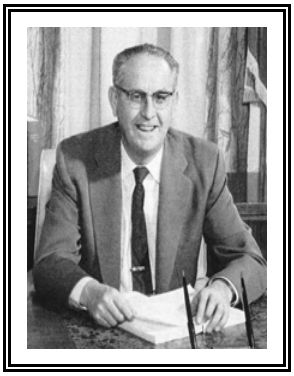
BROWN ACT ISSUES: THE PROBLEM OF THE SERIAL MEETING

ETHICS IN EDUCATIONAL GOVERNANCE WORKSHOP
JANUARY 26, 2009

Your board meetings are timely and properly agendized, with descriptions of each item sufficient to put the public on notice of the business being discussed. You use the closed session exemptions only for their intended purposes. Your board encourages public comment by citizens. Ralph M. Brown would be proud. Is a little board chit-chat outside of a meeting really a problem? Surely Mr. Brown didn't intend to restrict board communications so severely that board members are the least informed in the community. Surely a superintendent is entitled to keep the board abreast of developments.



Ralph M. Brown

This memo explores issues concerning "serial meetings" involving school and community college boards and county boards of education. It examines the state of law in this area in light of recent amendments to the Brown Act and provides you with some guidance concerning the risks. The discussion addresses separately communications between board members and staff/board communications.

I. WHAT IS A SERIAL MEETING?

The term "serial meeting" refers to a series of communications outside a formal meeting, each of which involves less than a quorum of the board, but when viewed collectively, encompasses a board majority. Such communications can occur directly, by telephone, e-mail or otherwise. According to the courts, a series of telephone calls between an agency attorney and members of a legislative body amounted to a meeting where the attorney polled the members for their approval of a transaction,[1] but a meeting did not occur in another instance when city council members simply received a letter from their attorney on an upcoming agenda item and there was no evidence of collective deliberation.[2]

Serial communications can occur through a chain of individual communications (Board Member 1 talks to 2 who talks to 3), or when a single person acts as the hub of a wheel (1 talks to 2 and 1 talks to 3), or through intermediaries such as staff.

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[1] *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95.

[2] *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363.

While not every communication outside a meeting is problematic, in many instances these chain communications can have the effect of advancing the Board's knowledge on an upcoming agenda item, helping the board to effectively reach consensus outside the presence of the public. The Brown Act favors public access to board deliberation and action, so that the board does not simply show up and vote as a formality, having already determined its position on a matter.

The courts and the Attorney General have wrestled with the impact of such communications and the appropriate line has been difficult to draw. The Attorney General takes a very conservative view of the issue, while at least one California Court of Appeal is willing to grant boards and staff much more leeway in order to move their business along. At the urging of media groups, the Legislature recently jumped into the fray to reverse a controversial court decision and to establish strict rules on communications between board members which took effect January 1, 2009.

II. WHAT WAS THE STATE OF THE LAW UNTIL JANUARY 1, 2009 CONCERNING SERIAL MEETINGS?

Subject to some specific exceptions, the Brown Act required school and community college boards and county boards of education to hold their meetings in public, pursuant to timely posted agendas adequately describing the business to be conducted.[3]

Under the prior law, serial communications arguably became problematic only if they were used to come to agreement on the action to be taken. Government Code section 54952.2, dating back to 1993, read as follows prior to January 1, 2009.

> (b) Except as authorized pursuant to Section 54953, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body is prohibited.

A. Communications Between Board Members – Prior Law

1. The Attorney General's Position. The Attorney General frequently issues opinions on Brown Act issues and the agency has a great deal of experience interpreting this law. Its opinions are not binding on the courts, but normally the courts give them great weight.

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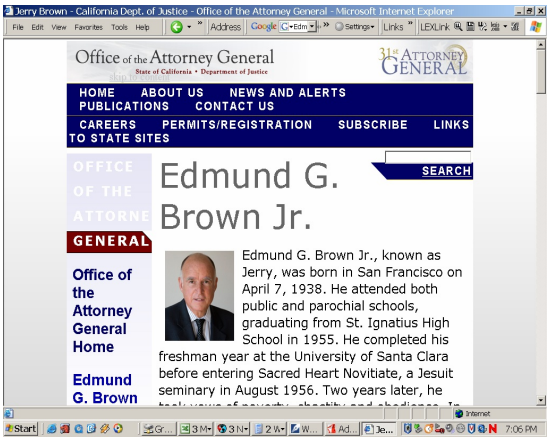
[3] The Brown Act defines "meeting" as any congregation of a majority of the members of a legislative body at the same time and place to **hear, discuss or deliberate upon** any item that is within the subject matter jurisdiction of the body. To "deliberate" means to examine, weigh, and reflect upon the reasons for or against the choice. (Government Code section 54952.2.) Case law establishes that this includes not only collective discussion, but also collective acquisition and exchange of facts preliminary to the ultimate decision. (*Sacramento Newspaper Guild v. County of Sacramento* (1968) 263 Cal.App.2d 241.)

