New Year's Resolutions for the Legislature: A Consumer Manifesto

While listing my annual New Year's resolutions several months ago, I realized that it is actually easier to formulate lists for others. I am saved the guilt of ignoring my own through the rest of the year and can chastise others, which is somehow more satisfying. In this spirit, and a bit belatedly, we list ten 1988 New Year's resolutions for the California State Legislature.

1. We Shall Not Let Personal Disputes Influence Our Decisions.

Sound obvious? Then you don't know Sacramento very well. It is most amazing how many legislators take confront at the actions of other legislators, whether due to failure to support one for a committee post, or an offhand sarcastic remark on the Capitol elevators. Legislators are gregarious—and they work in a quid pro quo world of bartering. One legislator may become angry at another for the way he/she has treated a legislative or pork barrel project. These emotional reactions are natural and understandable.

However, our state legislators manifest these feelings overwhelmingly in their official duties. A legislator who is chair of a critical subcommittee whose own bills were not passed summarily through the committee of another legislator will block that legislator's bills. A bill sponsored by a legislator who offended a key committee chair will get short shrift. These dispositions of public legislation are not made with reference to their merit. Rather, the bills are considered a kind of neutral and empty currency, a means of rewarding or punishing those who may have caused offense.

The significance of the bill lies in who wants it passed and who doesn't; and how one feels about those persons. The content of the bill becomes irrelevant. This "I'm going to block his bills because of what he did to me eight months ago" mentality is not an occasional flaw of an aberrant legislator. It is common.

2. We Shall Not Vote On Bills Based On "Nose Counting," But Shall Actually Try To Read And Understand Them.

Another simple one? Hardly. Most bills are proposed and drafted by agency officials or private interest groups, not by legislators. For each bill that is proposed, a separate file is kept. One of the chief jobs of the legislator—"sponsor" is to gather the endorsement of organizations in support of the bill. It is disturbing how many legislators vote for or against a bill simply by counting the noses of those who have endorsed or who are on record as opposing it. This "nose counting" method of decision-making is the norm rather than the exception in Sacramento. Understandably, legislators are caught up in the rush of a great deal of legislation considered in a short period of time. Nevertheless, they should take the time to read the bills (many of which are not lengthy), attempt to understand the impact the legislation will have substantively on the public, and ask independently-derived and poignant questions at hearings.

There are over 500 active lobbyists in Sacramento. Most profit-stake groups and institutions in the state are organized. Those who do not have a direct profit stake in public policy, i.e., the taxpayer, the environment, children, future interests, and the very diffuse general public, are underrepresented. Less than a dozen individuals in Sacramento even purport to represent these broad, diffuse interests. Legislators are elected to represent those broad interests and commonly abdicate that responsibility; they simply count noses of those who are already organized around a profit stake in public policy to determine their votes.

A typical conversation, not only among legislators, but among the Governor's staff in considering vetoes, commonly involves the following colloquy: Q. "Have you read the bill?" A. "Have you read the bill?" Q. "I don't understand how these other groups could be supporting it if it's such a bad bill?" A. "Have you read the bill? Can we discuss what the bill would do for at least three minutes?" Q. "I just don't understand why you just don't get together with those proposing the bill and work it out."

This "let's count noses," and, if someone really dissents, "why don't you guys go out in the hall, work it out, and come back?" attitude results in legislation determined in vector-like fashion by those with a profit-stake interest, with the greatest influence by those with the greatest profit stake. Everyone who is there works out a deal to take the maximum amount from those who are not there. And who is not there? Probably you, dear reader.

3. Our Committee Votes Will Be Accountable, Public, And Published.

Certainly the prerequisite to any effective democratic system is accountability. It is not enough that people have the right to vote for the candidates; they must have good information about what those candidates do in office in order to judge their performance. Without such information, elections become a charade.

