



1-1-1994

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Recommended Citation

Jeffrey J. Coonjohn, *Brief History of the California Legislative Counsel Bureau and the Growing Precedential Value of Its Digest and Opinions, A*, 25 PAC. L.J. 211 (1994).

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A Brief History of the California Legislative Counsel Bureau and the Growing Precedential Value of Its Digest and Opinions

Jeffrey J. Coonjohn*

Every action of government must have at its center a firm basis in law. No writ may be issued, grant paid, nor arrest made without some enabling legislation. As the purview of government expands, so too does the volume and complexity of the legislation authorizing, mandating, or prohibiting action. It is, therefore, imperative that all legislation be constructed with foresight, clarity, and exactitude; such that the laws might be drafted, executed, and interpreted within the bounds of their intent, without being contradictory, overly broad, or so narrow as to render them void. This balance is nothing less than efficient legislation.¹ Efficient legislation is thoroughly researched and contains well drafted enactments of government that function independently and in concert with each other.²

There are many factors working against efficient legislation. Foremost are the legislators themselves. By their very nature, populist legislatures tend toward inefficiency because of the multi-interests of their ever-changing members and the members' overall lack of special knowledge in public legislation.³ Too many people, pulling in too many different directions, without a concerted plan and without regard for current legislation, can only result in a Kafkaesque code, unintelligible to even its authors. Even under ideal circumstances, efficient legislation is not

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1. GUSTAVUS A. WEBER, ORGANIZED EFFORTS FOR THE IMPROVEMENT OF METHODS OF ADMINISTRATION IN THE UNITED STATES 311 (1919).

2. *Id.*

3. In an address delivered to the New York State Bar Association in January 1908, political commentator and British Ambassador to the United States James Bryce stated that: "[m]any of the problems which legislation now presents are too hard for the average members of legislative bodies, however high their personal ability, because they cannot be mastered without special knowledge." James Bryce, Address to New York State Bar Association (January 1908), in UNIVERSITY AND HISTORICAL ADDRESSES 75, 99 (photo. reprint 1968) (1913).

necessarily synonymous with good legislation. Only good people who harbor the public well being can make good legislation. Efficient legislation is only a tool that facilitates adoption and implementation of the law.

The purpose of this Article is to explore the process by which political plans are transformed into efficient legislation. More specifically, this article examines how an investigation of the bill drafting process can be utilized to ascertain legislative intent.⁴ In California, the procedure for converting ideas into legislation is institutionalized in the Legislative Counsel Bureau.⁵ An examination of the Legislative Counsel Bureau shows increasing judicial deference to its publications and opinions.⁶ In fact, opinions of the Legislative Counsel have been elevated to the same level as opinions of the Attorney General and perhaps further.⁷

I. HISTORY OF BILL DRAFTING

Recognizing the need for efficient legislation probably antecedes historical records. Correspondingly, the demand for efficient legislation increases when legislatures enact imperfect, imprecise, or even meaningless laws. In America, for example, colonial laws were often so carelessly framed that they were almost unintelligible.⁸ Some laws, like those adopted by the Virginia Assembly of 1619, were too "intricate."⁹ Others, like those from the New England states, broadly outlawed such things as "Devilish Practice."¹⁰ In either instance, whether too narrow or overly broad, early American bill drafting proved fertile ground for arbitrary decisions and general abuse. One attempt to correct inefficient legislation arose in 1691 when the Assembly of the Colony of New York requested that the Governor appoint an official to draft bills for them.¹¹ Although no action was taken on this request,¹² it evidenced recognition of the problem.

4. See *infra* notes 8-37 and accompanying text.

5. See *infra* notes 38-73 and accompanying text.

6. See *infra* notes 74-168 and accompanying text.

7. See *infra* notes 169-177 and accompanying text.

8. ROBERT LUCE, LEGISLATIVE PROCEDURE 535-36 (1922).

9. *Id.*

10. *Id.* at 535; see ELMER B. RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL 141-43 (1915) (stating that the most common complaint about colonial laws was that they were vague and loosely worded).

11. LUCE, *supra* note 8, at 568.

12. *Id.*

Throughout the British Empire and later in the independent United States, professional drafters (usually lawyers) were often employed on a case by case basis.¹³ Beginning in 1832, however, an institutionalized drafting service began to emerge in Great Britain, first in the Home Secretary's office and then in the Treasury.¹⁴ Formidable criticism on the current state of British laws by prominent authors like John Stewart Mill, Jeremy Bentham, and John Austin finally resulted in the Chancellor of the Exchequer, Robert Lowe, creating the office of Parliamentary Counsel to the Treasury.¹⁵ In 1869, the Parliamentary Counsel's first charge was the proper drafting of all government legislation.¹⁶ The effect was dramatic. James Bryce, the noted sociologist and British Ambassador to the United States, hailed the Parliamentary Counsel's office for producing harmony in legislation, greater economy, better legal form, and consolidation of the statutes, not to mention producing expert legal opinions on individual member's bills.¹⁷

In the United States the development moved more slowly. While some state legislatures utilized expert drafters within their own ranks, others continued the practice of employing professional drafters on a case by case basis. No state established an institutionalized method to ensure overall efficiency in legislation until 1868 when South Carolina adopted a statute that ordered the state Attorney General to assist in the preparation of legislative bills.¹⁸ Initially, no states followed South Carolina's lead. However, in 1882 the American Bar Association recommended the creation of "a permanent system" of "special commissions or committees" to expertly revise and draft legislation.¹⁹ In response to the ABA recommendation, the State of Connecticut appointed a "clerk of bills" to examine all public acts or resolutions and to make amendments as necessary to assure efficient implementation.²⁰ Meanwhile, the problem

13. SIR COURTENAY ILBERT, *MECHANICS OF LAW MAKING* 59-60 (1914).

14. ERNST FREUND, *STANDARDS OF AMERICAN LEGISLATION* 290 (1917).

15. J. H. LEEK, *LEGISLATIVE REFERENCE WORK: A COMPARATIVE STUDY* 45-46 (1925).

16. *Id.* at 48 n.44.

17. S. REP. NO. 1271, 62d Cong., 3d Sess. 78-79 (1914-15) (statement of James Bryce, British Ambassador to the United States), *cited in* LEEK, *supra* note 15, at 49.

18. 1868 S.C. Acts XIV No. 3. This law was enacted in conjunction with a law requiring codification of all state laws. 1868 S.C. Acts XIV No. 128.

19. 1883 A.B.A. FIFTH ANN. MEETING REP. 305.

20. 1882 Conn. Pub. Acts 137.

of poorly drafted legislation continued as a scourge of state governments.²¹

In 1885, New York Governor David B. Hill noted that in the previous year, fifty bills were recalled by the executive for necessary amendments or corrections due to poor drafting.²² Moreover, numerous bills were vetoed because of defects not discovered until after the Legislature had adjourned.²³ Sometime later, it was similarly noted that of 450 measures passed by the New Jersey Legislature, eighty-one were glaringly defective.²⁴ Poor bill drafting seemed especially pervasive in the western states where, in some years, almost half of all appellate and supreme court decisions concerned interpreting ill-constructed laws.²⁵ The absurdity of these poorly drafted provisions is best shown by example.

In Kansas, Governor Hodges recited a law mandating that, "[a]ll carpets and equipment used in offices and sleeping rooms, including walls and ceilings, must be well plastered"²⁶ The governor continued with one example after another, including reciting one chapter of the Kansas code that was repealed three times and another that was enacted and repealed, and then after repeal, was amended and repealed again before finally being laid to rest.²⁷ Unfortunately, the situation in Kansas was more the rule than the exception.²⁸

One notable attempt to reduce the problem of inefficient legislation originated with New York State Librarian Melvil Dewey, who, in 1890,

21. See generally Ernest Bruncken, *Defective Methods of Legislation*, 3 AM. POL. SCI. REV. 167, 167-79 (1909) (discussing poorly drafted state legislation); see *infra* note 41 (containing a quotation by Bruncken that describes complaints concerning California legislation).

22. LUCE, *supra* note 8, at 568.

23. *Id.*

24. PUB. AFF. INFO. SERV. 151 (1915).

25. Bruncken, *supra* note 21, at 168-69.

26. Governor George Hodges, Address to the Governor's Conference of 1913, in JAMES T. YOUNG, THE NEW AMERICAN GOVERNMENT AND ITS WORK 646 app. (1915).