In examining whether a serial communication occurred, the Attorney General is ever mindful of the spirit of the Brown Act: "to provide the public with an opportunity to monitor and participate in the decision-making process of boards and commissions."[4]



In the Attorney General's view, any "substantive" conversation concerning an agenda item "probably" would be viewed as contributing to the development of a concurrence on action to be taken. "Substantive" conversations include those which advance or clarify a member's understanding of an issue or facilitate an agreement or compromise among board members, or advance the ultimate resolution of an issue.

The Attorney General also takes the view that use of e-mail to develop a collective concurrence [exchange of facts, substantive discussion to clarify a member's understanding, etc.] violates the Brown Act even if the e-mails are posted on the agency website and forwarded to the chairman.[5]

In another opinion, the Attorney General held that a city council violated the Brown Act by holding a series of closed discussions with citizens having business before the council to gather or convey information, where the discussions were held on successive dates and so planned to insure a quorum of the council was never present at any single meeting. Citing a prior opinion and court decisions, the Attorney General noted that such informal meetings permit "crystallization of secret decisions to a point just short of ceremonial acceptance," thus eliminating the right of the public to be informed at all stages of the legislative or administrative processes of its governing bodies.[6]

Serial meetings can be viewed as permitting "crystallization of secret decisions to a point just short of ceremonial acceptance," denying the public the opportunity to observe deliberations.

The Attorney General also interpreted narrowly the exemption for communications between board members and "any other person." The Attorney General takes the view that conversations with board members and constituents are

[4] See the Attorney General's publication, *The Brown Act: Open Meetings for Local Legislative Bodies,* p. 12.

[5] 84 Opinions of the California Attorney General 30 (2001).

[6] 65 Opinions of the California Attorney General (1982).

not subject to the Brown Act, but that "any other person" does not include other board members or staff.[7]

2. The Position of the Courts. There is no comprehensive decision of the California Supreme Court on the issue of serial meetings. The Court's last major opinion was in the 1993 case in which it determined that receipt of a letter from its attorneys by the Palmdale City Council was not a serial meeting. Among the California Courts of Appeal, the Court of Appeal for the First Appellate District has probably been the most active in this area. This court touched off a lively discussion culminating in new legislation this year with its 2006 opinion in the case of *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533.

In the *Wolfe* case, the Fremont Chief of Police proposed a new administrative policy under which the City would no longer respond to home invasion alarms unless verified by a third party. The City Manager supported the proposal.

According to the complaint filed by a City resident, the City Manager met individually and privately with a majority of the city council members to discuss the proposed policy and obtain their support. The City Manager also sought to obtain the collective concurrence of Council members not to take any official action concerning the new policy or the existing policy, apparently so that the city administration could proceed to implement the change administratively. The complaint alleged that the Council members communicated their support for the policy to the City Manager, but it did not allege that they did so with knowledge of the positions of their fellow Council members. The plaintiff also claimed that the City Council violated the Brown Act in discussing the issue and expressing their support for it outside a public meeting.

In a now notorious footnote, the Court ruled, among other things, that Council members were not prohibited from meeting one-on-one to discuss the new policy if this type of communication did not lead to an actual consensus about action to be taken. In other words, board members under this rationale would be free to debate district business with every one of their fellow board members individually so long as they did not come to agreement on a course of action, even if they intended to circumvent public scrutiny. As discussed below, the Legislature has unequivocally bulldozed the rationale in the Court's footnote.

B. Staff / Board Communications – Prior Law

As a general rule, most superintendents update their boards between meetings. This often occurs through written communications. Sometimes superintendents individually brief the board president or individual board members on items of importance. The extent to which a superintendent is permitted to brief a board majority has been an area fraught

[7] See the Attorney General's publication, *The Brown Act: Open Meetings for Local Legislative Bodies,* p. 13.

with uncertainty. As we will see, the Legislature has taken a big step to address the confusion.

