do exist, because
if I may, I know that with respect to at least the
collection and preservation, handling of samples, there
are regulations. There are OSHA regulations, Cal/OSHA regulations, there are Vehicle Code sections that do apply to the collection and handling of samples, that have not been explored or presented at this time.

And so the Health and Safety Code is not the only thing that may end up in conflict with any regulations that we come up with. And those other background laws need to be before us before we can begin to examine those.

FACILITATOR ABINADER: Okay, so let's identify that -- Elisa, let's just put a little mark or something on it. That one and the suggestion of submitting proposals. So as we talk about the next steps, we make sure we go back to that and we, you know, clarify what needs to be incorporated into this information for the next round.

COMMITTEE MEMBER TANNEY: And I'm sorry if I'm jumping forward --

FACILITATOR ABINADER: No, that's fine.

COMMITTEE MEMBER TANNEY: -- it's just that I can even begin to discuss the other stuff.

And then I also wanted for clarification the background information that was given, and I want to clarify something with respect to the .07/.08 blood alcohol level. Because one can be driving under the influence at a .07 blood alcohol level. They cannot be in
violation of the B Section, which is blood alcohol level of greater than .08 percent, which is a per se violation of the law. But we can have somebody at a .01 or .02 percent who is driving under the influence.

And I think that that needs to be understood by analysts and the laboratories and by our regulations in general, because reporting, for instance, the -- how the blood alcohol level is reported, whether it's reported to the hundredths or thousandths is important when it comes to those lower blood alcohol levels. And I don't think we can lose sight of the fact that the lower -- the integrity of the results with respect to low blood alcohol levels is just as important as the integrity of the results between .07, .08 or even greater.

So I think that there needs to be a clear understanding that one can be under the influence of alcohol and be convicted of it by virtue of not being able to operate a vehicle in manner of a prudent sober person, at levels way below .08 percent. It's just that the presumption does not apply at the very low levels.

CHAIRPERSON KIMSEY: The presumption does apply at the .08?

COMMITTEE MEMBER TANNEY: Yes.

COMMITTEE MEMBER ZIELENSKI: Well, you can have a person that's at .07 and be convicted of it as well. I
you can retrovert extrapolate that person at a .07 2 hours later and there's somebody who you could say is actually at 1.4.

FACILITATOR ABINADER: So is there some information that we'll need to bring to the next meeting that we need to kind of think about to make sure that we're all in agreement about the implications of blood levels, and you know --

CHAIRPERSON KIMSEY: I think everyone on the Committee, except maybe for myself, has that history.

FACILITATOR ABINADER: Great. We're pretty --

CHAIRPERSON KIMSEY: I don't think we need to rehash that.

COMMITTEE MEMBER TANNEY: Right. And part of my clarification is for the audience, the public to understand that, but also that we keep that in mind with respect to the regulations that are promulgated. But I think the background information that does need to be brought over, the Code Sections and the OSHA regulations and things like that.

FACILITATOR ABINADER: And we'll also talk about this when we talk about next steps and what do we need, and the information, we'll revisit this toward the end of the meeting.

So I was asking the question from each of your...
perspectives, what aspect of the new law do you see called for the greatest change in the current programs. Laura, did you want to say anything more or do you want move on to Paul?

COMMITTEE MEMBER TANNEY: Go ahead and move on to Paul.

FACILITATOR ABINADER: Okay, great, thanks.

CHAIRPERSON KIMSEY: Well, as I'm representing the Department, I know we've had some discussions specifically about the impact of the new law on the Department's role. And I think Column 3, especially on this first page, really does sort of help direct us to that, in the sense that, basically eliminated licensing, eliminated site inspections, and has a major effect on proficiency testing.

I would take a little exception though, because from our perspective it didn't really remove our oversight completely. In the sense that, there's this phrase, "...to ensure the competence of laboratories and employees to prepare, analyze and report the results of tests and comply with applicable laws."

I think how the Department, you know, progresses with that is obviously going to be in large part up to this Committee. But also I think we're going to need some recommendations on actually how, you know, to go about...
doing that in the sense that historically or classically
the State agency has something to take away from an
organization if they don't comply with -- you know, for
enforcement purposes, and that's generally been a license.

So this law obviously takes away the Department's
ability to issue licenses and do site inspections where we
would also find out if things were not necessarily in
compliance.

So we're sort of between -- betwixt here with
still some oversight responsibility and basically unclear
authority maybe or unclear mechanisms for applying that
responsibility.

FACILITATOR ABINADER: Thank you. How about you,
Bruce, what do you think of these new laws have the
greatest impact on the current program?

COMMITTEE MEMBER LYLE: Well, first of all, I
agree with Laura that I need a little bit more of the
background. The background was good to start me off, but
I'm sort of at a disadvantage as far as most of the
background. One of the things that I think is missing
from my perspective is what the genesis of the change in
the law was. I don't know why it was changed. And it
would help me out to know, you know, what the thinking
behind the changes were, so I could get an idea as to what
my purpose is here.
CHAIRPERSON KIMSEY: So you're interested more in the history and the background?

COMMITTEE MEMBER LYLE: Well, I'd like to know a little bit more. I mean I can go back and research the history of the Senate Bill, but here it would be nice, like if I could just get sort of a brief rundown.

As far as the areas that I find to be more specific to me. And I'm having trouble sort of applying a lot of this to me, because a lot of it has to do with breath analysis, and we don't do anything with breath analysis, since no one is breathing.

(Laughter.)

COMMITTEE MEMBER LYLE: But how it affects the coroner and medical examiner, nobody's -- none of the laws have said anything about that particular. It's all having to do with drunk driving. And I'm not really 100 percent sure that it does pertain to those. Although, our lab does the analysis. It was basically the same lab that does the analysis on samples.

But what strikes me as the most important thing is the proficiency testing and making sure that the lab is -- that the people in the lab are proficient at doing it and who would have the authority over saying that.

FACILITATOR ABINADER: Paul, what do you think has the greatest impact.
COMMITTEE MEMBER SEDGWICK: Well, first of all a little background. For Bruce's information, the blood alcohol content on a deceased driver does have an effect on living drivers who may be prosecuted, insurance, past pedestrians they may or may not have hit. And even though they can't sue or prosecute the deceased, it does affect potential prosecution on those living. So that's where he comes in.

How they collect the samples at autopsy, those are handled in Title 17 as it exists. How the analysis is done is exactly the same for post-mortem samples as it is for antemortem samples for the most part.

But the bottom line is what I see as changing here is by re-education of the prosecution and defense attorneys. If a defense attorney asks a laboratory are you licensed and they say yes, you don't throw your hands up and go sit down and say no further questions. You have to learn the questions to ask about proficiency testing.

If an individual has flunked a proficiency test, what did the laboratory do to fix the problem, what was the problem? We know with DHS, because they tell us what they're doing.

If DHS is not there, what happens? You have to ask the right questions. And you need to be able to go right for the meat and find out what happened and what
remediation -- what required remediation was done and is it appropriate. That's just one example.

There are probably dozens of examples for each of these sections, but that is the sort of thing that I expect to see changed.

FACILITATOR ABINADER: All right, Patty, what would you say is the greatest?

COMMITTEE MEMBER LOUGH: I think the legislative intent was to greatly reduce the role of the Department of Health Services' oversight. I think reduce to the point where they might just monitor proficiency testing, have that information come in. They can make sure it's been performed.

Paul mentioned by having the oversight you had something you can take away such as the license. But actually in DUI cases this is probably subject to the highest level of scrutiny in almost any trial situation, even though often times it's just a misdemeanor, but they're probably some of the most difficult cases to present.

So I think there's going to be plenty of scrutiny. Certainly defense has every opportunity to say are you doing these things that the Review Committee said that you're supposed to do, it was determined to be. In the court room is where that will all come out.
And as was also mentioned, these same laboratories performing these services are also analyzing samples not just for DUIs but in homicide cases, crimes against children, many other cases. So there are huge implications to other areas as well.

So I think the biggest change that we're looking at is just who controls the oversight, how do we make sure it gets done, how is everyone competent that the results are being done. And I think we addressed these easily.

FACILITATOR ABINADER: Thank you.

Kenton.

COMMITTEE MEMBER WONG: I agree with that totally. With regard to our job here, I see it under the regulatory activities column under the new law. Although a lot of these say that there's no specific requirement under the law, that these things need to all be determined by the Review Committee.

