

COMMENTARY



IS THIS REALLY NECESSARY?

Some Agencies Need An "Attitude Adjustment"

There is no secret about the intent of California's vaunted "Sunshine" laws. They command that government's business be conducted in noticed, open sessions and that government records be available to citizens upon request and at reasonable cost. These laws are fundamental prerequisites to democratic accountability.

The declaration of legislative intent behind the state Open Meetings Act reflects that desire: "the legislature finds and declares that the public commissions, boards and councils and the other public agencies in this state exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for the people to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (Government Code section 54590.)

An eloquently written passage indeed, with hints of the poetic rhythm of Jefferson's pen. There follows from this preamble, and like preambles in three other statutes (Brown Open Meetings Act, California Public Records Act, Administrative Procedure Act), specific provisions to assure open government and due process. It does not take a lawyer to understand that these laws must be followed not only in letter but in spirit. Given enough time, however, any bureaucracy can develop defense mechanisms within the letter of the law to abrogate that spirit.

How? Don't keep public records in a way that they can be easily identified or requested. Intersperse public materials with portions of documents legitimately confidential. When a document is re-

quested which must be disclosed under the law, do not deny access to it—simply stall. Or impose practical impediments. Perhaps an internal appeal procedure which must be "exhausted" before court action is possible. The possibilities are limited only by the imagination of the agencies involved. Although many of us may have some doubt about the imagination of agency officials, to gauge its potential one has but to survey its use for institutional self-preservation.

Two of the more imaginative recent *modus operandi* of agencies, contrary to the spirit of the "Sunshine" laws, are in the areas of scheduling and cost. In simple agenda scheduling, most agencies operate their public meetings in ways which discourage public participation. Most often this is not done out of malice, but sheer administrative incompetence. The presiding officer of a typical board or commission begins a meeting with an agenda. The meeting begins in the morning and may be scheduled for one or two days. The presiding officer is usually a chairman, very often a member of the trade or profession regulated, and not necessarily experienced in managing meetings. (However, the following observations appear to apply to even the experienced presiding officers.) The meeting begins and agenda items are selected by the presiding officer in an order which is rarely organized. Items come up for discussion on some mysterious basis. Those that are heard first tend to be discussed at excessive length. Those that remain just before adjournment (when members must catch planes, which they often announce to the presiding officer one-half hour before they are scheduled to leave) are given short shrift. There is very little calculation of time required for each item, and little or no consideration given to the people who come to the meeting to hear a particular item on the agenda.

All of this is very easily remedied with nothing more than common sense and minimal preparatory planning. If an agenda appears to be an all-day matter, it can usually be divided into two por-

tions, morning and afternoon. This allows members of the public who are interested in hearing a portion of the business in the afternoon part of the agenda to avoid wasting all morning sitting in a room hearing irrelevant matters.

Next, during the morning session, the presiding officer should announce the agenda and immediately inform everyone of the order in which matters will be heard. This would include the "public comment" opportunity mandated by the Brown Act for local governmental bodies and usually followed by state agencies as well. A responsible presiding officer will go through each item of the agenda in a "calendar call" before the first item is addressed and ask for a time estimate from staff and those who will be testifying or commenting from the audience. The presiding officer learns how many people wish to participate as to the items to be discussed, how long the matter is expected to take, and whether the persons needed to participate are present and ready. After this very short inquiry as to each item, the presiding officer can announce the order of the agenda. People can then go out for a cup of coffee, make a phone call regarding a personal schedule, or otherwise accommodate their own convenience. The Center surveys the proceedings of sixty boards, commissions, and agencies in California. Less than one-half dozen of these agencies, or fewer than 10%, follow these elementary principles of courtesy.

What is more disturbing than the nonfeasance of failing to organize a meeting properly to encourage public participation in issues of interest, is the more direct discouragement now becoming prevalent. Agencies are increasingly playing games with their closed sessions to affirmatively discourage public attendance. Closed sessions, under the law, must be initiated at an open session. As a practical matter, this means that a regular meeting is held, and at the conclusion of the regular meeting, an agency will excuse the audience and go into closed session for those matters which are lawfully considered in private. An agency may, after the closed session, go back into open session again to complete business left on the agenda, or to consider new matters on which action may now be taken. It is important to complete all of the public business before the closed session begins. The reason, as a practical matter, is obvious. The members of the public in attendance have no idea how long the closed session

will last. There may not be a continued open session afterwards. Even if the agency attempts to hold an open session afterwards, the closed session may last too long and the open session may have to be continued to another time and perhaps another place. Agencies are, instead of adopting the obvious courtesy of reserving the closed session to the end of the open session meeting, beginning to stick the closed session in the middle of the open meeting. This means that the open meeting begins and goes to a certain point. Then the board or commission goes in to closed session for an unannounced period of time. The members of the public are excused and compelled to leave. If they wish to wait outside the door for an undefined period of time, it may open again. When it does open again, the public meeting may resume. Then again, it may not.

