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This follows up on two items: (1) what is process for proposing CA jury instructions? and (2) what is the process for developing regulations interpreting the EPA?

(1) CA Jury Instructions

California uses the CACI jury instructions (Judicial Council of California Civil Jury Instructions). CACI is regularly updated by the Advisory Committee on Civil Jury Instructions of the Judicial Council. I spoke with Bruce Greenlee who staffs this committee:

The Advisory Committee has engaged in joint drafting of proposed jury instructions in the past, for example, with various State Bar committees. He thought the same joint process could work for working with a smaller grouping of our Task Force for EPA jury instructions. In around Dec 2016 or January 2017, we would give him a list of proposed instructions, first drafts of the language, and authority. He would work on the language, placement, and connect with the Advisory Committee to form a working group with target of June/July 2017 to present for full approval to the Judicial Council. If we meet that date, then post for public comment in August 2017, and then a January 2018 effective date. He seemed to think doing this for EPA made sense. I told him I'd get back to him asap to let him know if the Task Force wants to pursue this.

(2) Regulatory Process

A preliminary question is: if we want to further define certain terms in the EPA, e.g., "substantially similar work," must we go through the regulatory process? If the answer is yes, then what does that process entail?

I spoke with my colleague, Robert Villalobos. He explained that generally, if we are developing a guidance that merely sets forth cases and statutory language on an issue, then we do not have to do regs. If we develop a guidance that interprets the EPA or makes it specific, or governs its procedure, then we need to do regs. Govt. Code sec. 11342.600 defines regulations as:

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

"Underground regulations" are guidelines that ought to have been regs, but were not adopted through the regs process. Underground regs are void and can be challenged with the Office of Admin Law.

Alternatively, there are "opinion letters" that do not get as much deference as regs, but can be used to apply EPA to certain facts. We get specific requests from public for opinion letters.

If we do regs, the Administrative Procedures Act (APA) sets forth the general process: Notice, comment and response, possible public hearing also, possible additional notice, comments, response, and then prepare materials for filing with the Office of Administrative Law. Takes more than 4 months. Before engaging in regs process, our office would need to get approval from the DIR and the Secretary. Attached is a flow chart that Robert sent me that I thought was helpful.