FEATURE ARTICLE

THE ATTORNEY GENERAL'S "CIRCLE OF ERROR" CASTS A SHADOW OVER CALIFORNIA'S SUNSHINE LAWS

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Functional democracy. It doesn't happen automatically. It has prerequisites, including governmental decisions made in public with advance notice by officials who are known and visible. This provides a way for the citizenry to pass judgment on the performance of their public officials, both elected and appointed. It also allows citizens to be heard as decisions are made which affect their interests.

Perhaps the most important protector of democracy is a set of statutes called "sunshine laws." In California, two of the most important sunshine statutes are the Bagley-Keene Open Meeting Act[1] (applying to state agencies) and the Ralph M. Brown Act[2] (applying to local agencies). Their elements are not complicated. Post your agenda in advance so those with some interest in what you are doing will know about it. Meet and make your decisions in public so what you do may be seen and reported. Most important—use the public forum to test what you intend to do; find out what people think of it; refine it if need be. And don't try to evade the law. Accept it. Don't run, and don't hide.

These are nice sentiments, but there are problems. These laws are not activated where individual officials are in a position to make decisions. For example, the Real Estate Commissioner, the Insurance Commissioner, and other regulatory officials with substantial public executive, judicial, and legislative powers do not act in public because they are not multimember bodies required to "meet" in order to make decisions. They just "decide"—alone and in their offices. Only if a hearing is required by statute do they convene a public forum—for example, the requirement of the Administrative Procedure Act that rules of an agency be adopted after public hearing (which is triggered only if the agency decides to hold one or someone requests it in a timely fashion).

But for state agencies guided by multimember bodies, the law applies to any meeting of the state body and most subsets thereof.[3] They cannot decide unless they meet, and any meeting must be public—which means it must be noticed in advance and may be attended and monitored. Fortunately, many important regulatory agencies are governed, or their decisions reviewed, by "boards" or "commissions" or other multimember bodies. So there is a public crucible for decisionmaking.

The most troubling evasion of this seminal democratic protection occurs where it is avoided *en toto* based on the contention that although a multimember body is involved, a meeting does not "qualify" for the law's protection—usually because "not enough people are meeting" or "it's not really a meeting" or "this is just a committee thing—it will be brought up again later at a more formal and complete proceeding." The intent of the law is hardly actualized where the required public proceeding is a later charade of a prior decision made in private. The real decision is not monitored when it is made; the opportunity for public participation and consideration of outside views becomes a fraud. For this reason, the law has traditionally applied to *all* meetings where officials gather together and discuss *anything* relevant to their public responsibilities. It is not merely the final decision which is to be made in public—the *discussion*, the consideration, the weighing and deliberation are to be in public.

The Brown Act covering local agencies is somewhat different than the Bagley-Keene Act applying to state agencies. For example, local agencies are required to reserve a portion of the meeting for general public comment[4]; state agencies are not. Further, the Brown Act now permits advisory committees of a local board or commission to meet and discuss public business in private, so long as the advisory committee is composed of less than a quorum of the local board[5]—so no business may be transacted. This flexibility for local agencies is ill-advised for the reasons noted above.

The Bagley-Keene Open Meeting Act applying to state agencies does ***not*** contain the provision exempting its application where a meeting occurs with "less than a quorum." Rather, state agencies (and subsets of state agencies which satisfy the definition of "state body") must meet in public under Government Code section 11123, unless their discussion concerns one of 26 enumerated exemptions in Government Code section 11126. Unlike the Brown Act applying to local government, even *advisory committees* of state bodies must comply with the open meeting requirement where, as the Bagley-Keene Act explicitly provides, "three or more" officials are meeting.[6]

The import of this distinction, requiring *state* multimember bodies—including advisory bodies consisting of three or more persons—to meet in public under the Act, is momentous. State agencies set the policy of the state as a whole across entire industry sectors. Their decisions, above all, must not be made in a private setting. Note that unlike full-time local governmental bodies, most state multimember boards consist of unpaid persons meeting as full boards only once per month or less often. Further, unlike most local entities, state boards and commissions are frequently controlled by persons from the very trade or industry being regulated by that board or commission. For the protection of the absent public, these officials—who do not necessarily live in the local community of the public being affected by their decisions—especially need public visibility and input. Finally, the application of the Brown Act's loophole would be especially pernicious in the state setting: An eleven-member commission with a six-person quorum could delegate its business to four- or five-member advisory committees. The public meetings of the full commission would merely be a

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summary rubber-stamp of the privately formulated decisions.