In addition to all of this, there appears to be the beginnings of a trend against allowing public comment before agencies. As mentioned, the Brown Act covering local governments now *requires* an opportunity for public comment. The public comment can be limited in length and scope and the agency need not entertain repeat comments on topics previously subject to public comment. However, the opportunity for members of the public to very briefly express their heartfelt views is an important part of democracy. Not only is it desirable to allow the public to view the public's business, but the opportunity to express oneself and to be heard is an important one. The state Open Meetings Act does not at this time replicate the local government provision requiring public comment opportunity. However, most agencies have historically provided for it. There may be a trend *contra* at this time. An example would be the Administrative Oversight Committee meeting of the Board of Medical Quality Assurance scheduled for March 6, 1987. The Committee was kind enough to note specifically in its agenda, "There will be no opportunity for public input." Although this expression appears consistent with the current attitude of this Board, it is not consistent with the spirit behind California's "Sunshine" laws.

In the area of cost, similar impediments are possible. The California Public Records Act specifically provides that the production of documents requested by members of the public is to be provided at out-of-pocket cost. However, the "interpretation" of out-of-pocket cost by many agency heads has an OPEC-flavored escalation to it. The

agenda packet of the California Waste Management Board is now \$120 per year. The Board of Medical Quality Assurance charges for minutes and supporting documents at \$60 per year. The agenda packets for the Board of Dental Examiners—which does not meet that often—now costs \$150 per year. Historically, boards and commissions had charged 2-5 cents per page, with the former figure being close to their actual out-of-pocket cost.

The cost barrier concern is exacerbated by the case of *Shippin v. DMV*, 161 Cal. App. 3d 1119 (1984). Here, the Department of Motor Vehicles sought to charge forty times the out-of-pocket cost for certain DMV records. The Department relied on a separate statute, which apparently gave the Director the authority to charge whatever he thought appropriate for DMV records, notwithstanding the general terms of the California Public Records Act. The court held that the specific DMV statute governed over the out-of-pocket cost standard of the Public Records Act. We may now expect to see spot bills and last-minute amendments tacked on to existing legislation with similar language giving "blank check" price-setting authority to various boards and commissions clever enough to seek this *Shippin* price obstacle to document acquisition.

There is a country/western song wherein the singer talks about the need for an "attitude adjustment." Of course, in the country music genre, this is code for a smack in the face. Or, perhaps better, ten or twelve smacks in the face. Perhaps one agency which needs to see the light behind the "Sunshine" laws is the peripatetic Board of Guide Dogs for the Blind. A former Board member, Robert Accosta, attended a recent meeting where a key vote occurred on a matter in which he was very interested. The Board voted by a show of hands. Mr. Accosta respectfully asked if the presiding officer would identify who was voting for and against the measure (a roll call vote). The presiding officer declined to do so; in fact, no member of the Board assisted this member of the public. Mr. Accosta, of course, is blind. He does not know as of this writing who voted which way on the measure, nor do his blind colleagues who were with him in the audience. It would appear that a board intended to serve and assist the blind of California by augmenting their sight with animal assistance might consider it appropriate to lend some verbal assistance on a matter of public business.

The point is not that a statute is needed every time there is an affront to civility. But the reasons behind the rules should somehow guide their administration. Barry Goldwater used to campaign under the cliché "you can't legislate morality." Of course, to a large extent, you certainly can legislate morality. Our penal code is, hopefully, such an exercise. However, there is a grain of truth in Goldwater's homily. You can't cover all of the bases all of the time when you have an endemic attitude problem.

Many of our agencies need an attitude adjustment, or perhaps attitude adjustments. Perhaps such adjustments are really what our framers meant by "checks and balances." The legislature and the courts will have to continue closing loopholes and imposing sanctions. But one is hard pressed not to occasionally yearn for the American country solution of a periodic smack in the face.

Solving Disputes Without Lawyers: It's About Time

How many of you have walked into a law office and asked an attorney to handle a consumer grievance amounting to \$3,000-5,000 in damages? What crosses your mind as you walk out the attorney's door, the echo of his laughter still reverberating dimly from his office? Was it the \$5,000 retainer up front he wanted which discouraged you? Was it the fact that the costs of suit alone, given several depositions, would probably amount to one-half or more of the amount sought?