Most of the critical decisions in our Legislature are made at the committee level. The decision where to assign a bill, the scheduling decisions of the committee chair, amendments to the bill, and the votes of the committee members occur at this level. In order to pass through a committee of the Legislature, a bill must be supported by the majority of the members of the committee, not a majority of a quorum present at a particular hearing. Hence, on an eleven-member committee, the bill must receive six affirmative votes. Legislators belong to more than one committee. They could be involved in three or four different committees, with meetings often in conflict. If legislators wish to vote against a bill, their most common recourse is simply not to show up for that committee’s vote. "Taking a walk," instead of voting, is commonplace in Sacramento. Hence, if one's bill needs two or three affirmative votes, one may be unable to find the legislators to achieve the majority vote. Why should a legislator vote "no" on a bill and perhaps offend someone when he/she can ambiguously "take a walk."

Exacerbating this trait is the tendency not to publicize the committee votes opposing it." A. "Have you read the bill?" Q. "I don't understand how these other groups could be supporting it if it's such a bad bill?" A. "Have you read the bill? Let's work it out."
which do occur. Who voted yes, who voted no, and who did not vote for each bill, is not a readily accessible piece of information. It is gathered in the Senate and Assembly Journals, but journalists do not seem to be making wide use of it. The Legislature, which passed a series of “sunshine” bills requiring the executive branch of government to be open to the public (requiring open meetings and the disclosure of all public documents) has largely exempted itself from these provisions. How about routine press releases on major committee votes, including who voted how?

4. We Shall Attempt To Do Something About Fragmentation In The Boundaries Of Assembly And Senate Districts, And Of Our Local Government Jurisdictions.

The Legislature is aware that every single incumbent legislator running for reelection in 1986 was reelected. There were very few close races—the average race involving a victory by more than two to one. The redistricting power must be taken away from the legislature, and given to a quasi-judicial commission to establish equitable and competitive district boundaries.

And legislative district boundaries are not the only problem. Local government in California is hopelessly fragmented. County and city boundaries look like ink blots on the map, with city territories extending five miles down one-hundred-yard-wide corridors to capture viable tax property in a blob at the end. City boundaries run down the middle of streets, with addresses running up on one side and down on the other—going in the same direction. Los Angeles County has more than 350 special districts, most with their own boundaries, many with their own elected bodies governing them. This local government complexity is further complicated by a mix of fire, police, water, sewage, and utility jurisdictions.

The legislative district and local government boundaries should be drawn so the jurisdictions have a natural center and compact shapes defining areas where there is a sense of commonality and community. Preferably, these visible local governments would absorb fragmented special districts into multipurpose jurisdictions. Elective accountability means that the voters know not only what their elected officials are doing, but who they are. Special districts can keep geographic unique boundaries for financing purposes where assessments benefit only those within small areas, but the notion of basic and wholesale government services devolved into scores of separate decisionmaking units for purposes of governance impedes real democracy.

5. We Shall Support, And Indeed Enact, Common Cause’s Campaign Finance Initiative Of 1988.

It is no surprise to our current legislators that they have a 20 or 30 to 1 ratio in campaign contributions vis-a-vis their challengers. The cost of elections has skyrocketed, and even though incumbents have no statistical reason to fear defeat, they perceive the need for substantial campaign contributions. (Perhaps it is like the common fear of flying, notwithstanding its statistically superior safety record.) Most campaign funding comes from political action committees associated with interests vying for favor before the Legislature.

It is true that campaign contributions do not dictate all legislators’ votes. But they have a mighty influence. At the very least, campaign contributions guarantee enhanced access to a legislator. Access, particularly where an issue is in its gestation stage, is critical to effective influence. Obtaining an early commitment from a legislator because of that access often ensures a compliant vote, since our officials are predictably hesitant to back off from a publicly stated position.

The public increasingly perceives the Legislature as “bought.” In reality it is not that simple, but campaign contributors again and again are able to persuade a legislator to “take a walk,” as described above, in critical committee deliberations where affirmative votes are necessary for passage. Campaign contributions do, in fact, determine the outcome of large numbers of votes on legislation. And they operate in extremis for party leaders who covet campaign contributions to dole out to other candidates for political power.