Such a *caveat* is not a hypothetical proposition; the use of subsidiary advisory committees by local boards and commissions, and avoidance of public decisionmaking through the "less than a quorum" exception, is common. You see, gentle reader, our public officials do not generally embrace the light of public examination. Given the choice, many will avoid it.

The fact that the Brown Act specifically allows avoidance of notice and public proceedings for a meeting of an advisory committee of a local entity where there is "less than a quorum" present does have one palliating aspect: the fact that the Bagley-Keene Act specifically does ***not*** have that provision. Further, the Bagley-Keene Act was amended such that its open meeting requirement explicitly applies to all subsets of "state bodies" except advisory committees consisting of less than three persons.

Or does it? Well, one would think so. The Bagley-Keene Act was broadly drafted to apply liberally to state boards, committees, subcommittees, delegated bodies, surrogate bodies, inter-agency bodies, advisory bodies, and the whole host of governmental structures inevitably created to avoid it.[7] In the Brown Act, however, we have a similar statute which specifically *allows* an advisory committee consisting of less than a quorum of a local entity to more liberally avoid the law. Application of the most basic rule of statutory interpretation[8] tells us that the legislature's failure to replicate that provision in the Bagley-Keene Act confirms its intent to require open meetings of all "state bodies" covered by the statute. If the legislature includes "x" in one statute and does not include it in a separate but otherwise similar statute, we can fairly assume that the intent is to...include "x" in one and not in the other. This is called **reading the statute**.

But, wait a minute. A certain legal office has opined differently. The Office of the Attorney General of the State of California has published a "booklet"[9] (not a formal opinion) in which a line deputy AG has fantasized that the Brown Act's "less than a quorum" exception reserved for advisory committees of local "legislative bodies" applies equally to the "state bodies" covered by the Bagley-Keene Act.[10] Where did he get this theory? Good question. Not from the statute. Not from any published case. Not yet—but they're working on it, as we describe below.

A History of Legerdemain by the Attorney General's Office

Let's be absolutely clear on the genesis and chronology of the "less than a quorum" exception. The Brown Act was enacted in the Government Code in 1953; the Bagley-Keene Act was added in 1967. As enacted, neither contained any such exception. The AG's Office originally invented the "less than a quorum" exception to the Brown Act in a formal Attorney General's Opinion published in 1958.[11] Referring to the Brown Act as the "secret meeting act" [sic], the AG noted that the statute applied only to a "legislative body," then defined as "the governing board, commission, directors, or body of a local agency, or any board or commission thereof." The Attorney General distinguished the "legislative body" from committees thereof, and concluded that "only meetings of the legislative body of a local agency are required to be open and public."[12] With regard to committees of a local legislative body, the AG opined that "meetings of committees of local agencies where such committees consist of less than a quorum of the members of the legislative body are not covered by the act."[13] The AG's office reached this conclusion despite its recitation of the well-known legislative intent language contained within the Brown "secret meeting law."[14]

In 1967, the legislature enacted the Bagley-Keene Act applicable to state bodies. In spite of the Attorney General's "longstanding administrative interpretation" of the similar Brown Act, the legislature did not see fit to include a "less than a quorum" exception in the Bagley-Keene Act. Other than the exempt topics of discussion contained in Government Code section 11126, *all* meetings of *all* entities qualifying as "state bodies" under the Act were required to be held in public.

In 1968, the legislature codified the "less than a quorum" exception—originated by the Attorney General's premature interpretation—into the Brown Act at Government Code section 54952.3. That section provided then—and still does today—that the term "[l]egislative body *as defined in this section* does not include a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body."[15] Note the italicized limitation: The section pertains only to "advisory committees" of legislative bodies. **By its own terms, the "less than a quorum" exception is inapplicable to local legislative bodies or subsets thereof which are other than advisory in nature.** And note: While the legislature codified the AG's "less than a quorum" exception into the Brown Act, it failed to do so for the similar Bagley-Keene Act.