1. The Attorney General's View of the World. As with communications among board members, the Attorney General has taken a narrow view of the proper scope of staff/board communications:

> " . . . executive officers may wish to brief their members on policy decisions and background events concerning proposed agenda items. This office believes that a court could determine that such communications violate the Act, because such discussions are part of the deliberative process. If these communications are permitted to occur in private, a large part of the process by which members reach their decisions may have occurred outside the public eye."[8]

The Attorney General took the position that communications between staff and board members were permissible with certainty only to the extent the purpose was to plan upcoming meetings by discussing times, dates and placement of matters on the agenda, or for staff to "receive spontaneous input from any of the board members with respect to these or other matters so long as a quorum is not involved." Thus, the Attorney General's view would not support an administrator individually meeting with each board member to provide the board member with information on an agenda item.

2. The View of the Courts. The Court of Appeal in the *Wolfe v. Fremont* decision took a much more liberal view of the permissible scope of staff/board communications. The court held that so long as he was not acting as an intermediary for a board member, the city manager did not violate the Brown Act in meeting individually with each council member to brief them on city business. The Court went so far as to say that the city manager could urge each board member to adopt his position on a matter, so long as he was not acting at the behest of a board member. This view was very much at odds with the position of the Attorney General and left school administrators with some doubt as to how other California courts might view the issue.

III. How Will the Brown Act Change As a Result of Senate Bill 1732?

After vetoing a similar bill from a prior term, the Governor signed Senate Bill 1732 (Romero), revising the sections of the Brown Act dealing with serial meetings. Sponsored by the California Newspaper Publishers Association and supported by the California Teachers Association, the law took effect January 1, 2009. The new Brown Act provisions basically adopt the Attorney General's view on serial communications among board members and the *Wolfe* court's view on staff/board communications.

The Legislature left no doubt as to its feelings about the Court of Appeals view of communications between board members as expressed in the *Wolfe v. Fremont* opinion.

[8] California Attorney General, *The Brown Act: Open Meetings for Local Legislative Bodies*, p. 12.

The uncodified portions of SB 1732 state that it is the intent of the Legislature in amending the Brown Act to supersede the *Wolfe* opinion and declare the Legislature's disapproval of the opinion "to the extent that it construes the prohibition against serial meetings . . . to require that a series of individual meetings by members of a body actually result in a collective concurrence to violate the prohibition rather than also including the process of developing a collective concurrence as a violation of the prohibition."

A. Communications Between Board Members As A Result of SB 1732

Under the new statutory definition effective January 1, 2009, the Legislature makes clear that an unlawful serial meeting encompasses (1) **communications outside a noticed meeting** among individual board members or groups of board members less than a quorum which come to involve a majority **(whether directly or through intermediaries)** which (2) are used to **discuss, deliberate, or take action** on any item of business.[9]

While the Governor's signature on the statutory amendments is still wet, one major shift in the definition of a serial meeting is evident: there is no longer any requirement that a serial communication be used to develop a concurrence in order to violate the Brown Act. The mere discussion of an agenda item or a likely agenda item by a majority of board members will now clearly be a violation.

Accordingly, board members must take great care in their discussions with fellow board members outside a meeting. For three-member boards, the new law effectively rules out any communication among board members regarding district business outside a meeting. For five- and seven-member boards, some discussion is permitted but should be undertaken with caution. On a five-member board, a single board member may speak with another member regarding district business, assuming the intent is not to communicate among a majority. However, if either of those members speaks with just one other board member, an illegal serial meeting has occurred. Similarly, with seven-member boards, a board member is permitted to speak with two other board members outside a meeting on an agenda item, but if just one additional board member is brought into the loop, the Brown Act has been violated. ***REMEMBER—intentional violations of the Brown Act by elected board members are punishable as criminal misdemeanors!***

In light of the potential consequences, Board members who desire further information on an agenda item between meetings are urged to consult with their superintendent rather than discuss it with other board members.

[9]Specifically, Government Code section 54952.2 as amended provides as follows:

> (b)(1) A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

In light of the potential consequences and the fact that it is rarely possible to predict the behavior of fellow board members with certainty, board members are urged to contact their superintendent for information on agenda items or other board business between board meetings rather than discussing or e-mailing other board members.

B. Staff / Board Communications As A Result of SB 1732

SB 1732 brings some needed predictability in the area of staff/board communications outside a meeting. On balance, these changes may be viewed as a fair trade for the seemingly harsh language concerning communications among board members.

The new law permits a superintendent/administrative staff to go considerably beyond the guidance formerly given by the Attorney General, who admonished chief executive officers to stick to development of agenda items in discussions with board members and sanctioned only "spontaneous input" from board members.