One reprehensible popular game is referred to by the few consumer advocates as “bill hijacking.” Common enough to warrant its own terminology, a powerful legislator will rejoice when a pro-consumer bill is proposed. Indeed, he/she will announce immediate support for it and try to sign on as sponsor. He/she will then use this standing as sponsor and the bill’s threat to profit-stake interests to extract campaign contributions. The contributions are made so the legislator will eviscerate his/her own falsely-claimed cause. Cynical? You bet. Some legislators have become so focused on money they have forgotten why they’re there. They begin to think the end result is influence qua influence—not a substantive body of law.

The Common Cause-sponsored initiative now before the voters probably will pass by an overwhelming margin. Rather than having the people jam ethical government down its throat, it would be nice for the Legislature to do it to itself. This might give the challengers an opportunity to raise some campaign finances through publicly funded contributions. It also might mean that legislators will have to forego huge contributions from individual special interests in order to receive these matching public funds. (See CRLR Vol. 7, No. 1 (Winter 1987) pp. 9-11 for complete details on the Common Cause initiative.)

This proposition, interestingly backed by academics, consumer groups, labor, and even substantial business interests (who say privately they are tired of being “shaken down” for huge sums of money every two years), will make an enormous difference in the quality of government. Incumbents will know they may be challenged and that their record may be examined as never before. A few of them might even be defeated. They would also know that they could mount a campaign against even a wealthy challenger without selling out to profit-stake interests for a comparable campaign fund; the matching formula greatly reduces reliance on private contributions.

It will end directly the perpetual campaign fundraising of legislative leaders so they can give to the campaigns of their favored candidates. These funds are fed substantially by special interests, and magnify the corruptive influence of those interests on the Legislature.

The Legislature believes that the public does not like the idea of using taxpayer monies to finance these often tasteless campaigns. But it underestimates the average Californian. Taxpayers don’t like the idea of financing boring sloganeering or dishonest campaigns, but they like even less their financing by those with narrow interests, and the resulting disproportionate influence on the enactment of public statutes. The California citizen is sophisticated enough to want to spend one or two percent of taxpayer monies to make sure the other 98% or 99% is spent rationally and fairly. That is a very good investment indeed.

These are pretty big items, but they hardly exhaust our resolution list for the Legislature. One might add the passage of Senator Marks’ bill to prohibit...
Commentary

Former state officials from lobbying their old agencies for twelve months after departure. Basic reforms are needed to strengthen the independence of the state—because the most important check in the American system is not the executive-legislative-judicial division, but the separateness and neutrality of the state as it represents the "people" in the broadest sense.

In addition to these structural reforms, the Legislature should focus attention on numerous areas of legislative policy needing alteration. For example:

6. We Shall Amend The Administrative Procedure Act To Provide For Fair Entry And Effective Discipline By Our Regulatory Agencies, And To Bar As An Agency Official Any Person With A Current Vested Profit Stake In That Agency's Business.

The entry decisions made by many licensing agencies are disgraceful. The Board of Accountancy approves CPA status sometimes for under 10% of exam takers. Does anybody know how hard it is to become a veterinarian, thanks largely to school barriers to entry—smilingly tolerated by the Vet Board? Has the Legislature noticed that some twelve law schools have a 0% Bar exam passage rate?

The Administrative Procedure Act (APA) requires an agency processing someone's application to prepare a "statement of issues" (if petitioned to do so) to notify the applicant where he/she is deficient. A right to a brief hearing then follows—with the burden on the applicant to show admission conditions have been satisfied. The problem? The statute contains no time limits for response or hearing by the agency.

Hence, agencies such as the Board of Medical Quality Assurance (BMQA) (which, for seemingly racist reasons, declines to license Vietnamese candidates who have scored at high levels in qualifying tests and internship performance) abuse their discretion. A request for such a statement of issues and hearing will receive no reply—for months and years on end. Where abuses occur which are as egregious as those now being perpetrated by BMQA, and which have serious civil rights overtones, administrative abuse should not only be checked by reasonable time limits, but should also include legislative power to compel the removal of public officials who flout legislative purpose. These statutes are enforced by officials in whom the Legislature has reposed a high degree of trust. A broad enabling statute delegates critical authority to officials to carry out legislative intent. Where the officials exhibit repeated contempt for that intent, the Legislature should have the power not only to alter the statute, but to remove those officials. In the case of the Board of Medical Quality Assurance, such removal of several Board members and top administrators is long overdue.