27. *Id.* at 645.

28. Most cases of bad drafting are not nearly so egregious as the examples given by Governor Hodges. A more common example appeared in *Ex parte Hedley* where the court analyzed a statute that stated in pertinent part:

Where the commission of a public offense commenced without the State is consummated within the boundaries thereof, the defendant shall be liable to punishment in this State though he were without the State at the time of the commission of the offense charged, provided he consummated the offense through the intervention of an innocent or guilty agent without this State, or any other means proceeding directly from himself; and in such case the jurisdiction shall be in the county in which the offense is consummated.

Ex parte Hedley, 31 Cal. 108, 114 (1866). Further the court noted that, "the word 'without' occurs twice in this provision, but it is apparent that in the instance in which it is used last, the word 'within' was the word really intended. The provision must therefore be so read." *Id.*

established a Legislative Reference Bureau within the State Library System.²⁹ While the Bureau did not offer a bill drafting service, it did provide valuable research information to assist the Legislature in enacting more thorough and comprehensive bills.³⁰

The recognized watershed in American drafting development, however, came with the 1901 creation of the Legislative Reference Bureau in the State of Wisconsin.³¹ The brainchild of Dr. Charles McCarthy, the Wisconsin plan called for the creation of a non-political, independent department, outside the state library, to provide extensive research material and drafting services to individual legislators regardless of affiliation or proposed content of a law.³² Owing much to its creator, the Bureau was an immediate success. Within ten years, Wisconsin's Legislative Reference Bureau drafted 95% of all state bills and resolutions.³³ However, the independent nature called for by the Wisconsin Legislative Bureau did not bode well with many State Librarians who felt that the research portion of the Bureau was more within their bailiwick. Therefore, some states followed New York precedent and adopted plans placing the Legislative Bureaus under the State Library System.

A system similar to the New York Bureau developed in Indiana under the direction of Mr. John A. Lapp.³⁴ Like New York, the Indiana Legislative Reference Department was under the State Library System but in addition to providing research materials, it also assisted law makers in the drafting process.³⁵ The Department remained under the Library for nearly six years.³⁶ Budgetary and administrative disputes, however, made continued operation under the State Library System difficult and, as a

29. LUCE, *supra* note 8, at 563.

30. Ethel Cleland, *Bill Drafting*, 8 AM. POL. SCI. REV. 244, 245 (1914) [hereinafter *Bill Drafting*]; Ethel Cleland, *Legislative Reference*, 10 AM. POL. SCI. REV. 110, 111 (1916) [hereinafter *Legislative Reference*].

31. LEEK, *supra* note 15, at 58; see John A. Lapp, *The Growth of a Big Idea*, 9 SPECIAL LIBR. 157, 158 (Sept.-Oct. 1918) (describing the functions of the Wisconsin special library).

32. LEEK, *supra* note 15, at 57-58. Even though it was administered by the State Library Commission, the Wisconsin Legislative Reference Bureau was completely independent of the State Library with a separate budget appropriation. See *Legislative Reference*, *supra* note 30, at 113 (discussing the Wisconsin Legislative Reference Bureau and bill drafting department).

33. LUCE, *supra* note 8, at 564.

34. Robert Snodgrass, *Program: Annual Meeting Special Libraries Association*, 8 SPECIAL LIBR. 72, 72 (May 1917).

35. *Bill Drafting*, *supra* note 30, at 246.

36. Snodgrass, *supra* note 34, at 72.

result, the department was made independent as the Bureau of Legislative and Administrative Information in 1913.³⁷

With the New York, Wisconsin and Indiana experiences as a reference, California attempted to adopt a hybrid model that selected the best components from each state. Facing similar opposition from the State Librarian, however, California created the Legislative Counsel Bureau that was initially limited to offering technical advice. The State's long history of inefficient legislation, however, necessitated that the Bureau accept increasing responsibilities.

II. BILL DRAFTING IN CALIFORNIA

In California, inefficient legislation was an issue that preceded the 1850 Statehood Act.³⁸ A corresponding controversy over whether California should be governed by English common law or a codified form of law exacerbated an already deteriorating situation.³⁹ While common law advocates won the day by default, codification of all the state's laws would eventually be completed.⁴⁰ The road to complete codification would take nearly a hundred years. Fortunately and necessarily, a solution to the drafting problem would take only half that time.

In the years following statehood, the California Legislature attempted to correct poorly drafted statutes, rather than provide an institutionalized mechanism to ensure their proper construction before passage. Therefore, the Legislature continued to churn out ill-conceived and poorly drafted statutes while simultaneously calling for corrections under the guise of "revision and reform."⁴¹ Codifying laws and correcting drafting

37. WEBER, *supra* note 1, at 332. It should be noted that the problems that existed in Indiana under the State Library did not completely disappear when the Bureau became independent. Snodgrass, *supra* note 34, at 72. In 1917, for example, the Indiana Legislature completely cut off funds to the Bureau. *Id.* Although the Governor kept the Bureau functioning with an appropriation from the emergency fund, WEBER, *supra* note 1, at 332, Snodgrass blamed the legislative action on: 1) Successful venting of animosity by corporation lobbyists who felt their power usurped; 2) charges of partisanship; 3) charges of injecting personal bias into its drafting; and 4) a desire by special interests that the Bureau not be in existence during the state's up-coming Constitutional Convention. Snodgrass, *supra* note 34, at 72.

38. 1 Cal. v-viii (1850).

39. Ralph N. Kleps, *The Revision and Codification of California Statutes 1849-1953*, 42 CAL. L. REV. 766, 766-67 (1954).

40. *Id.* at 792-93.

41. Ernest Bruncken, Chief of the California Legislative Reference and Statistics Department within the State Library, noted that:

Frequent, emphatic, and apparently unanimous for many years, have been the complaints that there is too great an output of statutory law by the fifty-odd legislative bodies within the sovereignty of the United States. No less widespread are the charges that the majority of these statutes are unwise,

deficiencies were combined under this “revision and reform” as though a singular issue. The problem was actually threefold. First, proposed bills were often not well researched. Second, the laws of the state were not compiled, indexed or codified in any manner that made them readily accessible. Third, the laws were very poorly written.

By 1861, the problem had reached such proportions that the Legislature enacted a statute that required the clerks of the several courts to report annually to the governor “any and all mistakes, errors, ambiguities, conflicts, defects, or cases of imperfect operation, of the laws of th[e] State.”⁴² In 1863, Governor Leland Stanford described the condition of California's laws as having deteriorated into a “state of wild confusion.”⁴³ Governor Stanford compared California's confusing affairs to the Roman tyrant who posted ordinances so high upon a column that they could not be read, thereby accomplishing the double objective of complying with a law requiring publication and keeping the people in ignorance of the rules by which they were to be governed.

In 1867, Governor Henry Haight took up the torch, recommending legislation to address the growing problem.⁴⁴ Acting on Governor Haight's recommendation, the Legislature of 1868 created the first California Commission to “revise and compile all the laws of this State [into a] comprehensive and concise system.”⁴⁵ The entire work was to be completed within fifteen months and a report filed with the Legislature by July 1, 1869.⁴⁶ For the time, the Legislature was content to view the amorphous charge given to the Commission as a panacea for all the ills that befell California's statutes. The Commission viewed its duties as not only correcting the drafting deficiencies in the current statutes, but also codifying all the State's laws into a concise system.⁴⁷ Obviously, the Commission was unable to complete this mammoth task in the brief fifteen months allotted. Failure to meet these unrealistic expectations resulted in the Legislature disbanding the 1868 Commission and creating a whole new

ill-digested and badly drawn.

Bruncken, *supra* note 21, at 167.

42. 1861 Cal. Stat. ch. 200, sec. 1, at 195.

43. Governor Leland Stanford, Message to the Legislature of California (1863), in Rosamond Parma, *History of the Adoption of the Codes of California*, 22 LAW LIBR. J. 8, 13 (1929).