However, from the late 1960s until the present, the Attorney General's Office has continued its assault on the language of the Brown Act, and also performed its prestidigitation on the Bagley-Keene Act. Regarding the Brown Act, it opined in a series of internal, informal letters that the "less than a quorum" exception applies not only to advisory committees as confined in section 54952.3, but to other "legislative bodies" defined in section 54952.[16] These informal opinions cite the Office's self-created exception and note its "longstanding existence" since 1958, ignoring the relevant and substantive amendments to the Brown Act since that time,[17] including section 54952.3 noted above which confined "less than a quorum" secret meetings to *advisory* committees of *local* agencies under the Brown Act.

In 1978, one court—*Henderson v. Board of Education of the County of Los Angeles*[18]—considered a Brown Act challenge to private meetings held by a three-member advisory committee of a local seven-member board of education. Instead of simply citing section 54952.3 (which had existed for ten years) and sending the plaintiff packing, the court launched into a spate of dicta including lengthy quotations from the AG's internal letters which—even post-section 54952.3—continue to insist that the Brown Act "does not apply to meetings of committees of less than a quorum of the legislative body of the local agency"—without any limitation to advisory committees as required by the statute. With much help from the AG's Office, this unfortunate dicta has taken on a life of its own. Relying on that dicta, the AG constantly cites *Henderson* as affirming its opinion that even non-advisory, "less than a quorum" committees may meet in private.[19] In turn, local governments continue to violate the Brown Act, citing the AG's imprecise interpretation of the *Henderson* dicta.[20]

Then, having excessively shaded the sunshine law applicable to local agencies beyond "advisory committees," the Attorney General began to engraft its "less than a quorum" Brown Act exception onto the Bagley-Keene Act applying to state agencies. As early as 1977, it informally opined that the exception applies equally to subsets of state bodies.[21]

In 1981, the legislature decided to

add a provision to the Bagley-Keene Act regarding advisory committees of state bodies. Did it adopt the 1977 AG's informal opinion, evincing its agreement with it? No. Did it simply replicate the "less than a quorum" exception from the Brown Act's section 54952.3 applying to advisory committees of local legislative bodies? No. It enacted Government Code section 11121.8, which provides that even *advisory committees* of state bodies, "if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons," must meet in public. Thus, the legislature rejected the "less than a quorum" exception for state bodies in favor of a bright-line test by explicit declaration.

It is hard to imagine a clearer indication of the legislature's intent here. But the AG still doesn't get it—or pretends not to get it—because it continues to apply inapplicable Brown Act concepts rejected by the legislature in the Bagley-Keene Act context, and specifically to opine that the "less than a quorum" exception applies to *non*advisory committees of *state* bodies.[22]

Unfortunately, this erroneous interpretation has found its way into caselaw. In *Funeral Security Plans, Inc. v. State Board of Funeral Directors and Embalmers*,[23] the plaintiff—a funeral director licensee of the Board—challenges numerous procedural improprieties it alleges the Board has committed, including closed sessions of a Board advisory committee which plaintiff claims are unlawful under the Bagley-Keene Act. The committee at issue is comprised of two Board members; two staff members (the Board executive officer and an auditor) regularly attend meetings to assist the committee. If we were defending the Board, we'd simply argue that the committee is exempt from the public meeting provision of the Bagley-Keene Act because it's an advisory committee and it does not contain "three or more persons" under Government Code section 11121.8. The AG's Office—which defends state agencies in litigation—made this argument, but went further. Unforgivably misleading the court by citing Brown Act cases, Brown Act AG opinions, and Brown Act concepts on an issue which is unambiguously addressed in the clear language of the Bagley-Keene Act, the Office argued that "[a]s long as a quorum of the board is not involved, no 'meeting' occurred" which was required to be conducted in public.[24]