The spirit of Title 17 is still alive and well, and I believe that it should be. The intent of Title 17 was designed and made as a good thing. And I don't see changing that in any way, shape or form.

There are some minor things in Title 17 that need to be tweaked and amended due to newer technology. And overall I don't see our role as totally over rewriting Title 17, but just tweaking it a little bit.
FACILITATOR ABINADER: Okay. Thank you.

COMMITTEE MEMBER ZIELENSKI: I'm not a scientist obviously. But it seems to me that much of what Kenton was just saying with respect to Title 17 is a great deal of application to this -- to what we're doing here. Because my guess is they were probably some on the books for quite some time, all the forensic labs and labs around the state have been following those standards. So my guess is they may very set the standards and precedent that would be implemented in terms of cross examination.

For instance, if their lab doesn't have the criteria that formally existed under Title 17, we're going to bring an expert in to say look it here's a way a lab should do it. This is the way it's been done in the past and their procedure is defective.

So you're going to obviously increase litigation and create an awful lot more room for argument from our perspective if many of the standards of Title 17 are not realized in terms of what we do here.

So my guess is you're probably going to have a large transference of that information and those standards there into what we have here. The only issue in my mind is how are we going to make sure that these labs, whoever they are -- I mean, how do we even know who they are? If they're not licensed, how are we going to know who's out...
there doing it? So how do we find out who they are and then go in and do any type of a check on them to make sure that they are who they say they are as opposed to some rogue lab signed up by the defense to go out and analyze these things.

So it's just, to me, the enforcement mechanism behind how we figure out who they are and what they're doing and how do we regulate what they're doing and what standard is going to be extremely important. Otherwise, you're going to have labs over here and one kind of doing it this way. Labs with more money are going to be doing it right. And the ones with less money -- so you're going to have a situation where there's a direct cause and effect based upon economics.

I'm all for trying to establish fairness and uniformity in terms of results.

FACILITATOR ABINADER: Okay.

So in terms of the stuff we heard this morning, and I know Kenton you want to talk, we'll get to that more in the open discussion part of this discussion.

We heard a lot about the legal responsibilities this morning. And from your perspective, what are the things that we really need to keep in mind as we work together, as you work together about the most important aspects of the legal responsibilities that -- to make sure
we pay attention to?

Do you feel like starting?

COMMITTEE MEMBER ZIELENSKI: Could you rephrase

that?

FACILITATOR ABINADER: Sure. We heard the

presentation this morning on the legal responsibilities.

And I wanted to get a sense from folks what you felt were,

from the legal responsibilities that were defined and

outlined for us, what do you think is key for us to make

sure we are keeping in mind as we move forward?

CHAIRPERSON KIMSEY: As it relates to the

Committee?

FACILITATOR ABINADER: As it relates to the

Committee and the work that we have to do, both the legal

responsibilities and also the process that Cathy

presented.

COMMITTEE MEMBER ZIELENSKI: Well, I think we

probably all have pretty much the same perspective with

respect to what it is that we want to accomplish. And

that is we want accuracy, reliability and legitimacy with

respect to the regulations that are formulated here.

To me, that's basically what it is. In terms of

how you we go about that, I assume we all have that

perspective in mind, I think logic and reason obviously

knowledge that you folks have doing this work on a day in
and day out basis will allow for a nice gel, I think, probably at the end with respect to all the issues.

FACILITATOR ABINADER: Kenton, do you have anything about the process or legal responsibilities you think are important to be mindful of as we move forward?

COMMITTEE MEMBER WONG: I too was a little bit overwhelmed with the legal requirements in changing some of these things. But I believe that we'll be able to overcome that. And I think we all have the same -- we all want the same things out of this.

FACILITATOR ABINADER: Patty, do you have anything?

COMMITTEE MEMBER LOUGH: No, just a comment, that everyone at the table understands that there was a time that the only thing that was regulated in forensic work was the alcohol program. As this was mentioned, it started back in the seventies. And as time has moved on, things have developed. There are many other watch dogs out there now to make sure that the work is done good, many other hoops that you have to jump through. So this what's started out as a very good foundation initially, just has sort of run its time out. And there is no other forensic discipline that is subject to State regulation. We're just kind of conforming to the rest of the other forensic disciplines.
FACILITATOR ABINADER: Thank you.

COMMITTEE MEMBER SEDGWICK: Frankly, I don't see a lot of change being required in Title 17. Most of the things they're requiring quality control, proficiency testing of laboratory, testing of individuals, training. Most of those are quite good.

If we make some substantive changes, like requiring 2 or 3 or 4 quality control samples instead of 1, so be it. But I don't see a lot of big changes being made.

FACILITATOR ABINADER: Bruce

COMMITTEE MEMBER LYLE: Well, the thing that scared me the most is it sounded like what we have to do is concentrate ferret out exactly what we need to change and then concentrate on those things that need to be changed and not sort of get mired in all the other stuff, so that we can word it nice and tight and get it passed.

FACILITATOR ABINADER: Cathy's the one.

How about you, Paul?

CHAIRPERSON KIMSEY: Well, I may be more familiar with our processes than most people here at the table. But I think it was a good presentation, even though I know a certain amount of it. I think it's quite clear that if we're following Bagley-Keene and go through the Administrative Procedures Act and we have people here to
help us, I think it's quite clear what our, you know, responsibilities are.

FACILITATOR ABINADER: Laura, do you have any comments on the process or legal?

COMMITTEE MEMBER TANNEY: Well, I was, in fact, very happy to hear about the procedures that are in place for regulations to be passed, because I think that it needs that type of scrutiny. They need that type of scrutiny. And I think the important thing for this group to keep in mind, if making any changes, is that, again, we do it right the first time, like Cathy said, and we don't spend a lot of time working on a product that there's no chance of getting through.

And to do that, again, we need to get information at the outset, the laws, so we make sure we aren't inconsistent with any laws in existence. And that, again, like pretty much everybody here feels that we focus in on what needs to be changed and not messing around with the things that don't need to be changed.

I agree with both Kenton and Paul that Title 17, the spirit of Title 17 is alive. That we -- that I think everybody here supports that. As far as it, number one, having worked for a number of years, and number 2 providing the integrity and reliability thus far.

So I think that we need to be very careful in how
FACILITATOR ABINADER: So what I want to do is I want to ask one more question that I really want to hear from each one of you about what you're not clear about or what you're -- you know, what you're confused or not clear about, so we can kind of get that articulated or identified up there. And then I want to go through a process where we look at each one of these activities and really start talking about and focusing on where the decisions are, and which ones you really want to move forward on.

Do you know what I'm saying? Because I'm hearing from folks around the table that a lot of you feel comfortable with the way Title 17 is currently written. So the challenge is okay where do we now focus the attention and work. So I want to go through that, but first I'd like to just go around and hear from people -- or we don't even have to go around. Are there elements about this law that people are still not clear about or you're confused about that we need to kind of identify and discuss?

COMMITTEE MEMBER ZIELENSKI: I'd like a little bit more time to actually sit down and to digest -- you guys have probably already read this stuff many times. I have not -- the old law and the new law and take a look at
the differences and find out, at that point, what needs to
be done. That's something I can do on my own, now or next
time.

FACILITATOR ABINADER: So, Torr, do you think
that the information that was provided you -- I know that
Laura had suggested bringing more of the other Health and
Safety codes?

COMMITTEE MEMBER TANNEY: Vehicle code, OSHA.

FACILITATOR ABINADER: Right, but do you feel
like the information that you have there can give you that
type of background?

COMMITTEE MEMBER ZIELENSKI: Well, certainly more
background would not be harmful. You know, I think it
would certainly be helpful. It seems to me, at some
point, you have to give your analysis about, kind of
compare and contrasting the old with the new and find out
how much you can -- what needs to be changed and how
you're to effectuate that change and really the
implementation of what's in the statute.

FACILITATOR ABINADER: Does anyone else still
need some clarification? Everybody is pretty clear about
the law?

COMMITTEE MEMBER ZIELENSKI: Yeah. I think it
takes some time to digest the totality of what we have to
do here. And the big picture is clear in my mind, but in
terms of the nuances and all that type of stuff, I think that will come after some thought.