44. Governor Henry Haight, Message to the Legislature of California (1867), in Rosamond Parma, *supra* note 43, at 13.

45. Kleps, *supra* note 39, at 770-73 (citing 1867-68 California Statute chapter 365, § 1, at 435).

46. *Id.*

47. *Id.* at 773.

commission in 1870.⁴⁸ The charge to the 1870 Commission was significantly more explicit and considerably diminished in scope.⁴⁹ Primarily, the Legislature directed the Commission to correct grammar and spelling.⁵⁰ While the Legislature seems to have intentionally omitted references to codification, the Commission realized that the problem was more pervasive than just grammatical and syntactic errors. Thus, on its own initiative, the Commission undertook the arduous task of codifying the State's laws to date.⁵¹ While the corrections and codification vastly improved the quality and organization of California's laws, the Commission could not work prospectively. With the Legislature continuing to enact ill-conceived and ill-constructed measures, it would only be a matter of time before the dismal condition of the laws returned.

The policy of correcting poorly drafted statutes rather than providing a mechanism to ensure proper construction at inception continued until 1895. Finally, in that year, Governor H. H. Markham proposed the appointment of a three member commission charged with revising the statutes and recommending changes to avoid duplication and promote legislative efficiency.⁵² The Legislature adopted the Governor's recommendation and created a commission of three attorneys to revise, systematize, and reform the laws of California.⁵³ This Commission, in many respects, was the precursor to the Legislative Counsel Bureau. Its duties required that it examine the State's statutes and "designate the errors, defects, or omissions, verbal, grammatical, or otherwise, and suggest what will be necessary to supply, correct or amend the same."⁵⁴ While these duties very nearly reiterated those assigned to the 1870 Commission, the new commissioners were additionally directed to "act as legislative counsel or advisor, in *drafting or passing upon* the form of any bill, or proposed bill, pending or to be introduced before the Legislature."⁵⁵ Finally, the Commission was authorized to give its legal

48. 1869-70 Cal. Stat. ch. 516, sec. 1, at 774.

49. *Id.*

50. *Id.* at 774.

51. The 1870 Commission eventually exceeded its statutory scope by codifying a majority of the state's laws through 1874. Kleps, *supra* note 39, at 772-79. Despite the apparent overreaching, the codification was considered quite successful. *Id.* See generally Parma, *supra* note 43, at 14-18 (reviewing the history of codification in California).

52. Kleps, *supra* note 39, at 781.

53. 1895 Cal. Stat. ch. 222, sec. 1, at 345. The Commission was known as the "Commission for Revision and Reform of the Laws." Kleps, *supra* note 39, at 779.

54. 1895 Cal. Stat. ch. 222, sec. 6, at 346.

55. *Id.* at 347 (emphasis added by author).

opinion on the form of any proposed legislation, and how it would affect existing law.⁵⁶ This was the Legislature's first attempt to deal with bill drafting in any way other than the symptomatic approach previously followed.

From 1895 to 1911 the Commission worked on indexing, revising, and maintaining the statutes.⁵⁷ During this period, legislative reference bureaus developed throughout the country. From the original subdivision in the New York State Library, reference bureaus emerged in more than thirty states, as well as the Library of Congress.⁵⁸ Some of these bureaus provided only research services while others included bill drafting assistance.

In December 1904, California State Librarian James L. Gillis created a bureau known as the Legislative Reference and Statistics Department within the State Law Library.⁵⁹ The Department was not statutorily sanctioned nor did it operate with separate appropriation. It was funded by Gillis out of the State Library's general appropriation. The Department's primary function was to provide research materials to state legislators and give "expert advice as to the *form* and subject matter of legislation."⁶⁰ Despite the work of Gillis and the State Library, the Reform Commission of 1895 was still the only government agency *officially* charged with correcting, advising on, or drafting bills.⁶¹

By 1913, the legislative calendar had become almost unmanageable. Although constitutionally limited to 100 days, the Legislature of 1913 had to analyze, debate, and vote on almost 4,000 proposed laws.⁶² The inability of the Legislature to handle the volume and complexity of the work resulted in the adoption of very little comprehensive legislation.⁶³ To resolve the problem, the Legislature proposed several different plans. One such plan, presented by Senator Leroy Wright, consisted of

56. *Id.*

57. Kleps, *supra* note 39, at 781-87. In 1903, the Commission was reduced to a single commissioner, John F. Davis, and in 1911 it received its last appropriation. *Id.* at 784.

58. John A. Fairlie, *Legislative and Municipal Reference Agencies*, 17 AM. POL. SCI. REV. 303, 304 (1923).

59. Johnson Brigham, Address to the American Library Association (May 1907), in PAPERS AND PROCEEDINGS OF THE TWENTY-NINTH ANNUAL MEETING OF THE AMERICAN LIBRARY ASSOCIATION 205 (1907) [hereinafter TWENTY-NINTH ANNUAL MEETING]; WEBER, *supra* note 1, at 357.

60. TWENTY-NINTH ANNUAL MEETING, *supra* note 59, at 205 (emphasis added by author).

61. 1895 Cal. Stat. ch. 222, sec. 6, at 346.

62. LEGISLATIVE REFERENCE SERVICE, A SOURCE BOOK ON THE CALIFORNIA LEGISLATURE 1849-1962 5-6 (1963). Never before had the Legislature considered so many bills and it would be twenty-four years before they would again. *Id.*

63. FRANKLIN HICHBORN, STORY OF THE CALIFORNIA LEGISLATURE OF 1913, 354-55 (1913).

completely rewriting legislative procedure.⁶⁴ While the plan itself was not passed, several of its provisions were adopted.⁶⁵ Prominent among them was the creation of a joint standing committee through which all bills must pass before consideration.⁶⁶ The Committee on Revision and Printing, as it was called, was broadly empowered to change the grammar, phraseology, or form of any bill.⁶⁷ Additionally, three proposals concerning bill drafting were introduced in the Legislature: one advocating the appointment of a legislative counsel; one proposing an officially sanctioned and expanded Legislative Reference Department within the State Library; and a final one advancing an independent Bureau of Legislative Reference and Bill Drafting.⁶⁸ Assemblyman William Clark, who had studied the Wisconsin and Indiana models, was the proponent of the independent Legislative Reference and Bill Drafting Bureau.⁶⁹ Not unexpectedly, State Librarian Gillis vehemently opposed the plan.⁷⁰ Gillis argued that research was within the province of the State Library and any appropriation for research should inure to the Legislative Reference Department that was already operating in the Law Library.⁷¹ The

64. *Id.* at 46.

65. *See id.* at 46-47 (discussing the adopted provisions).

66. *Id.*

67. Temporary Joint Rules of the Senate and the Assembly, Rule 30 (1913). Senator Wright's proposal for a joint, standing committee was probably based upon the 1907 recommendations of the Committee of the American Bar Association on Improving the Methods of Legislation. *See also* Legislative Reference Bureaus, a special report transmitted to the United States Senate by the Librarian of Congress, in S. DOC. NO. 7, 62 Cong., 1st sess. 36 (1911).

68. HICHBORN, *supra* note 63, at 358 n.366.

When you consider the fact that the Legislative Reference Department of Indiana was one of the most successful of the departments operated under the State Library, and when you consider that Mr. Lapp was practically given a free hand in all his work; and then note that his department is made a separate institution, you are compelled to conclude that any Legislative Reference Bureau operating under a State Library, where conditions are unfavorable, is absolutely hopeless. If a tactful, well-experienced man cannot succeed in such a department under the State Library, it is pretty positive proof that the system is wrong, and that the department should be separate and distinct.

Id. (quoting an address by Mr. R. A. Campbell).

69. *Id.* at 358 (stating that Assemblyman Clark spent two years collecting data on the Legislative Reference Bureau system to support a measure to establish a Legislative Reference Bureau in California).

70. *Id.* at 358.