We have created a system where the costs of resolving the largest category of human disputes far exceeds the amount at issue. Now, of course, an objective anthropologist might view this as a way of forcing accommodation between people otherwise in conflict. Perhaps a means of moderating an otherwise litigious society. But that is not at all what it does. What it does is to allow dispute resolution by another mechanism: he or she with the power obtains the reward. The institution or person in possession of the sought-after item—that is, physically holding it—usually prevails. A society which resolves disputes by this means does not dispense justice.

Small claims court has been an interesting aberration. It has developed into a means for the resolution of disputes affecting the average person. Certainly, the municipal court judges who hear



these disputes carry a heavy burden. The evidence they are able to see is often limited. The preparation and factfinding procedure is abbreviated. There are numerous other nitpicking flaws we can all identify. However, each side gets the opportunity to present a point of view and evidence, and a quick and definite decision is made by someone who is objective and at least knowledgeable as to the law. And, as an extra special bonus, the process is cheap and attorneys are not involved.

However, small claims court jurisdiction has been limited since 1981 to \$1,500. Disputes above \$1,500, to be fully recovered, must be filed in court, unless some arbitration or other resolution is provided for by contract. Municipal and superior courts are forums for attorneys. It is possible to pursue a legal action *in propria persona*; however, if one side is represented by an attorney, the other is at a decided disadvantage. Further, the courts themselves, as candid judges and administrators will admit, blanch at non-lawyers clogging their formal legal procedures.

All of these prefatory remarks are directed at the consideration of AB 301 (Bader), a bill which would raise the small claims jurisdictional limit to \$3,500. As the law firm of Jacoby and Meyers is apt to put it: "It's about time." Of course, in this case, it's about time to expand the system that allows consumers to avoid Jacoby and Meyers, and every other law firm.

An increase in the jurisdictional limit from \$1,500 to at least the \$2,500 range could easily be justified by inflation over the past six years. But there are additional reasons for the expansion of small claims jurisdiction apart from the obvious and perhaps dispositive point that such an increase is needed to compensate for inflation. At present, many disputes, particularly involving automobiles or large appliances, are brought in small claims court where damages are in the \$3,000-\$5,000 range, but the judgment is limited to the maximum \$1,500. The change would allow full or close to full recovery and an expedited procedure for a larger category of consumer grievances.

Those who oppose the increase in small claims jurisdiction often purport to cite consumer harm from it. They argue that creditors often use small claims as a means of expedited collection, and that this will just simply help them against the consumers who allegedly owe them money. In fact, the current small claims statute does not allow assigned creditors

to appear at all. That is, financial companies cannot pick up promissory notes and go into small claims court to enforce them. A business can go into small claims court to collect on a debt, but it must be a debt directly owed to it. (In fact, a strong argument could be made that assigned creditors should also be able to go to small claims court, even at the enhanced \$3,500 jurisdictional limit. A limitation on assigned creditors simply makes it more difficult for small businesses (those who normally assign their paper to creditors) to collect on monies owed. At present, the very large enterprises, such as Sears or Montgomery Ward, are able to go into small claims court for the debts owed to them directly, whereas small businesses who must assign creditors are forced into the municipal court arena.)

There are two reasons why the so-called "consumer detriment" argument behind the expansion of small claims is flawed. First, the alternative is for all of these creditors to go to municipal court. This means there is an attorney representing the creditor, and the consumer must either obtain an attorney (which he cannot afford) or attempt to defend the matter in person. At least in small claims, where no attorneys are present for either side, the consumer is on more of an equal footing. Hence, the alternative to the expansion of small claims jurisdiction is a relegation of the consumer to a forum which is more expensive, esoteric, mysterious, time-consuming, and inaccessible to him or her.

The second reason is the false view that creditor collection of monies due and owing from consumers somehow abridges consumer rights. A consumer who is a deadbeat, and yes, there are deadbeats out there, injures other consumers. Deadbeats may cost a small business its investment and deprive the marketplace of its services. Deadbeats impose costs that businesses must pass on to all of us in the form of higher prices. Why should they ride our bandwagon? We should not attempt to defend consumer rights by depriving society of means to resolve disputes on the grounds that some of those resolutions will involve consumers having to pay money to businesses.

The point is, let's find a way to resolve disputes, and to get a decision. It may not be perfect, but a good faith try at a good decision is better than no decision.

CPIIL supports AB 301.

"Short Lists" And "Dead Bodies": Violating The Body Politic

Governor Deukmejian signalled his hostility to California voters and his fealty to toxic chemical peddlers by his very first action under the recently-approved Proposition 65. To his credit, the Governor did meet the March 1 deadline for issuing the list of "those chemicals known to the state to cause cancer or reproductive toxicity." But his "short list" of 29 chemicals relegated to "further study" over 90% of the chemicals required by the initiative: those which are known to cause cancer by every respected national and international agency—but not, apparently, by California. In so doing, he has flouted the statute. Indeed, his actions are so indefensible that the Attorney General warned before the list was issued that he would not disgrace himself before a court by defending it.