FACILITATOR ABINADER: So maybe what we can do if --

CHAIRPERSON KIMSEY: I have one more thing.

FACILITATOR ABINADER: Yes, Paul, go ahead.

CHAIRPERSON KIMSEY: No, it's something that Patty mentioned, I think, that might be helpful for me also tying into what lawyer was talking about, is I'm not sure of what other -- you know, obviously there's OSHA law, there's Vehicle Code law that relates to the operation of these laboratories and obviously the people in the laboratories are much more aware of what sort of requirements they're under. It might be nice, at least for my purposes, I don't know about other people that that aren't in these laboratories, to sort of have an overview at some point of what sort of regulatory requirements you are under outside of Health Services.

I mean, obviously, there's some comment that, you know, a lot of this goes through the. And being a scientist, most of it, at least a few years ago, in the laboratory, that's not a venue that I am familiar with. I do know on the clinical laboratory side and the environmental laboratory side, we do have a lot of regulatory authority for things like licensing and
inspections and that sort of thing, and we do take a lot
of enforcement activities.

And so I'm familiar with healthy environment
field, but I am really not familiar with what other sorts
of regulatory requirements or agencies or whatever impact
of the forensic laboratories. So that's some information.

FACILITATOR ABINADER: Other folks have anything
to contribute in terms of what you're confused about or
what you're not quite clear about in terms of the law and
its intent?

So I would like to go through maybe each one of
these activities and go through a process of talking about
what is the important decisions that may need to be made
in each of the categories and what are the important
issues we need to consider as we make those decisions.

This way if we go through it, I know it might
seem like a little bit of an arduous process, but I think
that will really help us begin to ferret out some of the
areas that this Committee may want to really concentrate
its time and effort on.

Now, when we began this conversation, I had asked
the question which areas do you think have the greatest
impact on the current programs. And we have up there, I
don't know if we have it here, but people talked about
licensing and site inspections and proficiency, that whole
area of accountability, how do you make sure that laboratories continue to be competent and are able to prepare and analyze and report the results of the tests according to the applicable laws.

So I'd like to just kind of have a dialogue -- begin having a dialogue about each one of these activity areas and really try to ferret out what we see are the key decisions points that need to be made and the issues that we need to consider as we make those decisions.

Does that make sense to folks?

Okay. So if we looked at the development of regulations, does somebody want to just speak to that, what they see as kind of the key decisions points.

COMMITTEE MEMBER SEDGWICK: Question?

Development of what regulations, Title 17 as it originally came in, SB 1623 as it -- or what exactly is your question?

FACILITATOR ABINADER: Okay, my question is when we look at the new law -- I'm sorry, when we look at the new law and we know that that law needs to be translated into regulation, then what are the things that this Committee will need to decide about and what are the issues around those decision points that this Committee would need to consider to be able to make what's articulated here into regulation? Does that make sense,
Paul? Am I being more confusing?

COMMITTEE MEMBER SEDGWICK: If I understand you right, what you're saying is very, very broad.

FACILITATOR ABINADER: Okay, help me --

COMMITTEE MEMBER SEDGWICK: And what Patty said earlier, CACLD has apparently talked with a lot of people or the members. The California Association of Toxicologists last November set up a working group, forensic alcohol working group. Those people have been instrumental. I wasn't even involved in that. I did not go to that meeting.

March 10th we had another meeting, 70 to 80 people. I'm sorry. It was more like about 45 that day.

On March 12th, we had another 30 people, roundtable discussions. I collected an incredible amount of information on suggestions for how to rewrite things that people wanted.

Apparently, CACLD has taken not those suggestions, but those from their members and actually put them into a form. And you're talking about suggestions for changing regulations. Somebody has suggestions for changing regulations.

FACILITATOR ABINADER: What I was suggesting is not talking about the concepts to change, but what are the decision points.
We're sitting at a table with 8 -- 7 people now, that everybody has different levels of information. Clearly, both of your groups have done a lot of work, are very -- you know, you understand very much what the law might imply, what the regulations might need to look like, that would reflect the intent of the law.

But we also have folks at the table that don't have that level of understanding. So I don't know what would be helpful, at this point, Paul, in terms of -- because I know that you're sitting there with already some things that you want to present, and, Patty, it certainly sounds like you have stuff that you'd like to present.

But what I'm most concerned about today is when we walk out of this room that everybody has that same level of understanding about what are the key things that need to be considered.

Yes, Pat.

COMMITTEE MEMBER LOUGH: Well, for example, I'm not sure if this is where you're going, but just as one part, where we want to ensure the competence of labs and employees, dah, dah, dah. Well, one way that my organization has a change that we'd like to implement is the proficiency testing level.

Traditionally, it's always been certain levels. We would like to see it be broadened, so that you show
proficiency in the laboratory at much lower levels,
because you have commercial truck drivers, you have all
kinds of things happening in '02. You have the --

CHAIRPERSON KIMSEY: All levels of alcohol.

COMMITTEE MEMBER LOUGH: The zero tolerance. You
have all those things. Those are never and have never
been tested. And we would like to see, as a scientific
group, the addition to test at a much broader range, not
just always a narrow range that centered around the DUI
driver or the typical DUI driver.

So that's just one way we looked at it as a
scientific group, we'd like to see it change.

COMMITTEE MEMBER SEDGWICK: And not just testing
proficiency, setting up methods, analytic methods, that
are perfectly good from a .01, and we know how good they
are, from .01 to a .04, where the Department of
Transportation kicks in up to a .35 or a .50 where our
coroner friend kicks in. And knowing that the methods
we're using are good by whatever validation that's
required or quality control throughout the whole range.

FACILITATOR ABINADER: So that would relate to
the proficiency testing?

COMMITTEE MEMBER SEDGWICK: She's talking about
proficiency testing. I'm talking about analytic methods.

FACILITATOR ABINADER: So in terms of what you
1 were saying Patty. In terms of the proficiency testing,  
2 the concept that you're suggesting or your group is  
3 suggesting, what is the intent of it, what's it based on?  
4 Is it based on making the regulation more --  

COMMITTEE MEMBER LOUGH: It goes along the lines  
6 of what Laura was saying is you have to incorporate what  
7 the laws say so that your science is able to backup what  
8 the law says. So if DUI says you have a 0 tolerance or  
9 you have an .04 commercial or an airline or whatever that  
10 situation is, you know, you can do it analytically. You  
11 can do that by proficiency testing your people, but also  
12 your quality control standards are still set up,  
13 basically, at the 1.0 DUI level, which has been dropped  
14 down years ago.  

COMMITTEE MEMBER TANNEY: So for instance when  
16 they come up with an .02 blood alcohol level and the  
17 proficiency testing only tests between .08 and .10, for  
18 example -- I don't know what it is -- then that subjects  
19 the defense to be able to cross examine well your  
20 proficiency only shows that your reliability or accuracy  
21 within this particular blood alcohol level range, but how  
22 do we know that you have that level of accuracy with  
23 respect to the .02 percent rage? Is that where I'm --  

COMMITTEE MEMBER LOUGH: Right, because the  
25 proficiency tests I don't think have ever been lower than
a .09 if that's right, Clay? It's never been lower than a .09?

ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON: .10.

COMMITTEE MEMBER LOUGH: .10. They usually I think target .10. So that to us scientifically means, you know, we should be testing there and we would like to see the regulations state that.

FACILITATOR ABINADER: Okay. So let's start a list. That's why I was pointing at you Elisa. Let's start a list of the areas of the law that we need to really focus on. We've talked about proficiency testing. You, Paul, brought up the idea of a -- I spaced on it. If we could start --

COMMITTEE MEMBER SEDGWICK: Quality control and method development.

FACILITATOR ABINADER: Okay. So let's just start listing out what areas of the law that this group feels we need to develop concepts around that are priorities. Do you what I mean? And then we can just start discussing the concepts around those particular areas.

COMMITTEE MEMBER TANNEY: Well, I think there's regulations already, if I'm reading the -- reading them correctly, that have to be repealed just based on DHS's no longer having the oversight, because right now are there
not sections within Title 17 that talk about DHS oversight?

So those are going to have to be either repealed or modified somehow to address the very first issue here, which is, again, that DHS no longer has the same degree of oversight it had.