71. Most legislative reference librarians were not opposed to the creation of separate bureaus for the sole purpose of bill drafting. Robert Whitton, Address before the American Library Association of 1911, in 3 AM. LIBR. ASS'N BULL. 296 (1911). New York State Librarian Dr. Robert Whitton stated to the American Library Association that:

In addition to a bureau for the collection and collation of information it is desirable that each proposed bill should be drafted or revised by expert draftsmen. This work in some States is being performed by official draftsmen, appointed by the legislature. In other States it is being taken up by the legislative reference bureaus. My own opinion is that the legislative reference bureau should proceed cautiously in this matter. While it is highly desirable that it should aid in the constructive

controversy was sufficient to kill the bill in the Assembly.⁷² Revisions were made to Clark's bill that deleted the legislative reference section. With the revisions, the State Librarian dropped his opposition, and the bill—creating the Legislative Counsel Bureau—was passed.⁷³

III. THE LEGISLATIVE COUNSEL BUREAU

The statute creating the Legislative Counsel Bureau provided for a "legislative counsel bureau board."⁷⁴ The Board, consisting of five members, would supervise and appoint a separate chief.⁷⁵ One member of the board was to be appointed by the Governor, and two each selected from the Senate and the Assembly.⁷⁶ The chief would be selected utilizing criteria to ensure political neutrality.⁷⁷

The duties assigned to the Bureau required that it prepare or assist in the preparation of legislative bills.⁷⁸ Additionally, the Bureau was directed to study California laws, including comparing them with other state's laws so to better advise the Legislature as to needed revisions.⁷⁹ Finally, the chief and all employees of the Bureau were expressly forbidden from opposing or urging support for any legislation.⁸⁰

Creation of the Legislative Counsel Bureau did not end the State Library's involvement in legislation. While the Bureau did assume primary responsibility for the State's drafting duties, the 1913 Legislature simultaneously directed the Library to index the statutes and journals of each session of the Legislature, and revise and bring up to date the "Index to the Laws of California."⁸¹ In addition, the Legislative Reference

work necessary for the elaboration of an important project of law, there is some danger that its time may be so taken up with the formal drafting and copying of innumerable petty bills that it will have insufficient time for the more important constructive work.

Id.

72. HICHBORN, *supra* note 63, at 359.

73. 1913 Cal. Stat. ch. 322, sec. 1, at 626.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 627.

80. *Id.* at 628.

81. 1913 Cal. Stat. ch. 617, sec. 2, at 1150; CALIFORNIA STATE LIBRARY, 8 NEWS NOTES OF THE CALIFORNIA LIBRARY 292 (1913) [hereinafter NEWS NOTES].

Department under the State Library continued to provide research assistance.⁸²

The Legislative Counsel Bureau's early years were almost entirely devoted to its drafting duties. In 1917, the Legislative Counsel Board was replaced by a single chief, known as the Legislative Counsel.⁸³ The Legislative Counsel was appointed and held office at the pleasure of the Governor.⁸⁴ Various duties were directed to the Bureau between its creation in 1913 and 1927.⁸⁵ Many of these measures required that the Bureau complete studies and report its findings to the Legislature.⁸⁶ Unfortunately, the measures made no corresponding provisions to augment the Bureau's small staff.⁸⁷ As a result, the studies usually languished until forgotten or directed elsewhere.

On January 4, 1927, Fred B. Wood succeeded to the position of Legislative Counsel.⁸⁸ Wood's appointment was to last 23 years and see the evolution of the Bureau into its current form. Besides or because of Wood's appointment, 1927 to 1929 were notable years at the Legislative Counsel Bureau. During these two years, the Bureau published its first opinion by the Legislative Counsel and, more importantly, the Legislature increased its staff appropriation by more than 25%.⁸⁹ This gave the

82. NEWS NOTES, *supra* note 81, at 292.

83. Since the creation of the Legislative Counsel Bureau in 1913 the following persons have held the office of Legislative Counsel:

Arthur P. Will	May 18, 1914 to Sept. 20, 1920
George B. Bush	Sept. 20, 1920 to Jan. 9, 1923
John A. McGilvray	Jan. 9, 1923 to July 2, 1923
Thomas M. Gannon	Nov. 1, 1923 to Jan. 4, 1927
Fred B. Wood	Jan. 4, 1927 to May 15, 1950
Ralph N. Kleps	July 1, 1950 to Nov. 5, 1961
Angus C. Morrison	Nov. 6, 1961 to Sept. 22, 1964
George H. Murphy (Acting)	Sept. 28, 1964 to Nov. 30, 1964
George H. Murphy	Dec. 1, 1964, to Nov. 19, 1976
Bion M. Gregory	Nov. 22, 1976 to Present

DEPARTMENT OF STATE, CALIFORNIA BLUEBOOK (1913-15, 1924, 1928, 1932, 1938, 1942, 1946, 1950, 1954, 1958, 1961, 1963, 1967, 1971, 1975, 1986); Letter from Willie L. Brown, Jr., Speaker of the Assembly 1 (Sept. 28, 1993) (on file with the *Pacific Law Journal*).

84. 1917 Cal. Stat. ch. 727, sec. 1, at 1398.

85. Most notably was the successful assignment to publish the *Legislative Digest*. Kleps, *supra* note 39, at 790.

86. *Id.*

87. *Id.* at 789.

88. Fred B. Wood was an assistant in the Bureau from 1914 to June 1922. *Young to Take Time in Filling Vacancies, He Declares*, S.F. CHRON., Jan. 5, 1927, at 3.

89. 1929 Cal. Stat. ch. 39, sec. 1, at 82; Kleps, *supra* note 39, at 790.

Bureau the ability to address several mandated reports: most notably, a 1927 directive to investigate the necessity of compiling, codifying and revising the State's laws.⁹⁰ In 1931, the Legislature rescinded the Governor's appointment power over the Legislative Counsel and provided that the selection should be made by a joint session of the Senate and Assembly.⁹¹

A. Bill Tracking and Records

Beginning in 1921, the Legislature authorized the first of the Bureau's bill tracking publications.⁹² The *Legislative Digest*, published in the recess after the Legislature's first session, summarized all measures introduced, and identified existing law that would be amended, repealed or modified by new proposals.⁹³ An historical version of the *Legislative Digest*, known as the *Subject List*, was also published by the Bureau.⁹⁴ The *Subject List* not only showed all measures introduced, but it also showed all amendments made to the measures through the session.⁹⁵ Rounding out its bill tracking publications was the Bureau's *Summary Digest of Statutes Enacted*.⁹⁶ The *Summary Digest* was published at the end of the bill-signing period following a legislative session.⁹⁷ It summarized all statutes actually enacted into law and all proposed constitutional amendments.⁹⁸ Today, however, only the *Summary Digest* continues unchanged.⁹⁹

In 1957, the *Legislative Index* superseded the *Legislative Digest*.¹⁰⁰ Similar to the *Legislative Digest*, the *Legislative Index* is a cumulative, periodic publication of pending legislation including a separate volume of tables identifying existing law that would be amended, repealed, or modified by new measures. The *Index* indicates the subject of each bill,

90. 1927 Cal. Stat. ch. 43, sec. 1, at 2296.

91. 1931 Cal. Stat. ch. 853, sec. 1, at 1748.

92. ASSEMBLY J. 245, 533, 2135-36 (1921); SENATE J. 237, 498, 1822-23 (1921).

93. Since 1911 the introduction of bills has been limited to the Legislature's first session. CAL. CONST. art. IV, § 2 (1911); Temporary Joint Rules of the State and the Assembly, Rule 54 (1911).

94. LEGISLATIVE COUNSEL BUREAU, SUBJECT LIST (1921).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See Temporary Joint Rules of the Senate and the Assembly, Rule 13.1 (1989) (providing for the publication of the *Legislative Index*).

constitutional amendment, and concurrent or joint resolution as introduced and as amended. Also in 1957, the Legislature adopted rules that required all bills to be accompanied by a Legislative Counsel's Digest of the bill.¹⁰¹ The cumulative *Legislative Index* combined with the Legislative Counsel's Digest of the bill eventually obviated the need for a separate *Subject List*.

The Legislative Counsel's Digest of bill consists of a brief summary of each new proposed measure or amendment. Following the summary, the full text of the proposal appears. All new provisions are printed in italics with deletions to existing statutes appearing in strikeout type. As the new measures progress through the Senate or Assembly, they are themselves amended. Each new amendment must be referred to the Legislative Counsel Bureau to update the Digest.¹⁰² The updated portions of the Digest are printed in italics with the original, superseded portions printed in strikeout type. Following the updated summary, the amendment is once again printed with all new provisions in italics and all deletions appearing in strikeout type. Although the text of prior amendments is completely eliminated, the previous proposals are referenced chronologically on the face of the Digest and are filed under the bill number at depository libraries. When a law is enacted, the accompanying Digest contains a brief legislative history of the measure. Therefore, because the Digest becomes the first page of a bill and part of the permanent record, it can provide a basis for proving legislative intent.¹⁰³

Since 1927, the Bureau has indexed and maintained a bound file containing every official Legislative Counsel opinion.¹⁰⁴ Although public access is limited, some of these opinions are placed in the Journals of the Assembly and Senate and can be extremely valuable tools when legislative intent is in question.