In the area of discipline, the APA is also inadequate. It is clumsy, costly, and difficult to effectuate. The revocation of a license issued by the state of California—whether that of a pharmacist, accountant, or barber—is a serious matter. Abuses committed by these licensees may be serious, and the removal or suspension of their means of livelihood is also serious. Both of these interests require due process. However, the current APA process for disciplinary adjudications involves repeated proceedings, excessive opportunity for political factors or the proclivities of currently practicing tradespersons to intrude into an adjudication, and overwhelming expense. These disciplinary steps must be streamlined and reformed. Revisions roughly analogous to the reforms which are currently being implemented by the State Bar and which prove successful in its sui generis system should be considered for adoption by all agencies through an amended APA.

It may surprise some Californians to know that the APA does not prohibit agency governance by part-time officials with a current vested profit stake in the agency's business. In fact, such a conflict of interest is not only allowed, it is required by statute. It is fine for a trade to form an advisory group—perhaps with official status. It can offer expert views to supplement expert staff help. But the public decisionmakers acting for the state should represent the public and have no such tie. Adjudications to deny or revoke a license should not be made by a group of fellow tradespersons. Rulemaking and policy decisions about entry into the trade—which may restrain trade for the profit-benefit of the trade and be contrary to consumer and public interest—similarly should not be in the hands of the trade. This is all obvious, ninth-grade civics. Our government must be independent, as we noted above. The APA should require it.

7. We Shall Terminate Those Regulatory Boards And Commissions Which Are Not Necessary, And Shall Compel Those Which Are Necessary To Regulate Effectively.

The Legislature has traditionally allowed most any group of tradespeople to get together and form its own agency, funded through special assessment of its members. No money is spent from the General Fund, and nobody opposes it, particularly if the agency is formed in the name of "consumer protection."

Most of these agencies, however, are not formed by those with consumer rights foremost in their minds (notwithstanding their assurances at the time of formation), and the financing of these agencies is an indirect tax paid for by the public which uses the services preferred.

Legislators must develop a theory of regulation—a set of minimum criteria which must be met before the state will intervene in the marketplace. These criteria must include an analysis and conclusion that the marketplace is deficient and that the proposed regulatory scheme will address that deficiency narrowly and effectively. Such elementary analyses have not accompanied regulatory proposals in the past.

Senator Boatwright has introduced legislation which would eliminate or consolidate six boards. These bills should be enacted. The agencies involved, such as the Board of Landscape Architects, cover trades which do not require state licensing. The prior restraint bar from a trade or profession is an extreme regulatory measure. Rather than letting the marketplace regulate who is chosen to perform what service, government makes an in-advance decision based on its evaluation of who should be allowed. This momentous exercise of state power should be undertaken only where there is clear justification for it. Usually that justification involves an estimate of "irreparable harm," which other societal means cannot address if there is incompetence in that profession or trade. The licensing system focuses on the prevention of such incompetence in order to preclude that irreparable harm.

Critics argue that most boards and commissions have become fiefdoms of entry barriers to prevent "incompetence" but are very hesitant to excise practitioners who prove to be incompetent post-licensure. Indeed, very few regulatory agencies have a defensible record in the revocation of the licenses of those who are demonstrably incompetent, although that function is the raison d'être for their existence.

BMQA, for example, brazenly blocks entry to qualified physicians while lying moribund in discipline. Its constituent groups issue deceitful press releases...
about excessive malpractice awards, while it delegates the power to restrict licenses to private groups (such as hospital and professional specialty boards), and jerks very few licenses. The most aggressive activities of this sorry Board include a drug and alcohol diversion program which immunizes hundreds of substance-abusing physicians from license suspension, and a debilitating "Ben Casey" mentality which forces interns and residents into 20-hour shifts and little sleep as a kind of "we had to go through it so here's your boot camp too."

For many boards, such as the Board of Landscape Architects or the recently-terminated Board of Fabric Care, the person purchasing the services does not need an "assurance of competence" by the state. The need for repeat business allows the marketplace to purge the incompetent without the intervention of the state. Nor do those who hire petroleum engineers or golf course architects really need the state to tell them who is competent.