FACILITATOR ABINADER: Right. And, Paul, I want to make sure we get yours up there. We have the oversight power. We have the proficiency testing. You were talking about --

COMMITTEE MEMBER SEDGWICK: You can probably simplify it as broader quality control.

FACILITATOR ABINADER: Okay, great, broader quality control. Other areas that the group feels that we need to focus on -- needing to focus on?

COMMITTEE MEMBER TANNEY: Well, I have a question for the toxicologists and lab analysts present. Is the new technology -- I mean, if these were written in the seventies, is there new technology and new methods that make the use of regulations obsolete that need to be looked at?

For example, again in the collection and handle of samples, they talk about reusable equipment. I know that it depends on what we're talking about, with respect to vacutainer tubes. My understanding is OSHA now
requires that you use single-use tubes. So are some of
the -- and I'm asking this question. I don't know the
answer. Are some of these regulations obsolete as a
result of new technology or advancements in science?

COMMITTEE MEMBER SEDGWICK: They could be if we
choose to make them so. When Title 17 kicked in, most
people, many laboratories, were using the oxygen method.
Most of them use reusable glassware. And they very
specifically did not tell the laboratories what kinds of
methods to use, because for the most part most methods can
do most things exceptionally well.

The new technologies allow much greater
precision, much greater accuracy. The difference between
a .07 and .08 is an incredibly large amount when you're
working at 3 good decimal places maybe even 4. I don't
think of that reproducible, but we're working on it. And
most of the laboratories today now use or -- use
disposable glassware. But I don't know whether it's our
position or whether we even chose to take that position to
require that they do it.

COMMITTEE MEMBER TANNEY: No, I agree with you.
I mean, I think my point is the regulations have to be
expansive enough broad enough to allow for advances in
technology. I'm not trying to make them restrictive.
That's not what I'm getting at. I'm getting at are there
restrictive regulations now that interfere with the
ability to implement new technology, that need to be
changed? That's my point.

COMMITTEE MEMBER LOUGH: There are some things
that are, I'll call, archaic in how things are to be
performed. And I think it's generally accepted in the
forensic science community as being archaic. And those
things I'd like to see changed.

COMMITTEE MEMBER TANNEY: That's what I'm getting
at.

FACILITATOR ABINADER: So we want to make sure
that we get that. So we want to make sure that the
regulations that are restrictive to introducing new
technologies are looked at in light of the work that
you're doing here, correct?

COMMITTEE MEMBER TANNEY: Right.

FACILITATOR ABINADER: So other areas that you
feel this Committee needs to focus its attention and make
decisions about?

COMMITTEE MEMBER LOUGH: Personnel training.

FACILITATOR ABINADER: Okay.

COMMITTEE MEMBER LOUGH: How someone becomes
qualified. Not that it needs that much of a change, but
it does need a little bit of tweaking.

FACILITATOR ABINADER: Great. Other areas. This
is where we're starting to develop the list of where we focus our attention. And that's why I was trying to -- you know, for folks to look at column 1 and column 2 and really think about what are the implications and where is it that this law is really indicating that there are some key decisions that need to be made?

COMMITTEE MEMBER LOUGH: Can I ask the lawyers a question at the table?

FACILITATOR ABINADER: Sure.

COMMITTEE MEMBER LOUGH: With regard to proficiency testing, is it important to you to go to a State agency say did the San Mateo lab pass their proficiency test or is it suitable for you at trial to have them state or provide documentation that they have participated as the law reads in proficiency testing and perform them? Do you need a body sitting at the State to tell you that as an intermediate person?

COMMITTEE MEMBER ZIELENSKI: Well, I'd like to have some enforcement mechanism, someone that might be able to challenge what it is that they say that they've done. And there are various levels of failure at a lab in which they might -- it doesn't look to me like there's even a requirement that the labs successfully complete a test, as long as they took the remedial efforts to go ahead and fix the problem. But that's kind of like asking
the fox to attend to the hen house.

COMMITTEE MEMBER LOUGH: Well, that's the situation that exists today. If someone doesn't pass their State proficiency test, then they remediate. That's the situation.

COMMITTEE MEMBER TANNEY: I don't understand your question.

COMMITTEE MEMBER LOUGH: Okay. Currently, the State sends out the proficiency test. We all take a test, send our answers, and nobody ever asks us about them in court.

If we didn't have the State saying them -- because for the most part the laboratories that perform the bulk of this work are public laboratories, and they're all accredited through a national organization, and they're subject to proficiency testing by a national agency. So they are going to be doing it. It's only the defense labs and perhaps a few independent labs that are currently -- they don't even have to be licensed now.

So if my lab doesn't have the State sending me samples, but the law says you have to do ASCLD/LAB proficiency testing stuff, do you need to have someone in the State -- do I have to send proof to them that we've done our tests? Do you need to pay for a person to sit there and say, okay, all of the labs have to send me their
paper that they've taken their tests? Or is it sufficient in trial to ask has your lab participated in the program as prescribed by law?

COMMITTEE MEMBER ZIELENSKI: Well, I mean to validate their position, I think you want some means of checking that.

FACILITATOR ABINADER: If they've complied?

COMMITTEE MEMBER ZIELENSKI: Yes. To what extent what was their problem, as well. I mean what was the problem with the lab, and how extensive was it? Was it minor? Was it medium? Was it really significant?

COMMITTEE MEMBER LOUGH: For those that had a problem?

COMMITTEE MEMBER ZIELENSKI: Absolutely.

FACILITATOR ABINADER: Okay. So then one of the areas that need to be on this board over here really has to do with compliance, how do you ensure compliance. Particularly when a lab is found noncompliant, how do you ensure that they've addressed the issues of noncompliance.

COMMITTEE MEMBER LOUGH: Yes, do you need something outside the discovery, I guess, is what I'm asking? Because obviously you can get all this information through discovery.

So do you need to have something out of discovery, do you need to pay a State employee to sit
there and send you something that you couldn't automatically get through the discovery process?

COMMITTEE MEMBER ZIELENSKI: As a means of checking what it is that they provide us, yes. I mean, that would be my concern is that you would have a representation that there's been compliance, when, in fact, there is no means of checking what they say they do. How do you validate what they said they've done.

So you're more or less taking their word at that.

If you've got a lab out there running a muck, then you could have a situation where there's no check on it.

COMMITTEE MEMBER TANNEY: If I understand your question. Generally, we're always required to have the live witnesses unless the defense stipulates to a certain blood alcohol result, which happens much of the time. If there's any question because we don't have any information to give them ahead of time, documentation regarding proficiency or accuracy or reliability, then I would imagine they would be less likely to stipulate because they would want to cross examine that person on the stand. And that would require many more courtroom hours for laboratory personnel coming in.

So it would be, I think, both the defense and the prosecution's interest to have some documentation of that -- that ensures that accuracy, if we're not going to
eliminate stipulations completely.

COMMITTEE MEMBER LOUGH: Right. And if you're, for instance, an ASCLD/LAB accredited lab, which the majority are, that information -- you have a quality control manager. They have all this. And then have all the information they can send you. They could say here's the levels of proficiencies that went out. This is your score.

And certainly if you have a laboratory that is not performing, they're going to have to come in and defend their result, absolutely.

So that's just a question, do we need to have a State person do that or is it sufficient in accredited labs to have the quality control manager, quality assurance manager maintain the documentation to provide it when requested?

COMMITTEE MEMBER TANNEY: When you say a State person, you mean from DHS?

COMMITTEE MEMBER LOUGH: Yes.

FACILITATOR ABINADER: So under compliance -- COMMITTEE MEMBER TANNEY: So we don't have them come in generally now. We, usually, rely on the information we get from the individual laboratories.

COMMITTEE MEMBER LOUGH: And I would assume that the State now wouldn't be providing that information
because that's provided in discovery information without
going through the prosecuting agency. So I don't know how
that information would even get relayed now in.

FACILITATOR ABINADER: So we've got up there
personnel training. Is there something up there that
needs to be up there around the qualification of the
laboratory personnel. Is that an issue that the group
wants to address of how do we know?

COMMITTEE MEMBER TANNEY: That would be under
personnel training, I would imagine.

FACILITATOR ABINADER: It's a separate activity
in the work currently, but that's okay. I just want to
make sure under, you know, personnel training if we want
to include in that a conversation about qualifications.

COMMITTEE MEMBER LOUGH: Yeah. I think it should
be personnel training. It should include what kind of
titles these individuals are going to have.