The Legislative Counsel Bureau also maintains records of all letters and legal opinions written at the behest of legislators or the governor. By law, the correspondence between these state officials and the Bureau is

101. 1957 Cal. Stats. ch. 288, sec. 1, at 4744 (enacting Rule 8.5 to the Temporary Joint Rules of the Senate and the Assembly which requires all bills to be accompanied by a digest).

102. Temporary Joint Rules of the Senate and the Assembly, Rule 8.6 (1989).

103. *Id.* Rule 8.5 (1989); Walter K. Hurst, Comment, *The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria*, 12 PAC. L.J. 189, 204-05 (1981).

104. RALPH N. KLEPS, FUNCTION OF THE LEGISLATIVE COUNSEL 53-54 (1959); BION M. GREGORY, FUNCTION OF THE LEGISLATIVE COUNSEL 4 (1978).

strictly confidential.¹⁰⁵ Even though the Bureau keeps all documents confidential, a legislator may still request and publicize an opinion of the Legislative Counsel in order to gain support for a position or to build an evidentiary record of legislative intent.¹⁰⁶ The judicial value of such an opinion depends heavily upon circumstances. For example, the greater the circulation and notoriety the opinion had within the Legislature at the time of deliberation, then the greater the judicial value.¹⁰⁷

B. Authority and Duties of the Bureau

Although created in 1913, the Legislative Counsel Bureau did not reach its modern form until 1945.¹⁰⁸ Today, the chief of the Bureau is officially known as the Legislative Counsel of California.¹⁰⁹ The Legislative Counsel is appointed by concurrent resolution at the beginning of each regular session and serves until a successor is selected and qualified.¹¹⁰ The Legislative Counsel is chosen without reference to party affiliation and solely upon ability to perform the duties required of the office.¹¹¹ While the Legislative Counsel is empowered to employ as many professional assistants as necessary, appointments are always limited by budgetary constraints.¹¹² The permanent Sacramento headquarters of the Bureau presently employs about 425 people, of which 80 are civil service staff attorneys.¹¹³

105. CAL. GOV'T CODE §§ 10207-10208 (West 1992). Between 1945 and 1968, § 10207 stated that all books, papers, records and correspondence of the bureau were public records unless a request for confidentiality was received. *Id.* In practice, the Bureau observed the same adherence to confidentiality that it currently follows. *Id.*

106. See *California Legislative Materials*, 4 STAN. L. REV. 367, 371, 375 (1952) (stating that the opinion of the Legislative Counsel is relevant to determining the circumstances surrounding the signing of the bill).

107. *Id.* at 371.

108. CAL. GOV'T CODE §§ 10200-10245 (West 1992).

109. *Id.* § 10200 (West 1992).

110. *Id.* § 10201 (West 1992); see *id.* § 10202 (West 1992) (stating that, "[i]f a vacancy occurs while the Legislature is not in session, a committee consisting of the Speaker of the Assembly, the Speaker pro tempore of the Assembly, the President pro tempore of the Senate and the chairman of the Finance committee of the Senate shall select the Legislative Counsel to serve until the Legislature in session makes a selection for the office").

111. *Id.* § 10203 (West 1992).

112. *Id.* § 10205 (West 1992).

113. LEGISLATIVE COUNSEL BUREAU, LEGISLATIVE COUNSEL BUREAU BULLETIN (Sept. 1991) [hereinafter BULLETIN]; CAL. GOV'T CODE § 10206 (West 1992).

The modern Bureau is organized into four major departments: Legal, Legal Support, the Legislative Data Center and Administration.¹¹⁴ The Legislative Counsel maintains an attorney-client relationship with each Member of the State Legislature. Additionally, the Legislative Counsel and all staff members are statutorily prohibited from revealing the nature or contents of any non-public Bureau records.¹¹⁵ Therefore, all communications including legal opinions, letters, and analyses are non-public records unless released by the person requesting the information or by operation of law, such as through the Legislature's Joint Rules or by statute.¹¹⁶ The demand for strict confidentiality by the Legislative Counsel results from three specific areas: bill drafting duties, access to State records, and duties as legal counsel for the Legislature.

To further elucidate these three areas, we first note that no bill may be introduced, nor may any amendment be offered, unless accompanied by a Legislative Counsel's Digest of the bill.¹¹⁷ Often this results in the Legislative Counsel entering into a confidential trust with members of the Legislature. Not unrelated, the Legislative Counsel is statutorily given complete access to *all* State records held by *any* State agency.¹¹⁸ While this power is rarely exercised, it does require the most stringent confidentiality. Finally, with the prior approval of the Joint Rules

114. BULLETIN, *supra* note 113. The Legal department is, itself, divided into four Divisions and one Special Unit. *Id.* The four Divisions are each assigned specific fields of law and within that field they provide: drafting and analysis of legislation; assistance in the preparation of legal opinions; professional assistance at legislative committee hearings; and professional advice to members of the Legislature and their staff. *Id.* The Special Unit, consisting of about six attorneys, represents the Legislature in litigation; drafts contracts and leases; oversees the annual budget bill; drafts all Senate and Assembly Resolution; and advises and consults with Legislators and staff on legislative procedures. *Id.*

The Legal Support department provides support activities to the Legal staff. *Id.* In addition, this department includes an Indexing Unit that is responsible for "ensuring that publications reflecting the current status of versions of California codes and the constitution are maintained and available to users, as well as indexing all the letters and opinions that are generated by the Legislative Counsel Bureau." *Id.*

The Legislative Data Center provides "computer services, data networking and customer services to Members of the Legislature in both their Capitol and District Offices, Legislative Committees and staff, including the Bureau, the Legislative Analyst's Office, and the Auditor General. *Id.* The Data Center developed and supports a legislative information system that serves as a national prototype. *Id.* This comprehensive system contains, among other information, the current status, history and full text of all legislative bills; the full text of the California Constitution and Codes; and bill analyses and voting information. *Id.*"

Administration of the Bureau is accomplished by the Legislative Counsel and his two Deputies. *Id.* In addition to the Executive Staff, there are Personnel and Accounting Units within the Bureau's administration. *Id.*

115. CAL. GOV'T CODE §§ 10207, 10208 (West 1992).

116. *Id.* § 10207 (West 1992); Temporary Joint Rules of the Senate and the Assembly, Rules 34, 34.1, 34.5 (1989).

117. Temporary Joint Rules of the Senate and the Assembly, Rules 8.5 & 8.6 (1989).

118. CAL. GOV'T CODE § 10209 (West 1992).

Committee, the Legislative Counsel participates in litigation involving the Legislature, its committees and members.¹¹⁹ Mandating confidentiality also promotes use of the Bureau which, in turn, facilitates more efficient legislation.

Another limitation of sorts on the Bureau, and an early mandate in its creation, prohibits any employee from opposing or urging legislation.¹²⁰ This does not mean that the Legislative Counsel or the Counsel's staff cannot give advice or expert opinion. To the contrary, the Legislative Counsel must assist, advise and prepare legislation for any legislator, legislative committee, the Governor, or any State agency when so requested.¹²¹ Similarly, when the Legislative Counsel believes that there is a "reasonable probability" that an initiative measure will be placed before the voters, the proponents of the measure must be given assistance when 25 or more electors so request.¹²²

For a fee which may not be less than cost, the Legislative Counsel may also contract with any county or city for the codification, compilation, or indexing of any or all of its ordinances or resolutions.¹²³ All money received under these contracts serves to augment the Bureau's current appropriation.¹²⁴ As a mandated assistance to counties, cities, and other affected governmental agencies, the Bureau prepares a quarterly publication entitled *Reports Required from State and Local Agencies*.¹²⁵ The publication, begun in 1989, lists all reports that state and local agencies are required or requested by law to prepare and file with the Governor, the Legislature or both.

Additional duties assigned to the Legislative Counsel, or to the Bureau, include: determining whether a measure appropriates funds that apply toward the minimum funding for school districts and community college districts as constitutionally required;¹²⁶ cooperating with educational institutions of the State;¹²⁷ advising the Legislature from time to time as

119. *Id.* § 10246 (West 1992).

120. *Id.* § 10210 (West 1992).