California voters approved Proposition 65 by a nearly two-to-one margin, sending a strong message to state government that the policy on toxics should be: "Just Say No." The historic strategy for regulating toxics has been "anything goes," until a cancerous or birth defect-causing substance is found to be so dangerous that government agencies must bestir themselves: a form of "innocent until proven guilty" due process conferred upon PCBs, heavy metal, and other chemicals. Traditionally this means that little regulatory activity occurs until after the drinking wells, air, soil, and public are contaminated. At this point, millions of dollars must be allocated to clean up the mess and years expended in regulatory proceedings to remove the chemical from distribution.

Proposition 65 at least partially reverses that practice, and requires that *before* any chemical known to cause cancer, birth defects, or sterility is introduced into drinking water or to the public, there must be an established safe level for exposure. This proactive, preventive strategy should be a model for the nation. In essence, it is nothing new. In automobile safety, for instance, the government requires that vehicles be made safe before they are sold. Except for notable exceptions like the Ford Pinto, we do not generally wait until highways are strewn with carnage before deciding to fix the defects or recall the cars. And if we know of a possible safety hazard, isn't it advisable to make a decision *before* we build and distribute one million models?



COMMENTARY

To create a preventive regime, Proposition 65 required the Governor, by March 1, 1987, to "cause to be published a list of those chemicals known to the state to cause cancer of reproductive toxicity....," with annual updates. Once a chemical is listed, it cannot be leaked into drinking water, nor can the public be exposed to it, unless and until adequate levels of safety are assured or warnings are given. To prevent disruptions, a twenty-month grace period is allowed after listing. To help the Governor generate the first list in a short time, the law requires that "[s]uch list shall include at a minimum those substances identified by reference in" certain California Labor Code sections dealing with listing of hazardous substances. The Labor Code sections, in turn, refer to the most respected authorities in the field: the National Toxicology Project (NTP) and the United Nations' International Agency for Research on Cancer (IARC). NTP and IARC annually publish lists of substances which cause cancer and pose reproductive hazards. Thus, the Governor's burden was a light one: look up the Labor Code sections, then call NTP and IARC and have them send the latest listings; cull for duplications and voila! The list of 264 internationally-recognized hazardous substances.

Had he followed this simple procedure, chemical manufacturers who use and discharge chemicals would benefit from simplicity and certainty. As substances are added to the NTP and IARC lists, all parties know that they will appear on the next annual Governor's list, with a grace period before the law takes effect. A company wishing to continue to expose the public to the chemical has the time to meet its burden by testing to establish the safe levels of exposure. This is in contrast to the current system, where chemicals are dispersed, discovered to be harmful after the fact, and then everyone fights about it for years while the government ponders what to do, with attendant uncertainty, cost, and litigation.

But the Governor listened to a different drummer and heard the strident beat of chemical manufacturers and toxic polluters. Astute readers will recall two features of the campaign against Proposition 65: the claim that it had "too many exemptions," and that it was too sweeping, covering hundreds or thousands of chemicals. Immediately after the voters rejected these arguments, the Proposition's opponents—of which the Governor was a prominent representative—adopted a clever bit a leger-

deman that effectively combined their two themes: yes, the initiative affected hundreds of chemicals, and yes, most are exempt. Following the siren cry of the opponents for a "short list" contained in a January 16 communique, and ignoring the warnings of the authors of the initiative, the Governor adopted a regulatory and scientific theory without support in either law or science. Only the 29 chemicals that have been irrefutably proven to have caused known cancers in known humans were listed. The other 235 chemicals proven in laboratory studies to be just as virulent will be referred to a panel of scientists appointed by the Governor for "further study." To ensure that this panel would produce neither swift nor sure results, he included in its membership opponents of the initiative.

The Governor's theory is premised on the same argument that cigarette manufacturers have honed to a fine art: you don't know something causes cancer until you have a real (formerly) live person and can directly trace cause and effect. This is known in toxicology circles as the "dead bodies" method of testing. Although choosing humans as test subjects rather than laboratory animals plays into the erroneous public perception that rats gorged on Pepsi is the standard for testing, the scientific protocols are far more rigorous, and the Governor's "dead bodies" approach has been rejected by both the federal and state governments, as well as by cancer researchers worldwide.

The Governor should listen to the public—not the regulated—in interpreting a public initiative intended to protect the public. He should reject failed, cramped interpretations and adopt a modern regulatory policy. A complete, supplemental list should issue forthwith.