COMMITTEE MEMBER TANNEY: I think what Paul said
earlier is the position I'm finding myself in as part of
the same as Torr, I'm not familiar with what all the
regulations say right now, and whether we need to have a
discussion on each and every one depends on whether we
identify them as something that needs to be changed.

I mean, all of these things have to be addressed,
but maybe they're already satisfactorily addressed by

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Title 17 as it exists now. And I think from my point of view, it might be premature to have this discussion trying to limit what we're going to be discussing in the future without now having the background that we have and perhaps getting some more, and having the opportunity to go through it ourselves. I don't know.

COMMITTEE MEMBER ZIELENSKI: Actually, what sounds ideal to me is looking at Title 17 as it was, looking at the new law now, and looking at what it is that these folks have apparently done an extensive amount of time — or you know, spend an extensive amount of time evaluating. It seems like they're the experts in terms of doing this type of stuff.

So I'd like so see what they have, see what's in Title 17 and see what obviously is in the new law and take from those 2. Maybe with any additional suggestions from the panel here, you know, extrapolate between all those 3 things as it relates to the new law.

CHAIRPERSON KIMSEY: Did anyone else have some concepts?

COMMITTEE MEMBER LYLE: Well, it sounds like one of the big questions after we're done with all that stuff that we should decide on, is it more efficient or is it better that more in the spirit of the new to allow the final say to be battled out in court or should there be a
regulatory body that handles it. Is that what you're asking?

COMMITTEE MEMBER ZIELENSKI: I think if you don't regulate it, you're going to have some real problems in court. I mean, potentially with respect to --

COMMITTEE MEMBER LYLE: So the courts is not the place to have it solely --

COMMITTEE MEMBER ZIELENSKI: You can have it there, but you may have problems of admissibility. A lab does, you know, their work in a certain way. They may not have established Kelly-Frye standards and be generally accepted in the scientific community. So I think keeping that in mind for purposes of admissibility on down the road, it seems to me Title 17 is a good solid starting point.

With reference to the work that you folks have done, being experts in that field, compare those 2 things and see how the interrelate with the new one and --

COMMITTEE MEMBER TANNEY: I'm getting the feeling that we're starting from 0 in this discussion rather than starting from Title 17 as it exists and then determining whether any of it needs to be revised.

And to me that's a much easier place to start is with Title 17 as it exists rather than trying to build from the ground up, whether we need to discuss everyone of
these, which I would say, yes, we do, if we don't already have Title 17 as a starting place.

FACILITATOR ABINADER: And do we have Title 17 in our packets?

COMMITTEE MEMBER LOUGH: Yes, it's in there.

FACILITATOR ABINADER: There's only one thing I want to bring up in terms of a little bit of a concern I have about going immediately to concepts. And that's ensuring that people really understand what the implications of the new regulations are, so that when -- or the new law is, so that when you're reviewing the concepts, when you're looking at the concepts that people are presenting, you're really have a sound background on understanding what the implications are, what the current program was doing and why it was doing that -- you know, why did they decide to do this or focus on that or not focus on that -- and what the new law may mean.

And then when you entertain the concepts, we're sitting around the room where everybody is kind of sharing and understanding of the implications.

And that's where I was trying to get to today.

But it sounds like folks, first of all, need some more background information, more time to kind of digest. And it also sounds to me like it would -- this group would benefit from reviewing Title 17 to really think about, you
know, what aspects of Title 17 really folks feel comfortable with and then move into concepts.

Is that -- am I reading the group right?

CHAIRPERSON KIMSEY: I think some of that the workload though -- I mean, I think for the purposes of today -- I think, of course, it's about time for a break. That's kind of the job of the Chairman -- would be to come back after the break and have some discussion about the concepts or the proposal that Patty's group is bringing forward.

From my perspective, I think the suggestions of setting things down and reviewing them is going to be unfortunately homework. I mean, especially for those of us that aren't as familiar with this area. And getting other background information out to us. And so I would have a feeling that, you know, at a subsequent meeting of some sort that then we would have a discussion starting with Title 17 and looking at what they're proposing and having us all a bit more at the same level -- playing field with regard to having reviewed the concepts.

COMMITTEE MEMBER TANNEY: And maybe when you first went around the table and asked what our goals were, what we were hoping to see, the way I view my role in this is that the laboratories have to -- they're the ones familiar with the procedures. And what my role is, as far
as I'm concerned, is to make sure that what is developed -- certainly to give input, but to make sure that what is developed is something that will withstand the scrutiny in court and maintain the integrity of the process.

So rather than, as much being a developer of the regulations, rather than a reviewer -- and I'm not saying I'm not willing to participate in developing them, but again that's difficult to do at least without the scientific background that the analysts and the people at ASCLD and the California Association of Toxicologists have. But I certainly want to be able to provide input as to whether or not any proposal would be detrimental to the prosecution of driving under the influence cases or detrimental to the integrity of the process.

I don't know how you feel.

COMMITTEE MEMBER ZIELENSKI: I agree totally.

That would be my view of it.

CHAIRPERSON KIMSEY: Do we want to take --

FACILITATOR ABINADER: Well, let's take a few minute break and then regroup and see where we want to go from here.

(Thereupon a recess was taken.)

FACILITATOR ABINADER: We're going to go ahead and try and get started again.
CHAIRPERSON KIMSEY: We're going to go ahead and get started again.

Thank you all. We've had a little discussion around -- with regard to the use of the time for the rest of the day. And Selma and I are going to try and sort of summarize where we think we are and have some discussion on that.

It would appear that we have one group, at least that has brought some ideas of some concepts for changes to the regulations. And we may have a bit of an overview of that. I think, there's more detail there than we can get into today. Patty mentioned that she can get that to us in an electronic format, and so we can, as has been discussed, sort of do some homework and some comparison of Title 17 and some proposed ideas. And that would not preclude any other organization that might have some ideas to present. I don't think anyone else is prepared today, but at a subsequent meeting there may be some other concepts presented.

And so we're thinking that if we could spend like 20 or 30 minutes maybe at a higher level going over the concepts from Patty's group, the Association of Crime Lab Directors. And then we can have a little bit of maybe a background -- a little bit of the last number of years and what led up to the legislation a bit from the
laboratories' perspective. And then we're going to have some public comment.

Before we get to public comment, we'll probably go over the committee structure and leadership responsibilities, talk a bit about our next meeting, which I would encourage that we try and maybe do by a telecon or a video conference type of a format. Now, that we've all sort of seen each other, I think we'll recognize each other's voices. We can make arrangements for the public to be able to call in also.

Were there other items?

FACILITATOR ABINADER: No. I think that, Patty, you thought that maybe the stuff that you had to present would be too extensive to present today?

COMMITTEE MEMBER LOUGH: I think to go into it, yeah. And it would save time if we could compare the existing Title 17 to the revisions that we would be proposing.

FACILITATOR ABINADER: And I think Paul and Kenton didn't also your organizations have concepts that they wanted to put forth?

COMMITTEE MEMBER WONG: Yes.

FACILITATOR ABINADER: And also anyone else, you're saying Paul has invited DHS included, to present concepts as well?
CHAIRPERSON KIMSEY: Sure.

FACILITATOR ABINADER: Okay.

CHAIRPERSON KIMSEY: So did you want to go over them just a little bit or did you just want to get them to us electronically?

COMMITTEE MEMBER LOUGH: I think electronically. I think it would be easier for you to have them side by side and compare them.

FACILITATOR ABINADER: I would note for the public to receive them, please be sure when you signed in, go back and put in your E-mail address, if you will.

DR. LEMOS: Could you post them on the Internet website as well?

CHAIRPERSON KIMSEY: That's a very logical suggestion. And the only difficulty being sometimes the timing on that is not -- is Larry still here?

How is your folks IT on being able to get things posted on your website?

FOOD, DRUG AND RADIATION SAFETY DIVISION CHIEF BARRETT: Basically, if I get it that day, I'll post it up on to the site?

CHAIRPERSON KIMSEY: Oh, okay.

And can I have him work on my website.

CHAIRPERSON KIMSEY: Either way, you can leave your E-mail address and we'll send it to you and then
we'll also post it on. And this is your --

FOOD & DRUG LABORATORY BRANCH CHIEF SOLIMAN:
dhs.ca.gov/fdlb.