We should be hesitant to regulate a profession or trade - particularly where the regulation involves prior restraint licensing. But if we do find that there is serious and repeated irreparable harm where there are incompetent practitioners, then - really regulate. Accomplish what is in fact our stated purpose for government intrusion. Direct that intrusion at the abuse which justifies it. At present, the Legislature allows far too much licensing, and where that licensing is clearly unjustified, allows it to perpetuate a great deal of incompetent practice.

8. We Resolve To Enact Statutes To Preclude The Unfettered Granting Of Local Monopolies By Local Governments.

Years ago, the Legislature wisely adopted a statute which prohibits any local government from engaging in a major public project (over $5,000) without competitive bidding. The reason is obvious: we cannot allow local government officials, particularly in the fragmented structure described above, to give out huge private construction projects and other favors without some form of market check. The alternative to such a check is inevitable payoffs and corruption.

A new area of favor dispensation has arisen that the Legislature has missed. In addition to giving out construction contracts and other awards for large "public projects," local governments are increasingly able to give out even much more lucrative "exclusive franchises." An entrepreneur may operate a permitted monopoly in a sector of business. For example, a local jurisdiction can declare not only residential- but even the normally competitive commercial - trash hauling industry to be subject to an "exclusive franchise" in its territory. Nobody but the private firm it chooses may operate - even if there is no "natural monopoly" requiring only one entrepreneur. In the area of cable television, local jurisdictions can (with some free speech right limitation) set up a system which allows only one entrepreneur in an area. They can do the same in the area of stadium authority concessions, ambulance services, and other areas where "privatization" is possible. This power of local government to set up such a monopoly is momentous. It is the opportunity for perpetual unmonitored excessive profits.

Without competitive bidding or other market check, these monopolies are an open invitation to corrupt local officials in their award. And many of these local monopolies collect money. The collection of these monies is usually subject to a "franchise fee" going to that local government. Hence, the post-Proposition 13 revenue needs of a local jurisdiction may be accommodated through high franchise fees on excessively priced monopoly services.

In a series of unfortunate decisions, the federal courts have allowed very broad state enabling statutes to justify the delegation of the power to grant monopoly franchises without any meaningful check. A statute should be enacted which allows local jurisdictions a wide variety of options, even where they have their own proprietary interests in the enterprise. However, that statute should not allow for the granting of exclusive franchises without either competitive bidding or meaningful rate regulation. There should be no "free lunch" plumb worth millions of dollars to be allocated by local officials; the result is commercial abuse and incentive for local government corruption. A state statute should require, in the context of any exclusive franchise, meaningful specifications and competitive bidding for such a franchise for a reasonably short period of time (e.g., no more than five years) and/or PUC-type rate regulation. Rate regulation should require cost justification, rate base or investment calculation, and the fixing of rates based on a fair rate of return given the risk and comparable profits in the private sector. If it is difficult to fashion a general statute, specific statutes should be so fashioned in trash hauling, cable television, and other areas where current abuse has already been demonstrated.

9. We Shall Reform Proposition 13.

It is understandable that the people of California wanted to impose some kind of restraint on the seemingly endless increase in property taxes to feed local government bureaucracy. The concept of a 1% maximum limit on taxation of real property value is eminently defensible. And, indeed, it should be defended against the current trickery of local governments to exceed those amounts. However, this is an ad valorem tax; that is, it is a tax on the value of something. Each person is taxed a percentage of the market value of real property assets located in California. But the way Proposition 13 was drafted (incompetently drafted California propositions are a prevalent problem), the calculation of value is inequitably applied. This is not a small complaint about fringe effects; it goes to the heart of our basic equal protection concepts.

You have two houses sitting side by side. They are identical, perhaps even tract homes. They were both built at the same time and have the exact same market value. Except the owner in house #1 has been there since 1972 and the owner of house #2 just bought last year. Because the "market value" under the terms of Proposition 13 is set substantially based on the most recent market sale, the buyer of house #2 will probably pay four times the property taxes as the owner of house #1. The owner of house #1 receives an enormous tax subsidy from other taxpayers simply because of the time when his home was purchased. Both owners receive the basic same city services for their tax monies. Such a variation based on the time of purchase, and unrelated to the market value of the property, violates fundamental tax equity and equal protection concepts. The California Supreme Court had an opportunity to redress this grievance, but succumbed to either illogic or political vagaries and refused to do so.