Effective January 1, 2009, the Brown Act will make clear that staff can meet with individual board members to "answer questions or provide information" relating to district business. This confirms that a superintendent can meet with every single board member to brief them on upcoming agenda items without triggering a Brown Act violation. Similarly, a superintendent could meet with groups of board members less than a quorum for the same purpose.[10]

These new provisions were originally only "intent language" in the legislation, and would not have become part of the codified version appearing in the Government Code. Thanks to pressure applied by the California School Boards Association, districts will now have a clear exception for a commonly used informative communication practice that might have otherwise been in question given the other changes made by the bill.

However, in any staff/board communications, the following caveats still apply:

- Staff may not divulge a board member's comments or position to other board members.
- In meeting with board members, an administrator cannot act as an intermediary for one or more board members.
- If staff meets with more than one, but less than a quorum of board members, the rules concerning board member communications discussed above must be observed.

[10] Specifically, the new language on staff/board communications in Government Code section 54952.2 reads as follows: "(b)(2) (Paragraph (1) [relating to communications among board members] shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations oar communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.

Another method of staff/board communication that was considered appropriate even before the change in the law is for the superintendent to issue a memorandum to board members on an upcoming agenda item. Remember that any such documents relating to open session items will normally be considered public records subject to inspection by the public.

IV. WHY IS COMPLYING WITH THE BROWN ACT SO IMPORTANT?

Transparency and adherence to the Brown Act are part of an elected body's duty to the public and represent fundamental safeguards in a democratic society. Adherence to Brown Act requirements builds public trust in the integrity of district operations.

If a board is found to have engaged in an improper serial meeting, the district can be sued to invalidate any action taken by the board as a result of the serial meeting. So, for example, if a board were to discuss a serious personnel matter outside a meeting, an employee upon whom the board intended to impose discipline could invalidate the action. Similarly, a citizen might sue to set aside the award of a contract.

A district could also be subject to a lawsuit to prevent future violations of the Brown Act. In either scenario, if the challenger prevails, the board may be liable for the challenger's costs and attorney's fees. Media and other public interest groups lawsuits are often willing and able to finance such challenges using expensive attorneys!

As noted above, if a board member knows that a serial meeting is taking place and intentionally participates in order to keep the discussion outside the public forum, a criminal misdemeanor may be charged.

Finally, negative press is likely to follow any such challenge. The media sees itself as the guardian of public information and the protector of the Brown Act. Agencies who violate the Act are often painted as scoundrels engaging in smoky back-room politics. This impacts the reputation of the district as a responsible public entity. A reputation for transparency and good government can translate into community support for district programs, more volunteers, support for bonds, donations to district programs, etc. This valuable goodwill should not be tarnished by a practice that can be avoided with some simple precautions.

In summary, boards and staff should keep the following principles in mind, both now and after SB 1732 goes into effect:

- Board members should stop and consider the ramifications to themselves and the district any time they have the urge to discuss district business outside a meeting; they may be setting in motion a Brown Act violation over which they have no control, since the other party to the conversation may talk with other board members, resulting in a serial deliberation among a quorum of the Board.

- The safest course of action for board members is to always consider that any communication with another board member outside a meeting regarding district business may well end up as one in a series of conversations which a court may later characterize as a serial meeting involving a quorum of the board. Board members needing information between meetings can safely consult the Superintendent.

- In discussions between the superintendent/administrative staff and individual board members, the superintendent or administrative staff must not divulge information as to the comments of other board members, how other board members intend to vote or where they stand on an issue.

- Legal counsel can assist you in determining whether a proposed form of communication may violate the Brown Act and in proposing appropriate methods for communicating the desired information.

Enclosed with this memorandum is a "Brown Act Serial Meeting Checklist" which you may circulate to your administrative staff and governing board to help remind them of the principles discussed. Board policies relating to meeting conduct may need to be updated in response to the change in law. For members of CSBA, the relevant model policies are expected to be updated this fall. (See CSBA Board Bylaw 9320).

Please contact our office if you need further information or assistance on this topic.

— GRANT HERNDON, GENERAL COUNSEL

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ADMINISTRATIVE BODIES AND RELATED MATTERS. THEY ARE NOT INTENDED AS LEGAL ADVICE IN ANY SPECIFIC SITUATION. PLEASE CONSULT LEGAL COUNSEL AS TO HOW THE ISSUE PRESENTED MAY AFFECT YOUR PARTICULAR CIRCUMSTANCES.