FACILITATOR ABINADER: So if you go to the
Department webpage, you'll be able to drill down to it.
In fact, maybe could you put that up on the --
Can you give it to her Mary, again, so we have
the website.

FOOD AND DRUG LABORATORY BRANCH CHIEF SOLIMAN:
www.dhs.ca.gov/fdlb, right Chris?
F as in food, D as in drug, L as in lab.

ABUSED SUBSTANCES ANALYSIS SECTION CHIEF LARSON:
It's also on the agenda at the bottom of the page.

CHAIRPERSON KIMSEY: Good timing. It's at the
bottom of the agenda.

FACILITATOR ABINADER: So maybe I could just
summarize what we at least identify as areas that would
need to be addressed. And I believe that the proposals
that people will see from the different groups will
address these.

But some of the things we talked about that would
need to be focused on are issues around or regulations
around proficiency testing, oversight powers, broader
quality control, personnel training and qualifications,
compliance for labs, and enforcement regulation who will
And there were a few others that I'm losing here. Oh, and then ensuring that there aren't regulations that are restricting the ability to use more innovative equipment. Anything else I missed? So what I'm hearing from folks is that Title 17 that there doesn't seem to be the need to do a whole lot of changes in Title 17. That folks are suggesting that the concept papers that get sent to you that you look at them in relationship to Title 17, and that the next discussion at the next meeting would talk about the concepts and talk about Title 17 and where people found issues or where there might be some areas of confusion or areas that needed further discussion.

So, if I may Paul, I would like the group to go around and just from your perspective when you think about this homework assignment you're going to have, and that's like looking at Title 17, looking at the concepts that different groups are going to put forth for you to review, what do you think are the most important things you'd like to make sure you keep in mind or you'd ask other people to keep in mind as they look at them, as they make that comparison between the concepts that are proposed and the Title 17 regulations?
Anybody have anything they'd like to say about that? Because this is big change and we have different levels of information and understanding at this table and different areas of expertise?

COMMITTEE MEMBER ZIELENSKI: I'd like as many different sources with respect to the potential development of regulations that I can be informed, so I can consider -- and again, I'm not a scientist and what we're talking about here is fairly technical stuff. The more information that I have, the more that I have to compare and contrast, the more likely it is that I think I'm going to be able to come to a reasoned, intelligent decision in terms of what regulations ought to be implemented.

So the more the merrier for me in terms of background information.

COMMITTEE MEMBER WONG: With regards to that it's been brought up on a couple of occasions for background information. And to kind of get everybody on the Committee as well as the public on the same foot, many of the laboratories in California are ASCLD/LAB accredited. And ASCLD/LAB stands for the American Society of Crime Lab Directors Laboratory Accreditation Board.

And what they do is they're an oversight private organization which looks at a laboratory's procedures,
their personnel, their training records, proficiency.

Basicallly, they ensure quality and quality work coming out
of the crime lab.

Now, looking at Title 17, Title 17 looked at and
addressed maintaining quality control and forensic alcohol
analysis within the state of California. Title 17 only
applies and apply to public forensic laboratories. It did
not apply to private laboratories, such as Torr discussed
that if some guy wanted to start a rogue lab, and start
putting out forensic alcohol analysis results, he or she
could and would not be mandated to be covered under Title
17. So Title 17 only covered public forensic
laboratories.

As it stands now, there are only 2 laboratories
in the state of California that are non-ASCLD accredited
labs. And they -- public labs. And they are currently in
the process of becoming ASCLD accredited as we speak.

So what happened was as these laboratories were
becoming ASCLD accredited and also following Title 17
regulations in the California Administrative Code, there
was a lot of duplicativeness between Title 17 procedures
and requirements and the ASCLD/LAB requirements. So
Senate Bill 1623 what it basically did was it basically
said let's just kind of go with one of these since you
guys are having to do the same things for both of them
anyway in large part and parcel.

COMMITTEE MEMBER TANNEY: That goes to the not
the method of the testing but rather who is providing the
oversight, whether it be ASCLD or DHS, right?

COMMITTEE MEMBER WONG: Correct, but the
ASCLD/LAB also does look at the procedures and inspections
and all those things as well.

COMMITTEE MEMBER TANNEY: Right, okay.

COMMITTEE MEMBER LOUGH: But the new law does not
require that a laboratory be ASCLD accredited.

COMMITTEE MEMBER SEDGWICK: I'd like to add
something to what Kenton said. When Title 17 was
originally written, it specifically targeted laboratories
doing alcohol analysis for measurement for prosecutory
purposes. Far and away the majority of these are public
laboratories, but we do have some private laboratories out
there doing that under contract to police agencies. They
are Title 17 accredited. They have to follow Title 17.

It's the non-Title 17 laboratories doing defense
reanalysis or any other kind of alcohol analysis that do
not -- for DUI purposes that don't have to follow Title
17. I don't see changing that. That's a very substantive
change in the law and circumvents the initial intent of
Title 17.

COMMITTEE MEMBER LOUGH: And that's stated -- it
still says the same thing?

COMMITTEE MEMBER SEDGWICK: Yes.

CHAIRPERSON KIMSEY: That was not changed in the law.

COMMITTEE MEMBER LOUGH: No.

FACILITATOR ABINADER: Any other thoughts about what folks should keep in mind or any other additional information that you may need to be able to do this comparison between Title 17 and the new -- and the proposals that you'll see from different groups?

CHAIRPERSON KIMSEY: Is there a timing on when -- obviously I imagine Patty's package of information will come electronically as fairly close to being ready, if not ready. Do we want to set some sort of timeframe? I mean, if there are going to be other, you know, concepts coming from other organizations, what's a reasonable timeframe or is there -- is that --

COMMITTEE MEMBER SEDGWICK: Let me speak for the California Association of Toxicologists. My job over since November was to read what the working group put together and some ideas they had, moderated a group on March 10th, went through some roundtable discussions on March 12th, and basically I listened to an incredible number of divergent opinions with an emphasis on divergent. And I wrote them down and made a report.
We did not rewrite Title 17. We did not put out proposals. Some of the people we had there, some of the moderators, did do that for their particular areas.

I don't have a specific direction from the CAT.

CHAIRPERSON KIMSEY: Do you think some of that information would be helpful for us?

COMMITTEE MEMBER SEDGWICK: Well, it's available.

CHAIRPERSON KIMSEY: I mean even if it is a little bit disjointed or --

COMMITTEE MEMBER SEDGWICK: No, it's available on the website on the CAT website I don't know if it's limited to numbers or not, but I can certainly make that report available to everybody here. It is disjointed, yes.

CHAIRPERSON KIMSEY: I think that would be -- I would find that helpful.

FACILITATOR ABINADER: I think anything that gives people a sense about the issues that they need to think about, the implications. I mean, we tried to talk about it today, but we really don't have enough information around the room. But that's the kind of things, to make a comparison, you have to -- what are you basing your comparison on, because it sounds good?

I mean, and those are the kinds of things that we need to really think about, what are the implications of
it, in terms of the assurance, accountability, competence,
all those things that you all brought up as being very
key, and, you know, really respecting and reflecting the
intent of the law, which I'm sure the proposals do.

CHAIRPERSON KIMSEY: Do the criminalists have
some?

COMMITTEE MEMBER WONG: Yes, we do. If I can add
on to what Paul said. In general, I think when we look at
all this data, we're going to find many areas of
commonality that everyone is addressing and seeing the
same things.

CHAIRPERSON KIMSEY: And does your group have
something in a reasonable timeframe that we could look at?

COMMITTEE MEMBER WONG: Yes. It's not -- we have
not rewritten or tried to rewrite Title 17, but ours is in
a disjoined --

CHAIRPERSON KIMSEY: In a similar format. And
that's already ready. So theoretically by the end of next
week we might all have that information.

COMMITTEE MEMBER SEDGWICK: Just tell us where to
send it.

FACILITATOR ABINADER: And is there anything that
would come from DHS?

CHAIRPERSON KIMSEY: No, I don't think we have --
if we do, we will meet whatever timeframe you want us to
meet. We're talking about the end of next week, we would -- if we have something, we'll get it out.