In an unnecessarily deferential opinion reminiscent of (and relying on) *Henderson*, the trial court actually bought this latter, untenable, and dangerous argument. The Sacramento County Superior Court held that although the language of the Bagley-Keene Act might appear to compel the committee to hold public meetings,[25] "an overriding principle applies" which permits the advisory committee to meet in closed session. Citing *Henderson* (an inapplicable Brown Act case), the court held that the "less than a quorum" exception "has been applied administratively for many years to state agencies operating under the Bagley-Keene Act as well. See *Open Meeting Laws* (1989), California Attorney General's Office....Since the Act has been amended several times without disturbing this long-standing administrative interpretation, this exception is entitled to respect and, unless clearly erroneous, should be followed."[26] This holding, of course, is correct under Government Code section 11121.8; the tortured reasoning the court used to get there, led by our AG's Office, is erroneous. This regrettable decision reflects the overriding deference paid to executive agencies and their counsel by many California courts. The case is now pending before the Third District Court of Appeal.

In addition to *Funeral Security Plans*, a second case involving the Attorney General's interpretation of the "less than a quorum" exception is pending; the California Supreme Court recently granted review in *Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors*.[27] Here, the respondent local government is advancing the Attorney General's anti-democratic and—perhaps more troubling—intellectually dishonest arguments. In *Freedom Newspapers*, the Court has before it an appellate court decision which carefully traces the relevant history of the Brown Act. Based upon that legislative history and the actual, operative language of the Brown Act, the court ruled that meetings of four-member committees of a nine-member local body must be held in public, because the committees meet the current definition of "legislative body" contained in Government Code section 54952. The court of appeal rejected the flawed analysis of *Henderson* and its citation of informal Attorney General "indexed letters," commenting that reliance on unpublished letters of the AG's Office is "somewhat like relying on a treatise that itself relies on a nonpublished opinion of the Court of Appeal and does not explain the rationale of the nonpublished opinion....We decline in this opinion to join this circle of error. While we agree that courts should give great weight to the published opinions of the Attorney General, they are not bound to perpetuate obvious errors in nonpublished indexed letters."[28]

The AG's continuing and insistent interpretation of these two statutes implies that (1) state and local boards and commissions may create committees which have binding decisionmaking authority, and (2) these committees may meet in private so long as they comprise less than a quorum of the board or commission which created them. This interpretation is absolutely contrary to the intent, spirit, and *language* of both statutes. Hopefully, both the court of appeal reviewing the superior court's servile decision in *Funeral Security Plans* and the Supreme Court reviewing the correct analysis of the court of appeal in *Freedom Newspapers* will focus on the unambiguous words and intent of the legislature, and conclude that **there is no such thing as a "nonadvisory committee" which is permitted to meet in private, either under Brown Act section 54952 or Bagley-Keene Act sections 11121–11121.7. Only "advisory committees" may meet in private, and then only if they comprise less than a quorum of a local legislative body under the Brown Act or less than three members of a state body under the Bagley-Keene Act.** All other conceivable subsets of state and local agencies are required to meet in public, unless their topic of conversation satisfies one of the subject-matter exemptions.

We do not urge this position on the basis of the underlying policy—conceding that it represents our preference—but from the application of the most basic rules of legislative interpretation. Here, it consists of simply *reading the statute*, and honestly attempting to apply its facial and unambiguous meaning. It is difficult to read the briefs in these two cases—in both, the respondents rely on the opinions of an office funded by The People and obliged above all others to maintain exemplary standards, including some measure of intellectual integrity. It does not lessen our distress that the arguments are offered in order to advance a position antithetical to legislative intent and democratic values.

The Genesis of the Problem: The Acculturation of Deputy Attorneys General

The conflict problem confronting the Attorney General is a conundrum. The Office is a special kind of attorney. First, the Office is the *attorney* of these state

agencies. It *represents* them. [*Query*, how much weight should be given to the opinion of an attorney framed to the advantage of his client?] But at the same time, the Attorney General is the chief law enforcement officer of the state. This dualism creates many problems for the Office (problems which appear to warrant its constitutional division and restructuring). But it is reasonable to expect the chief law enforcement obligations of the Office to supersede the representation of agencies. In fact, where legal counsel is performing in full ethical regalia, one does not have to be vested with special law enforcement status to tell a client: "That is wrong. You will not do that or you can get yourself another attorney."