121. *Id.* §§ 10231-10236 (West 1992). The mandate to assist in the preparation or amendment of legislative measures also extends to State judges who are empowered to suggest changes or additions to the law. *Id.* § 10237 (West 1992). The Legislative Counsel forwards judicial suggestions to the chairman of the Judiciary Committee of each house for appropriate action. *Id.* §§ 10237-10241 (West 1992); *see id.* § 8289(c) (West 1992) (allowing judges to recommend changes in the law to the California Law Revision Commission).

122. *Id.* § 10243 (West 1992).

123. *Id.* § 10244 (West 1992).

124. *Id.*

125. *Id.* § 10242.5 (West 1992).

126. *Id.* § 10247 (West 1992); CAL. CONST. art. XVI, § 8.

127. CAL. GOV'T CODE § 10245 (West 1992).

to legislation necessary to maintain the codes and legislation necessary to codify the statutes,¹²⁸ serving as a member of the California Law Revision Commission and the California Commission on Uniform State Laws,¹²⁹ attending all special or regular sessions of the Legislature;¹³⁰ and, writing and inserting into the *Ballot Pamphlet*, a brief, impartial summary of all initiatives that appear before the voters.¹³¹

*C. The Legislative Counsel's Digest as Extrinsic Evidence in Determining Legislative Intent*¹³²

Since 1959, every measure or amendment before the California Legislature has contained a prefatory summary of the proposal, prepared by the Legislative Counsel Bureau, called the Legislative Counsel's Digest of bill.¹³³ In the 1992 legislative session, this meant that the Legislative Counsel Bureau wrote over 6,600 Digests of bills. Since the Legislative Counsel is a state official who is required to analyze and summarize measures before the Legislature, courts have consistently held that it is reasonable to presume that the Legislature adopts measures with the intent and meaning expressed in the Legislative Counsel's Digest of the bill.¹³⁴ Courts have made it equally clear, however, that the Legislative Counsel's Digest, although helpful in interpreting a statute, is *not* the law.¹³⁵ Where the law is unambiguously clear, the "plain meaning" rule restrains the court from interpreting statutes beyond their ordinary and popular

128. *Id.* § 10242 (West 1992).

129. *Id.* §§ 8281, 8261 (West 1992).

130. *Id.* § 10230 (West 1992).

131. CAL. ELEC. CODE § 3575 (West 1977); CAL. GOV'T CODE § 88005.5 (West Supp. 1993).

132. In addition to the Digest, the Legislative Counsel's summary that is inserted into the *Ballot Pamphlet* has also been utilized as an extrinsic aid in clarifying ambiguous language. *See Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 245-46, 583 P.2d 1281, 1300, 149 Cal. Rptr. 239, 258 (1978) (asserting that apparent ambiguities in a statute may be resolved by reference to the administrative agencies charged with implementing the new law); *Rich v. State Bd. of Optometry*, 235 Cal. App. 2d 591, 603, 45 Cal. Rptr. 512, 519-20 (1965) (establishing that a court, when interpreting a statute, may rely on extrinsic aids such as the history of the statute, committee reports, legislative debates, and statements to the voters on initiative and referendum measures).

133. Temporary Joint Rules of the Senate and the Assembly, Rule 8.5 (1989).

134. *Maben v. Superior Court*, 255 Cal. App. 2d 708, 713, 63 Cal. Rptr. 439, 442-43 (1967); *People v. Martinez*, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987); *People v. Tamble*, 5 Cal. App. 4th 815, 821, 7 Cal. Rptr. 2d 446, 449-50 (1992).

135. *Clark v. Workers' Compensation Appeals Bd.*, 230 Cal. App. 3d 684, 695, 281 Cal. Rptr. 485, 492 (1991); *In re Marriage of Stephens*, 156 Cal. App. 3d 909, 916-17, 203 Cal. Rptr. 331, 336 (1984); *California Teachers Ass'n v. Governing Bd. of Cent. Union High*, 141 Cal. App. 3d 606, 614, 190 Cal. Rptr. 453, 458 (1983).

meanings.¹³⁶ A strong argument can be made, however, that there is no absolutely unambiguous statute. Therefore, the Legislative intent as provided by the Digest of a bill, is always relevant.¹³⁷

When a court finds ambiguity in a law, the Legislative Counsel's Digest may be used to determine legislative intent.¹³⁸ Additionally, it is reasonable to presume that the Legislature adopts or amends laws with the intent and meaning expressed in the Legislative Counsel's Digest of the bill.¹³⁹ This is true even when the ambiguity is a result of poor draftsmanship or where a Digest remains unchanged despite several seemingly substantial changes to the measure.¹⁴⁰

136. *Clark*, 230 Cal. App. 3d at 695, 281 Cal. Rptr. at 492; *In re Marriage of Stephens*, 156 Cal. App. 3d at 916-17, 203 Cal. Rptr. at 336; *Travelers Ins. Co. v. Sierra Pacific Airlines*, 149 Cal. App. 3d 1144, 1149-50, 197 Cal. Rptr. 416, 419 (1983); *Solberg v. Superior Court of City & County of San Francisco*, 19 Cal. 3d 182, 198, 561 P.2d 1148, 1158, 137 Cal. Rptr. 460, 470 (1977); *Rockwell v. Superior Court of Ventura County*, 18 Cal. 3d 420, 442, 556 P.2d 1101, 1114, 134 Cal. Rptr. 650, 663 (1977); *People v. Knowles*, 35 Cal. 2d 175, 182, 217 P.2d 1, 5; *Taylor v. Lundblade*, 43 Cal. App. 2d 638, 641, 111 P.2d 344, 345 (1950).

The "plain meaning" rule of statutory construction holds that when a law is reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning. *Taylor*, 43 Cal. App. 2d at 641, 111 P.2d at 345. Ambiguity exists when the statutory language is reasonably susceptible to two disputed meanings. *Swift v. Placer County*, 153 Cal. App. 3d 209, 214, 200 Cal. Rptr. 181, 184 (1984). Practically, however, no law can be written to such exactitude such that all ambiguities are completely eliminated, thus the plain meaning rule has been roundly criticized. See *California Legislative Materials*, *supra* note 106, at 368 n.7 & 8 (citing treatises and articles that criticize the plain meaning rule).

In the *Legislative Drafting Manual* published by the Legislative Counsel Bureau, the Legislative Counsel urges legal authors to use those words "which come naturally in expression of your thoughts." LEGISLATIVE COUNSEL BUREAU, LEGISLATIVE DRAFTING MANUAL 4 (1975). The drafting manual states that:

If one has a normal vocabulary, the words he naturally uses will have meaning for every reader, the same meaning for the reader as for the writer. You write for every man who reads, not just for judges, lawyers, doctors, engineers, teachers, physicists, social scientists or any other group possessed of a special or technical vocabulary. Every person is presumed to know the law. The draftsman writes for him to read and understand.

Id.

137. *California Teachers Ass'n*, 141 Cal. App. 3d at 616, 190 Cal. Rptr. at 459 (Stanton, J. dissenting); *California Legislative Materials*, *supra* note 106, at 368 n. 7 & 8. "Although the clear meaning of statutory language is not to be ignored, words are inexact tools at best and it is therefore essential that the court place the words of a statute in their proper context by resorting to legislative history." *United States v. Union Oil Co. of Cal.*, 369 F.Supp. 1289, 1292 (N.D. Cal. 1973) (quoting *Tidewater Oil Co. v. United States*, 409 U.S. 151 (1972)).

138. *Maben*, 255 Cal. App. 2d at 712, 63 Cal. Rptr. at 442-443; *Tamble*, 5 Cal. App. 4th at 821, 7 Cal. Rptr. 2d at 450; *Billings v. Health Plan of America*, 225 Cal. App. 3d 250, 257 n.3, 275 Cal. Rptr. 80, 85 n.3 (1990); *Auto Club of Southern Cal. v. Spectrum Inv. Corp.*, 209 Cal. App. 3d 1243, 1252, 258 Cal. Rptr. 43, 47-48 (1990); *Martinez*, 194 Cal. App. 3d at 22, 239 Cal. Rptr. at 276.

139. *Maben*, 255 Cal. App. 2d at 713, 63 Cal. Rptr. at 442-43; *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1157-58 n.6, 805 P.2d 873, 880-81 n.6, 278 Cal. Rptr. 614, 621-22 n.6 (1991); *Martinez*, 194 Cal. App. 3d at 22, 239 Cal. Rptr. at 276.