COMMITTEE MEMBER TANNEY: And I'd like people to consider the applicable code sections. I don't know -- I mean those are public records. I don't know if they need to be posted or anything, but --

CHAIRPERSON KIMSEY: That's an area, I think, we, DHS, may have very little knowledge of or -- actually, I shouldn't say -- well, is there a way of -- can you get something -- do you have that?

COMMITTEE MEMBER TANNEY: I can send that to you.

FOOD AND DRUG LABORATORY BRANCH CHIEF SOLIMAN: I have a question. What is required with the ASCLD/LAB accreditation? Could you please describe what it takes for a laboratory to be accredited by this body?

COMMITTEE MEMBER WONG: The process is fairly rigorous. Your laboratory has to submit procedures and methods for all different types of analysis. And these all get reviewed by the Laboratory Accreditation Board. They are looking for quality control, qualifications for personnel, proficiency testing, blind testing. They come in and they look at your physical plant as well. They do physical inspections.

You're required as an ASCLD/LAB accredited laboratory to do a self-audit to make sure that you're
doing all your proficiency testing and all your
inspections of your physical plant to make sure that
there's security, and change of custody of evidence and
all those certain things, and things are packaged
properly, so that there's no question of any breeches for
responsible.

And then the laboratory also is physically
inspected by ASCLD/LAB accreditation board every 5 years.

COMMITTEE MEMBER LOUGH: Every 5 years?

COMMITTEE MEMBER WONG: They descend on your
laboratory and pick your place apart. And they go through
all your instrumentation to make sure that if you say that
you're doing your quality checks on your instrument that
you are indeed doing that. And they check to make sure
that people are doing their proficiency testing and that
you are having security. And that they go through your
evidence vaults and make sure that everything is safely
secured and that chain of custodies are signed. And it's
fairly rigorous.

CHAIRPERSON KIMSEY: And they have, as I would
imagine, a website that you can look at.

COMMITTEE MEMBER WONG: Yes, they do.

CHAIRPERSON KIMSEY: So just to sort of help
clarify, you'll be able to send -- and who should they
send it to? I'm just trying to think who people should --
sort of the coordinating entity here, I guess is the
Department. I guess -- I'm looking around the room. I
guess we've been having the -- Mary has been sending out
the communications. So why don't we have you get the
information to Mary. And then Mary can get it out. And
her E-mail address would be msoliman@dhs.ca.gov.

Other items that we might want to pull together
for all of our review? We're going to get the other
citations or codes from Laura. Other groups are going to
be providing the documentation -- or some sort of
documentation, either actual revisions to the regulations,
suggestions or summaries of discussions from their various
organizations.

COMMITTEE MEMBER SEDGWICK: Would it be
appropriate or reasonable or even easy to get ASCLD/LAB
inspection criteria, quality assurance definitions? I'm
an ASCLD/LAB inspector. I inspect laboratories, and I
have copies of this. But it might be more appropriate to
get it directly from the Lab Accreditation Board.

CHAIRPERSON KIMSEY: Is it something they have on
their website?

COMMITTEE MEMBER SEDGWICK: I don't know.

COMMITTEE MEMBER TANNEY: I think I've looked
them up when I was looking at the Senate Bill and
researching that. I think I looked up their website and
found it, but I'm not positive.

CHAIRPERSON KIMSEY: Why don't we each sort of
look at the website. And if we think that there's
information that we would need at a subsequent time, then
we can make arrangements to get it.

Any other comments before we go to the public for
comment?

COMMITTEE MEMBER LOUGH: When were we going to
determine rescheduling? Yeah, that's -- we'll sort of do
that after the public comment. We have governance
discussion, meeting process, and we'll talk about when we
want to meet again.

Any comments from the public at this point?

MR. ZEHNDER: Jeff Zehnder, Drug Detection Lab
Sacramento.

I have a little concern about the neutrality of
the oversight. And maybe I don't understand everything
that's happened here with the change in the law, but it
seems to me that this was really all about taking the
oversight away from DHS and giving it to ASCLD.

Well, I have one of the private laboratories that
was licensed under Title 17 for 20 years until January
1st. And I have a little problem if ASCLD is going to
be having oversight of my lab. ASCLD is the Association
of Crime Lab -- American Society of Crime Lab Directors.
That means that it's strictly a prosecution oriented organization.

And this is an adversarial system. And God bless us for that. I think it's the power and the glory of our whole legal system is in the adversarial aspect of it.

So I guess my only concern here is that labs like mine, which are fully qualified to be doing this work as well, could be subject to oversight by somebody who has a dog in the fight, if you will. And I don't think that that's right, just in -- now, maybe there could be some clarification on this. Maybe I don't know exactly who ASCLD is or where their loyalties lie, but somebody said something about the fox watching the hen house. And that's what it appears to be to me.

CHAIRPERSON KIMSEY: Thank you for the comment.

Another comment?

MS. WEINGARTEN: My name is Halle Weingarten. And for 22 years I was at the crime lab in San Jose. I've been in private practice for 10 years. So I feel like I come with kind of a balanced position seeing both sides of the issues.

But I have several concerns about things that were said today or maybe not said today that should have been said today.

First, I think you have to recognize that in most
counties in California well over 90 percent, probably somewhere around 98, 99 percent of DUIs plead guilty. Those guilty pleas are based, for the most part, on the fact that they know, they've had confidence up to this point, that the alcohol levels being reported were accurate and that the whole procedure was done correctly. And that is due to the rigorous oversight of the Health Department. And I'm not going to pretend that I didn't -- when I was running the alcohol program in Santa Clara county, I'm not going to pretend that I didn't chafe or disagree with DHS frequently. But on the other hand, there were a number of advantages to having that oversight. And I think that eliminating that oversight is a huge mistake. It will create more problems for crime labs than it will solve. Many people don't have money for attorneys. And so they will just plead guilty. And again this goes back to the issue of is the result reliable and are we being fair to the public. I think that's a big issue. Public defenders for indigent people, indigent DUI defendants, public defender's office is for the most part urge, if you will, their clients to plead guilty, because they are generally not staffed to handle the load. That was one issue.

There seems to be some thought that proficiency
testing will take care of ensuring reliability of testing. There is no proficiency testing at all involved in running a breath testing program not of any kind.

   In addition, proficiency tests come to the laboratory in open forum. In other words, everybody knows its a proficiency test. So a more effective way of handling the proficiency testing problem would be to have blind proficiency submitted. Everybody groans whenever I suggest that. But in the federally certified laboratory system, blind proficiencies are required. And there are mechanisms for setting up submission of blind proficiency samples to crime labs. This could be done, and this would certainly have more of an effect on ensuring the accuracy and fairness of testing.

   There were also statements made about private labs. And although it may not be common knowledge, there are at least 6 private laboratories in this state, which have been licensed to perform forensic alcohol tests. They do it -- contrary to what has been said, they do -- some of them do a huge volume, because they contract with many, many, many agencies, and they do testing on tens of thousands of blood alcohol samples a year.

   ASCLD is not the only certified agency that would be appropriate for this type of work. Toxicology associations, namely the American Association of Forensic
Sciences and Society of Forensic Toxicologists have a joint accreditation program for toxicology laboratories. Blood alcohol is certainly considered a toxicology type of analysis.

So there are other types of accreditations available which would be more appropriate for some laboratories, which are not crime laboratories. These are laboratories which specialize in toxicology and blood alcohol testing. And those certifications would certainly be appropriate when many of them are much more rigorous than ASCLD accreditation.

So I would like to suggest other types certifications if we're going to go away from oversight by the Department of Health Services, that we move away from ASCLD as well. I agree with what Jeff said about the fox and the hen house. I think it's probably not the best way of being able to defend your work.

Over break I was talking with a couple people from crime labs who are very concerned. And one of them has left. They're very concerned that in a laboratory with a small program that when they have very little resources allocated to their alcohol program, this is going to create a huge burden, because taking the oversight away from the Health Department is going to mean that each laboratory will have responsibility for
producing discovery. And this could amount to stacks and
stacks of records, producing the copies, mailing out many,
many records that currently now the Health Department has
been handling.

So I think that there is -- what I'm hearing is
that there is a concern that this type of change is going
to put a much larger burden on the laboratories in other
ways than just having to go to court. More often, which I
think we recognize, and to defend what you're doing in
great detail, rather than just being able to say as we did
for many years of at the crime lab, hey my lab is
licensed, we're all certified, we're good to go. And it
was always accepted. That's going to change.