Occasionally the Office of the Attorney General will do that—usually if it is a political matter. But when agencies are just *wrong* on the law and refuse to follow sound advice, even where the results are cruel and abusive, our public attorneys all too often defend the bad rather than repair to higher ground.

The reason has to do with the acculturation of attorney to client which imbues many of the regulatory agencies; these deputy attorneys general literally join the tribe. Adding to that problem is the "hired gun" ethic many attorneys mistakenly deduce from the moral relativism implicit in Socratic law school training (there is no right or wrong; just different arguments, all of which are flawed). The final result: I am a "professional," which means I am to maximize advantage for my client. I advise my client in order to advance his or her interests and attempt to steer him away from the reefs and shoals his proposed actions might impose. I am "his" or "hers."

Wrong, my brethren. Ideally, you are accountable too. And in a more democratic world, just as your public clients would shoulder the accountability they so assiduously avoid, so would you.

How does one explain the Office of the Attorney General standing for the proposition that the most important statute in the Code defending democratic values and assuring public government is loopholed based on an interpretation fabricated out of thin air? Is there accountability within the Office? Competence? Why doesn't the Office purge these obviously outmoded decisions now that they have been rejected by the legislature?

If there is to be a response to the eternal Archimedean search for honesty among our institutions, it must begin with the Office of the Attorney General. Here is the proper repository of our highest standards: the chief law enforcement officer of our state. But thus far, this Office has attempted to block the light of California's most important sunshine laws. It has done so with "disingenuous analysis"—this is lawyerspeak for "lying."

The development of the downward spiral on this important issue is not directed from the top. It really has not mattered who has been the Attorney General. These briefs and positions are not reviewed from an aspirational or even a generalist perspective. The inmates rule this part of the asylum. The civil service line deputies are "defending their agencies," who want maximum secrecy and unfettered discretion. Creative arguments easily slide into error, usually through the process of half-truths. "I won't lie; I'll just state half of it. Then it's up to the other side to correct the record."

As wrong as this assumption may be, it is particularly reprehensible for a public official, and for this officer of the court. Contrary to some perceptions, the public prosecutor has a special duty to the truth; for example, he or she does not seek to convict, but to determine the truth, and to help produce even-handed justice. The credibility of public agencies to the public, and to the courts reviewing the prosecutor's contentions, properly depends upon their fealty to higher duties, not to procuring an advantage for a client agency. In this case, the Attorney General's course of action in seeking such advantage comes at a heavy price; it seeks to create by judicial holding unenacted loopholes to allow common avoidance of our most important sunshine statute, the procedural underpinning for open government, the condition precedent to our precious democracy.

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ENDNOTES

1. Government Code section 11120 *et seq.*

2. Government Code section 54950 *et seq.*

3. *See* Government Code sections 11121–11121.8 for the Bagley-Keene Act's broad definition of a "state body" subject to the Act's public meeting requirement in Government Code section 11123; *see especially* section 11121.8, which even includes an advisory body as a "state body" if it is "created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons."

4. Government Code section 54954.3(a).

5. Government Code section 54952.3. The "less than a quorum" exception in section 54952.3 of the Brown Act is expressly confined to *advisory* committees of "legislative bodies"; other entities qualifying as "legislative bodies" under the Brown Act may not avail themselves of the exception and must meet in public unless the topic of discussion falls within one of the exempt areas listed in Government Code sections 54956.7 (consideration of license applications filed by persons with criminal records), 54956.8 (real estate negotiations), 54956.9 (pending litigation), 54956.95 (discussion of claims for payment of liability losses), 54957 (personnel matters), 54957.6 (labor negotiations), and 54957.8 (discussions of case records by the legislative body of a multijurisdictional drug law enforcement agency).

6. Government Code section 11121.8.

7. See Government Code section 11120 *et seq.*; *see especially* sections 11121–11121.8.

8. *Estate of Simpson*, 43 Cal. 2d 594 (1954); *In re Khalid*, 6 Cal. App. 4th 733 (1992); *Hennigan v. United Pacific Insurance Co.*, 53 Cal. App. 3d 1 (1975); *Signal Oil and Gas Co. v. Bradbury*, 183 Cal. App. 2d 40 (1960).