140. *People v. Superior Court*, 24 Cal. 3d 428, 434, 595 P.2d 139, 141, 155 Cal. Rptr. 704, 707 (1979); *People v. Tanner*, 24 Cal. 3d 514, 542, 596 P.2d 328, 345, 156 Cal. Rptr. 450, 467 (1979) (Newman, J. concurring).

The rationale for continuing this presumption despite poor drafting is logically rooted. The Legislative Counsel Bureau's bill drafting service is voluntary. A legislator may introduce a measure that has been amended or completely constructed by staff, by constituents or by a third party. The only prerequisite to introducing a bill before the Legislature is that it must be accompanied by a Legislative Counsel's Digest of the bill.¹⁴¹ Therefore, the Legislative Counsel has had an opportunity to review every bill enacted into law no matter who originally authored the bill. While a bill may contain glaring errors or unnecessarily nebulous language, the only portion of a bill that can be attributed to the Legislative Counsel with certainty, is the Digest. Most courts would or should recognize this distinction, thus allowing the Digest to continue to guide them despite flaws in the statute's construction. In addition, confidentiality restricts the Legislative Counsel from commenting on the origin or drafting process of a bill. This may result in the erroneous appearance that the Bureau has issued a poorly drafted bill.

Similarly, where the Digest of the bill remains unchanged despite several amendments to the measure, it may appear as though the Legislative Counsel failed to update.¹⁴² Again, appearance may not reflect the facts in the case. In *People v. Tanner*,¹⁴³ for example, the California Supreme Court considered a bill concerning a mandatory sentencing provision that was amended twice without any change in the Digest of the bill.¹⁴⁴ A concurring opinion reasoned that if the amendments actually changed the substance of the law, then the Legislative Counsel would have updated the Digest.¹⁴⁵ More precisely, where there is no revision to the Digest, it is presumed that no revision is necessary.¹⁴⁶ Although this presumption was not addressed by the majority, it is an appropriate "juridical explanation."¹⁴⁷ The contrary argument, that the Legislative Counsel and his staff were too busy to update the Digest in the "final, hectic days" of the legislative session,

141. Temporary Joint Rules of the Senate and the Assembly, Rule 8.5 (1989).

142. Joint Rule 8.6 requires that amendments adopted on the floor of the legislature be forwarded to the Legislative Counsel Bureau to update the Digest. Temporary Joint Rules of the Senate and the Assembly, Rule 8.6 (1989). Obviously, if the amendments are not forwarded to the Bureau, an updated Digest will not be published.

143. 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979).

144. *People v. Tanner*, 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979).

145. *Id.*, 24 Cal. 3d at 542, 596 P.2d at 345, 156 Cal. Rptr. at 467 (Newman, J. concurring).

146. *Id.*

147. *Id.*

presumes that the Legislative Counsel was derelict, a seemingly inappropriate judicial presumption.¹⁴⁸

When the Digest of a bill is continually updated, the changes may be utilized to evidence legislative intent.¹⁴⁹ For example, in seeking to diminish the harsh treatment of innocent clients whose cases were defaulted because of their attorney's neglect, the Legislature enacted a law that *required* courts to vacate previously ordered default judgements when an attorney swears that the default was predicated upon the attorney's own (not the client's) mistake, inadvertence, surprise or neglect.¹⁵⁰ This statute, section 473 of the Code of Civil Procedure, also states that when vacating the default judgment, the court "shall" direct the offending attorney to pay reasonable compensatory legal fees.¹⁵¹ The Legislature also allowed the court to grant other appropriate relief in a discretionary manner.¹⁵² In two separate cases addressing section 473, the court examined changes in the Legislative Counsel's Digest of the bill to determine the extent and applicability of the law.¹⁵³

In the first case, *Billings v. Health Plan of America*,¹⁵⁴ the issue before the State's Second District Court of Appeal was whether the statute extended to dismissals as well as default judgments.¹⁵⁵ The *Billings* court ruled that it did not.¹⁵⁶ The reasoning behind the decision was based upon changes in the Legislative Counsel's Digest of the bill.¹⁵⁷ The Digest as initially introduced, indicated that the bill which required a court to vacate a judgment, would apply to any "judgment order, or other proceeding."¹⁵⁸ The Digest as amended and adopted, however, indicated that the bill would only apply to default judgments.¹⁵⁹ The conclusions of the *Billings* court were that the changes in the Digest evidenced an

148. *Id.*

149. *Billings v. Health Plan of America*, 225 Cal. App. 3d 250, 256-57, 275 Cal. Rptr. 80, 84-85 (1990). *But see* *Stroh v. Midway Restaurant Sys.*, 180 Cal. App. 3d 1040, 226 Cal. Rptr. 153 (1986) (stating that only the courts may interpret statutes affecting a regulatory agency).

150. CAL. CIV. PROC. CODE § 473 (West Supp. 1993).

151. *Id.*

152. *Id.*

153. *Billings*, 225 Cal. App. 3d at 250, 275 Cal. Rptr. at 80.

154. 225 Cal. App. 3d at 255, 275 Cal. Rptr. at 83.

155. *Billings*, 225 Cal. App. 3d at 255, 275 Cal. Rptr. at 83.

156. *Id.* at 256, 275 Cal. Rptr. at 84.

157. *Id.* at 256-57, 275 Cal. Rptr. at 84-85.

158. *See id.*, 225 Cal. App. 3d at 257 n.3, 275 Cal. Rptr. at 85 n.3 (stating that the Legislative Counsel's Digest of Bill accompanied the first draft of Senate Bill No. 1975 when it was introduced on Feb. 9, 1988).

159. *See id.* (stating that the Legislative Counsel's Digest of Bill accompanied the subsequent draft of Senate Bill No. 1975 when revisions were introduced on Aug. 1, 1988). This version of the bill was eventually adopted by the Assembly and the full Senate on Aug. 11 and 23, 1988, respectively. *Id.*

intent by the Legislature that the statute be narrowly construed to exclude dismissals despite the fact that the same harsh treatment might again befall innocent clients.¹⁶⁰

In the second case, *Rotter v. Berneman*,¹⁶¹ the Second District Court of Appeal again confronted section 473.¹⁶² In this situation an attorney submitted a proper affidavit and was duly directed to pay compensatory legal fees by the trial judge who also conditioned the vacating order upon *actual* payment of the fees, not simply the order to pay.¹⁶³ The issue before the appellate court was whether the additional condition to pay violated the statute's mandatory relief provisions that indicated that the attorney need only submit the affidavit and be *ordered* to pay.¹⁶⁴ The court's decision, again based upon changes in the Digest of the bill, held that the trial judge could extend the conditions for vacating a judgment to include actual payment.¹⁶⁵ The *Rotter* court again marshalled out the original Digest of the bill that *authorized* the imposition of sanctions and contrasted it to the subsequent, enacted Digest that *mandated* imposition of sanctions.¹⁶⁶ The conclusion of the court, based upon the changes, was that the Legislature intended that actual payment be made without further contempt proceedings or other wasteful hearings.¹⁶⁷ Although limited in their precedential value, both *Billings* and *Rotter* symbolize a judicial willingness to review changes in the Legislative Counsel's Digest of a bill as evidence of legislative intent.¹⁶⁸

160. *Billings*, 225 Cal. App. 3d at 258, 275 Cal. Rptr. at 86. In 1992, the Legislature explicitly added "dismissal" to § 473, thus, overturning the *Billings* decision. 1992 Cal. Legis. Serv. ch. 876, sec. 4, at 3510 (amending CAL. CIV. PROC. CODE § 473).

161. 278 Cal. Rptr. 326 (1991), *reh'g denied and ordered not officially published* (May 16, 1991).

162. *Rotter v. Berneman*, 278 Cal. Rptr. 326, 328 (1991), *reh'g denied and ordered not officially published* (May 16, 1991). For a case sanctioning the use of legislative materials, including the Legislative Digest, to determining legislative intent, see *Beeman v. Burling*, 216 Cal. App. 3d 1586, 265 Cal. Rptr. 719 (1990).

163. *Rotter*, 278 Cal. Rptr. at 327.

164. *Id.* at 329.

165. *Id.* at 329-330.

166. See *supra* notes 134-140 and accompanying text (explaining that the Digest of bill may be used to determine legislative intent).

167. *Rotter*, 278 Cal. Rptr. at 329.