CHAIRPERSON KIMSEY: Thank you for your comments.

Any other public comment?

MR. PHILLIPS: My name is Bill Phillips. I'm the
laboratory director with the California Department of
Justice. I run the toxicology and blood alcohol programs.
There was some misinformation given today, and I'd like to
straighten that out concerning the qualitative or
quantitative analysis of forensic science in forensic
science.

The DNA program, which is right down the road
here, with the California Department of Justice would
seriously disagree with the qualitative and quantitative
ability of forensic science, and also the toxicology laboratory. We do quantitative analysis on a daily basis at levels of parts per billion. And we can significantly disagree with the opinion.

And alcohol of course the .08 analysis of alcohol is a simple process. We would like to be able to make it more understandable to the Department of Health so that we can better regulate our own business.

Thank you.

CHAIRPERSON KIMSEY: Thank you.

Any other comments?

Okay.

Oh, there is one. There's a spotlight in my eye.

MS. HEUER: My name is Gail Heuer. I work with the Department of Motor Vehicles. I'm their senior staff counsel there. I'm the lead attorney for driver safety and driver's licensing issues.

And I want very much to be a part of this process, in that, our Department is a big enduser for Title 17. What you're going to do at that table is going to affect our driver safety programs hugely. We are expending a great deal of money now defending things that we didn't used to need to defend, because of the state of flux of Title 17 at present.

So I urge your prompt work on this revision. And
I volunteer in any way, shape or form that I can help with comments and so forth presenting DMV's point of view.

CHAIRPERSON KIMSEY: Thank you. Yes.

DR. LEMOS: My name is Nikolas Lemos. I am the Chief Forensic Toxicologist for a public lab at the Office of the Chief Medical Examiner in San Francisco. We do all the blood and urine DUIs in the county of San Francisco.

I am concerned right now that as it stands there's no opportunity for transparency of the analytical methods used in laboratories. The methods are not on record with anybody, and nobody really has the chance to peer review.

This is a basic scientific method principle. And we have to make sure that whatever comes out of your discussions and decisions includes that basic scientific principle of peer review.

Also, we have to decide that many -- or you have to decide, but many facilities here feel uncomfortable able, including my public laboratory that I represent, to be perceived to be certified by the American Society of Crime Lab Directors. Because like many other speakers have said or many other members of the public have said that comes with a certain label.

We treat forensic alcohol like any other forensic determination in the laboratory. And at the American
Board of Forensic Toxicology, Society for Forensic Toxicologists and many other professional bodies would be able to give you guidance as to how it is that every forensic determination should be performed in a laboratory.

I feel that if you actually have the decision or if you make the decision that this should be ASCLD related, then I will be going to court a lot as a prosecution witness, which I am not. I am an independent expert giving my scientific opinions based on scientifically proven methods.

Thank you.

CHAIRPERSON KIMSEY: Thank you.

Other comments?

Okay. The next part of our agenda is the governance and meeting process. We can talk about the Committee structure, leadership, responsibilities, when we want to meet next, what our timeframes are.

I think our structure is pretty well set.

There's 8 of us. And the Department has asked me, at least for today's meeting, to be the Chair. And that's sort of up to the group if we want to elect a chair. I mean it's a fairly nominal position as we're imposing it so to speak, to sort of keep us on an agenda and that sort of thing and doesn't really -- everybody's vote is still
the same. The chair doesn't break a tie. But that's up to the group.

And when do we want to meet next? What do the frames allow.

COMMITTEE MEMBER LOUGH: Thirty days.

CHAIRPERSON KIMSEY: Meet again in 30 days.

We'll try and get as much information together and out to everybody by the end of next week. We need to meet in 30 days, we're looking towards the end of September.

What we'll do is we can send out an E-mail to the Committee and look at people's schedules. Does a telephone conference set up suffice?

COMMITTEE MEMBER TANNEY: It's my understanding that we would each then have to be in a public room, is that with the public invited or --

CHAIRPERSON KIMSEY: I believe that's the case.

SENIOR STAFF COUNSEL ENG: Correct.

COMMITTEE MEMBER TANNEY: I'll have to look at the feasibility of that.

CHAIRPERSON KIMSEY: There's another. Some of you are closed together and you can get into together in a public building -- not that close?

FACILITATOR ABINADER: It would be great if -- particularly since you're going to be reviewing concepts and talking about implications of those concepts, is it...
possible to meet face to face or is it hard?
I mean, what is the pleasure of the Committee?
CHAIRPERSON KIMSEY: I think there's some
advantages obviously meeting face to face, you know. It's
just timeframes.

COMMITTEE MEMBER SEDGWICK: The only disadvantage
in meeting face to face is it takes us all day. But the
alternatives are virtually impossible. At least, I don't
know how I can manage that.

COMMITTEE MEMBER TANNEY: Well, also the cost --
I mean it's not just the taking all day, it's the costs
involved in travel. But I don't know what the
feasibility -- I mean, I would have to investigate the
feasibility of a teleconference or video conference
option, which is difficult.

CHAIRPERSON KIMSEY: There's nothing wrong
with -- from the Department's perspective in coming here
again. If you wanted to do something in southern
California, I'm sure the State has office buildings
fairly -- that we could use in southern California.

But we could try and meet back here in a month if
that -- since we all know where it is now. And why don't
we tentatively -- and, of course, this Committee can
change it, but it will posted. But why don't we
tentatively set up that we would meet again in
approximately a month back here. People might look into
their options of doing a telecon in some sort of public
environment. But right now it looks like we're headed
back to another face-to-face meeting here toward the end
of September.

Any feelings about the chairmanship issue?

(Laughter.)

CHAIRPERSON KIMSEY: I guess that's -- other
items we want to discuss before we close the meeting?

COMMITTEE MEMBER LOUGH: Just a comment for the
general public. This isn't a group of ASCLD people. This
is a group of people representing various organizations.
So make sure that those of you who are working in certain
fields that have a certain opinion that you contact these
associations that you should have representatives going to
those meetings so that you can make sure your voice is
heard.

But we don't want anyone to confuse the fact that
we're talking about setting a proficiency test program
similar to ASCLD/LAB that we are an ASCLD organization or
requiring any laboratory to become accredited. We are
not.

CHAIRPERSON KIMSEY: And from the Department's
perspective, we're very much interested in input from any
organization. You can contact, you know, people on this
Committee. You can always contact me. We very much need to know the consequences of actions the Department is going to be involved in.

So please do not hesitate, if you have public comment or talking with anybody on the Committee, to make your opinions known. If there's nobody on the Committee, you can always talk with the Department, and I would be that sort of point person. You can get to me through Mary Soliman or my own E-mail address. Although I have 700 currently unread.

(Laughter.)

FACILITATOR ABINADER: And yours could be 701.

CHAIRPERSON KIMSEY: That's not to say that I won't get to them by tomorrow. But it's pkimsey@dhs.ca.gov. But you can also get in touch with Mary Soliman. pkinsey@dhs.ca.gov.

Other comments or items?

If not --

COMMITTEE MEMBER TANNEY: I'm sorry. Just for clarification on contact with the public, are there any limitations on individual members of the Committee with respect to communications with the public regarding any of these issues?

CHAIRPERSON KIMSEY: I believe as an individual there are none, but -- is that correct?
SENIOR STAFF COUNSEL ENG: That's correct.

COMMITTEE MEMBER ZIELENSKI: They can talk to us, but we can't solicit them, is that how it works?

SENIOR STAFF COUNSEL ENG: There really isn't a limitation on committee members talking to individual members of the public.

CHAIRPERSON KIMSEY: So you can solicit or you can be approached.

Okay. Well thank you all very much for coming today. And good luck on your travels.
(Thereupon the California Department of Health Services, Forensic Alcohol Review Committee meeting adjourned at 3:00 p.m.)
CERTIFICATE OF REPORTER

I, JAMES F. PETERS, a Certified Shorthand Reporter of the State of California, and Registered Professional Reporter, do hereby certify:

That I am a disinterested person herein; that the foregoing California Department of Health Services, Forensic Alcohol Review Committee meeting was reported in shorthand by me, James F. Peters, a Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewriting.

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

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of September, 2005.

JAMES F. PETERS, CSR, RPR
Certified Shorthand Reporter
License No. 10063