9. California Attorney General's Office, *Open Meetings Laws* (1989).

10. *Id.* at 14 ("*[e]ven though this office has informally concluded that the less than a quorum exception generally applies to meetings of state bodies*, the exception is specifically inapplicable to advisory committees [under Government Code section 11121.8]") (emphasis added). Note that in reciting this interpretation in an informal booklet, the AG has relied on a *previous* informal opinion.

11. 32 Op. Cal. Att'y Gen. 240 (1958).

12. *Id.* at 242.

13. *Id.* Note that section 54952 of the Brown Act has since been amended to define the term "legislative body" to mean "the governing board, commission, directors or body of a local agency, *or any board or commission thereof*, and shall include any board, commission, *committee*, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, *committee* or other body is organized and operated by such local agency or by a private corporation" (emphasis added).

Section 54952.2 was added in 1981 to further include within the definition

of the term "legislative body" "any board, commission, *committee*, or similar multimember body which exercises any authority of a legislative body of a local agency delegated to it by that legislative body" (emphasis added).

14. "In enacting this chapter, 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 them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." Government Code section 54950.

15. Government Code section 54952.3 (emphasis added).

16. This view, first published in Indexed Letter (I.L.) 69-131 (June 30, 1969), was later included in the 1972 edition of the AG's publication entitled *Secret Meeting Laws Applicable to Public Agencies*. It finally found its way into formal opinions in 1980, 63 Op. Cal. Att'y Gen. 820, 823 (1980), and in 1981, 64 Op. Cal. Att'y Gen. 856 (1981).

17. *See supra* note 13. For a full treatment of the history of the "less than a quorum" exception to the Brown Act, *see Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors*, 9 Cal. App. 4th 134 (1992), *pet'n for review granted*, Nov. 30, 1992, No. S029178 (hereinafter referred to as "*Freedom Newspapers*").

18. 78 Cal. App. 3d 875 (1978).

19. 68 Op. Cal. Att'y Gen. 34 n.11 (1985); 63 Op. Cal. Att'y Gen. 820 (1980).

20. *See, e.g., Freedom Newspapers, supra* note 17.

21. I.L. 77-104 (July 8, 1977).

22. *See* California Attorney General's Office, *Open Meetings Laws* (1989) at 13–14 and 20–21, in which the AG's office continues to insist that the "less than a quorum" exception applies to *non*-advisory committees of state bodies covered by the Bagley-Keene Act. *See also* 68 Op. Cal. Att'y Gen. 34, 40 n.11 (1985).

23. *Funeral Security Plans, Inc. v. State Board of Funeral Directors and Embalmers of the Department of Consumer Affairs*, No. 512564 (Sacramento County Superior Court, April 24, 1991); this case is now on appeal to the Third District Court of Appeal (No. 3-CIV-0011460).

24. *Id.* (Defendants' Memorandum of Points and Authorities in Support of Demurrer to Plaintiff's Complaint for Declaratory Relief at 19).

25. The court here was referring to Government Code section 11121.7, which provides that the term "state body" also includes "any board, commission, committee, or similar multimember body on which a member of a body which is a state body pursuant to Section 11121, 11121.2, or 11121.5 serves in his or her official capacity as a representative of such state body and which is supported, in whole or in part, by funds provided by the state body, whether such body is organized and operated by the state body or by a private corporation." Under a literal reading of this section, even a two-member committee of the Funeral Board (a state body) must meet in public so long as the members are serving in their official capacities as Board representatives and the committee is supported in whole or in part by the Board. 65 Op. Cal. Att'y Gen. 638 (1982). With regard to two-member advisory committees, however, courts may consider section 11121.8 (with its specific reference to advisory committees) as controlling over the general, broad language of section 11121.7.

26. *Funeral Security Plans, Inc. v. State Board of Funeral Directors and Embalmers of the Department of Consumer Affairs*, No. 512564 (Sacramento County Superior Court, April 24, 1991), *supra* note 23.

27. *Freedom Newspapers, supra* note 17.

28. *Id.* at 147.