10. We Shall Reform The Insurance System of California.

The insurance industry and the trial lawyers are two of the most powerful lobbies in Sacramento. Either one of them seems capable of stopping any legislative measure which they oppose. It is time to pass a measure both would
oppose in the interests of the citizens of California.

We now have mandatory auto insurance, and it has passed muster in the courts. Because of “red lining” or perhaps economics, poorer Californians are going to have to pay anywhere from $800 to $2,000 for required minimum coverage for a single automobile. They will have to pay such rates or they will be committing a criminal offense if they drive a car. It is difficult or impossible to hold a job or live in California, given its land use and transportation systems, without a car.

We all know that the majority of monies obtained from personal injury litigation goes to attorneys. And it is not just plaintiff attorneys working on contingency fees; attorneys for insurance firms bill at $80 to $150 per hour and collect a mighty sum. And the insurance firms themselves take a healthy cut for claims adjusters, sales costs, advertising, etc.

We have proposed a “no lawyer” auto insurance plan to provide this minimum required insurance. It would operate on a no-fault basis and award basic property and medical damage recompense to those who most need it—the injured. There would be a much lower transaction cost in awarding these costs—they would be made by an agency after an efficient investigation. No insurance administrative costs, claims adjustments, defense counsel, or plaintiff contingency fee award. Maybe even fewer obnoxious plaintiff personal injury attorney television ads—no small side benefit.

The recompense would be quick and much less costly. If an accident has been caused by gross negligence causing damage well above the minimum limits, there could still be a lawsuit and “verage” insurance. But there is no reason to contaminate insurance costs all of us must now pay if we drive a vehicle. This system, according to experts, could cost no more than $300 per year per car—a manageable sum for most California citizens.

Most accidents do not involve huge amounts of damage and are redressable under the system outlined. Most people do not engage in accidents for the fun of it, and the government inquiry should be sufficient to prevent fraud on the public fund created. And, indeed, where there is such fraud against a public fund, criminal prosecution would be more likely by public prosecutors.

Now that we have offended the trial lawyers, let’s offend the insurance industry. Insurance firms are exempt from antitrust law at both the federal and state levels. The state insurance commissioners have done virtually nothing in the area of rate regulation over the past twenty years. Hence, insurance firms are in the unique position of not having their rates examined on a fair rate of return basis, and at the same time are able to collude and fix prices, or engage in other antitrust violations (within certain limits) without private or public check. There should be no free lunch for the insurance companies either.

Insurance rates are obviously excessive by any competitive measure. Insurers spend a great deal of their time openly engaging in lies about “runaway juries” in cases where those they insure have ruined lives or threatened the public health through egregious behavior. The Legislature should bite the bullet here also, and remove the antitrust exemption for the insurance industry, as recommended by distinguished panels under both Democratic and Republican administrations at the federal level.

After removing that exemption, the Insurance Commissioner should be compelled to engage in rate regulation on a logical basis. This would involve the following procedure: the insurance commissioner is required to make a finding of fact that there is “effective competition” for each line of insurance sold in California. This “finding of fact” is based on an investigation by the Department and, if challenged, should be the subject of an evidentiary hearing. “Effective competition” requires the findings that (1) there has been no collusion between those setting rates affecting that line of insurance in California; (2) there are more than three such carriers providing that line of insurance in any relevant geographic market within the state; and (3) there is no evidence of rate discrimination violating existing standards.

After that determination has been made, or if tested, after initial hearing which validates that finding, the rates as established by the insurance companies will stand as proposed by them. As to the lines of insurance where the Insurance Commissioner is unable to make a finding that there is effective competition, he/she will then be obligated by law to set rates according to PUC-type “fair rate of return” procedures.

This system is simple: either set your rates by market competition, or subject yourself to rate regulation to substitute for an absent marketplace. But you can’t have it both ways—and insurance firms have had it both ways for too long.