168. Compare *Billings v. Health Plan of America*, 225 Cal. App. 3d 250, 258, 275 Cal. Rptr. 80, 86 (1990) with *California Ass'n of Psychol. Providers v. Rank*, 51 Cal. 3d 1, 17, 793 P.2d 2, 11, 270 Cal. Rptr. 796, 805 (1990) (stating that "[r]ejection by the legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include omitted provision" (quoting *Rich v. State Bd. of Optometry*, 235 Cal. App. 2d 591, 607, 45 Cal. Rptr. 512, 522 (1965))).

That principal, however, cannot apply if the specific language is replaced by general language that includes the specific instance. If, for example, . . . a bill were introduced dealing with teachers salaries in Los Angeles County, then amended to deal with teachers salaries generally, we would not construe it to apply to all counties except Los Angeles.

D. The Legislative Counsel's Opinions as Extrinsic Evidence in Determining Legislative Intent

The Legislative Counsel, at the request of the Governor, State Agencies or any member of the Legislature, will issue a legal interpretation or opinion on measures pending before the Assembly or Senate. The landmark decision concerning opinions of the Legislative Counsel came down in the 1990 case, *California Association of Psychology Providers v. Rank*.¹⁶⁹ Despite the Legislative Counsel's sixty-three year history of issuing opinions, the California Supreme Court had never defined their persuasive value until the *Rank* decision. In that decision, the Supreme Court elevated opinions of the Legislative Counsel to at least the same level as opinions of the Attorney General.¹⁷⁰ The court held that opinions of the Legislative Counsel, while not binding, are entitled to great weight.¹⁷¹ In the absence of controlling authority, the court stated that these opinions are persuasive, because they are prepared to assist the Legislature in its consideration of pending legislation.¹⁷² The *Rank* court further opined that, by analogy, the Legislature is presumed to be cognizant of the Legislative Counsel's statutory construction.¹⁷³ This presumption can only apply to Legislative Counsel opinions that are placed in the record or publicly released, since all other opinions are kept strictly confidential by the Bureau.¹⁷⁴ A stinging dissent characterized the majority opinion as judicial activism and picked through its analysis point by point.¹⁷⁵ However, this dissent voiced no objection for the principal establishing the persuasive value of the Legislative Counsel's opinions.¹⁷⁶ While the dissent did chastise the majority's specific reliance on an unpublished opinion of the Attorney General and an opinion of the

Rank, 51 Cal. 3d at 18, 793 P.2d at 11, 270 Cal. Rptr. at 805.

169. 51 Cal. 3d 1, 793 P.2d 2, 270 Cal. Rptr. 796 (1990).

170. *Id.* at 17, 793 P.2d at 11, 270 Cal. Rptr. at 805.

171. *Id.*

172. *Id.*

173. *Id.* The *Rank* court analogized Opinions of the Attorney General to Opinions of the Legislative Counsel. *Id.* The court's decision to presume the legislature is cognizant of unpublished opinions of the Attorney General (and opinions of the Legislative Counsel) has been criticized. *Id.* at 31, 793 P.2d at 20, 270 Cal. Rptr. at 814 (Kennard, J. dissenting); Bradley R. Kirk, *Health Law, California Supreme Court Survey January 1990-September 1990*, 18 PEPP. L. REV. 623, 784 n.46 (1991).

174. See *supra* notes 105-106 and accompanying text (discussing the confidentiality of the Legislative Counsel Bureau's communications).

175. *California Ass'n of Psychol. Providers v. Rank*, 51 Cal. 3d 1, 22-33, 793 P.2d 2, 14-21, 270 Cal. Rptr. 796, 808-15 (1990) (Kennard, J., dissenting).

176. *Id.*

Legislative Counsel that had dubious circulation within the legislative halls, it did not criticize the persuasive authority of the Legislative Counsel's opinions as enunciated by the majority.¹⁷⁷

CONCLUSION

Until California adopted an institutionalized mechanism to foster efficient legislation, the State languished in an inaccessible legal abyss.¹⁷⁸ Generally the laws were not well researched, were poorly drafted, and were not compiled, indexed, or codified in any manner conducive to efficient use. Although recognition of the problem preceded statehood, no action was taken to implement a systematic approach until almost the turn-of-the-century.¹⁷⁹ Slowly, the State initiated institutional changes that facilitated adoption of efficient legislation. Most notable among these changes was the creation of the Legislative Counsel Bureau.¹⁸⁰ With the development of the Legislative Counsel Bureau, the State embarked on a course that introduced precision, clarity, and organization to California's laws. Eventually, the legislature would require that every proposed measure be analyzed by the Bureau.¹⁸¹

The judicial response to the Legislative Counsel Bureau grew considerably, as the Legislature relied more and more upon the Legislative Counsel. Today, the Legislature is presumed to have adopted a bill with the intent and meaning expressed in the Legislative Counsel's Digest.¹⁸² Opinions of the Legislative Counsel are afforded even greater precedential value. On equivalent basis with Opinions of the Attorney General, the Legislative Counsel's opinions are persuasive in the absence of other controlling authority and are entitled to great weight.¹⁸³ While the final judicial value of a Legislative Counsel opinion may be further defined by

177. *Id.* at 31-32, 793 P.2d at 20, 270 Cal. Rptr. at 814-15.

178. *See supra* notes 38-51 and accompanying text (discussing the historical evolution of bill drafting in California).

179. *See supra* note 53 and accompanying text (stating that the Legislature created a commission of three attorneys to revise, systemize and reform the laws of California).

180. 1913 Cal. Stat. ch. 322, sec. 1, at 626 (enacting CAL. GOV'T CODE § 10200 (West 1992)).

181. Temporary Joint Rules of the Senate and the Assembly, Rule 8.5 (1989).

182. *See supra* note 134 and accompanying text (explaining that because the Legislative Counsel is required to analyze and summarize all measures before the Legislature, courts have consistently found it reasonable to presume that the Legislature adopts measures with the intent and meaning expressed in the Legislative Counsel's Digest).

183. *See supra* note 169-177 and accompanying text (discussing the California Supreme Court's holding in *California Association of Psychology Providers v. Rank*).

subsequent courts, its value as persuasive authority is likely manifest in our jurisprudential fiber.

This is not the end of the story, however. Within a few years after the Legislative Reference Bureau addressed the major flaws in the bill drafting process, additional institutional structures were needed. Codification of California laws had yet to be completed and the existing statutory law was still considered one of the worst in the nation.¹⁸⁴ Also, despite the clarity and accuracy in newly enacted statutes, unforeseen ambiguities, and differing judicial interpretations required that adjustments and revisions be made to certain laws. The Legislature responded with the creation of the California Code Commission and its successor, the California Law Revision Commission.¹⁸⁵ While the primary duty of the Code Commission was to codify the state's laws, the Law Revision Commission was given the continuing task of informing the Legislature on the status of the laws recommending changes to more fully carry out the Legislature's intent.¹⁸⁶ With the Law Revision Commission, the Legislative Counsel Bureau operates the process by which political edicts are transformed into efficient legislation.¹⁸⁷ Because the Legislative Counsel plays such an integral part in crafting and revising the State's laws, the Legislative Counsel's Digest and Opinions probably reflect, better than any single source, the intent and meaning adopted by the Legislature.

184. CALIFORNIA CODE COMMISSION, REPORT TO THE LEGISLATURE 19 (1930), cited in Kleps, *supra* note 39, at 792 n.106.

185. 1929 Cal. Stat. ch. 750, sec. 1, at 1427. The Legislative Counsel served as secretary of the California Code Commission, and presently serves as an ex officio member of the Law Revision Commission. 1929 Cal. Stat. ch. 776, sec. 1, at 1546; see *supra* note 129 and accompanying text.

186. 1984 Cal. Stat. ch. 1335, sec. 1, at 4687 (amending CAL. GOV'T CODE § 10330) (creating the California Law Revision Commission).

187. At a federal level, there is no counterpart to the Law Revision Commission despite numerous and continuous proposals to implement one. Beginning in 1921, for example, Judge Cardozo recommended creation of a Ministry of Justice to study and suggest changes in the laws. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 115 (1921). More recently, Supreme Court Justice Ruth Bader Ginsburg has proposed that Congress establish a legislative statutory revision commission to carry on functions similar to the California Law Revision Commission. Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 1013 (1987). See generally Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1059-1093 (1991) (discussing statutory interpretation and methods for maintaining the laws).

