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March 2021

IS RALPH BROWN READY FOR INSTAGRAM?
AMENDMENTS TO THE OPEN MEETING LAW ADDRESS COMMUNICATION ON SOCIAL MEDIA

The Ralph M. Brown Act came into being long before the advent of electronic communication and certainly well before social media came onto the scene. Always slow to catch up, the law now attempts to adapt the open meeting rules to the world of social media. Assembly Bill 992 is the Legislature's first real attempt to incorporate this facet of communication into the Brown Act.

1. Background – What is a Meeting?

The Brown Act still presumes that board business and collective board discussion occur at a public meeting at the appointed time and place, normally in full view of the public. The Brown Act tells us that a meeting occurs when a majority of board members gather at the same time and location to "hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body" (in other words, when a board majority gathers to discuss district business).[1] The Act requires that a number of features be in place to ensure public access at a meeting, such as agenda posting, opportunity for public observation and comment, etc.

When a board majority gathers informally over breakfast or in the parking lot, or otherwise outside a meeting without the required public access features, and ends up hearing, discussing, deliberating, or taking action on district business, a Brown Act violation has likely occurred. Among other things, this may pave the way for a challenge to associated board action and potential liability for the attorney fees of the challenger.[2]

[1] Brown Act, Education Code section 54954.2

[2] An interested person can file an action to invalidate board action taken in violation of certain Brown Act provisions (Government Code sections 54953 [meetings must be open and public, teleconferencing permitted with certain requirements, no secret ballots, oral summary of executive compensation], 54954.2 [72-hour posting for regular meeting with appropriate description, online posting requirements, new internet-based social media platform requirements], 54954.5 [closed session agenda descriptions], 54954.6 [taxes and assessments], 54956 [special meeting notice and posting requirements], or 54956.5 [emergency meeting notice and posting requirements].

2. Serial Meetings

The concept of a serial meeting addresses communications among board members outside a meeting and across time and space. A series of communications regarding district business, including electronic communications and even at different times and places, becomes an unlawful serial meeting when it comes to involve a majority of board members.[3] From a Brown Act perspective, the danger is that these private communications among a board majority can allow for a collective exchange of facts to occur, thus advancing the decision-making process outside of a board meeting.

That concept applies not only to communications by phone, email, or text, but could include communication on social media as well. While these communications may be very public and reach a great number of people, they do not occur within the confines of a board meeting with its prescribed rules around notice and public access.[4] The law was not entirely clear as to how Brown Act standards would be applied to board member communications on social media. Some clarification, along with the potential for many questions, arrived in the form of AB 992.[5]

3. Assembly Bill 992

AB 992 seeks to regulate board communications on a specific type of social media platform - an "Internet-based social media platform," which is defined as an online service in which members of the general public have the ability to access and participate, free of charge, "without the approval by the social media platform or a person or entity other than the social media platform, including any forum and chatroom," and in which they cannot be blocked from access or participation, except when the platform determines that an individual violated its protocols or rules.

Presumably this would include the major social media venues such as Facebook, Instagram, Twitter, Nextdoor, LinkedIn, TikTok, Parler, Reddit, blogs, etc. While it may be necessary to register for the app to access these sites, they appear to meet the definition in that they are free of charge, accessible by the public, etc.

On this specific type of platform, the Brown Act now confirms that board members may engage in separate conversations or communications to "answer questions, provide information to the public, or to solicit information from the public" regarding district business with two caveats:[6]

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[3] "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." Brown Act, Government Code section 54954.2(b)(1).

[4] See Senate Rules Committee, Senate Floor Analysis, July 31, 2020: "If exploited, local elected officials could misuse these provisions by moving some conversations currently reserved for open and public meetings onto social media without the same public meeting requirements. Whether the bill achieves the right balance between constitutional and statutory public access requirements and the free flow of communication is unclear." The analysis goes on to discuss the "digital divide" and questions whether the provisions allowing board members to communicate with the public on social media could be problematic in light of limited access to digital resources.

[5] AB 992 was supported by the League of Cities and the California Special Districts Association.

[6] Brown Act, Government Code section 54952.2.

- **Board Majority – Don't "Discuss Amongst Yourselves."** A board majority cannot use the platform to discuss among themselves specific district business ("business of a specific nature that is within the subject matter jurisdiction of the legislative body"). This would likely be the standard with respect to use of social media posts on <u>any</u> type of platform.

  "Discuss among themselves" means communications made, posted, or shared between board members, including "comments or use of digital icons that express reactions to communications made by other members of the legislative body."

- **Individual Board Members – No Direct Response to Board Member Posts.** Even a single board member is prohibited from responding directly to any communication on an internet-based social media platform regarding district business made, posted, or shared by any other board member. This requirement is unusual because the Brown Act normally permits one-on-one communications between board members that do not come to involve a majority.[7]

  Note that a single board member's response or reply to an email or text from another board member does not trigger a violation under this new provision, but as discussed above non-social media electronic communications can become serial meetings when they come to involve a board majority.

The provisions of AB 992 are automatically repealed on January 1, 2026, unless extended by the Legislature.

4. What Questions Remain?

AB 992 raises as many questions as it answers. Given the nature of social media and the opportunity to raise a Brown Act violation based on what could be as simple as a board member "liking"a post, it can be expected that the new rules may give rise to a proliferation of claimed violations based on actual or perceived board member activity on social media. Here are some potential questions:

- The use of digital icons as an expression of communication comes in the context of the section of the new law prohibiting a board majority from discussing board business among themselves. Does the same concept apply to the other provision in AB 992 prohibiting a direct response to another board member's post? It seems probable that "liking" a post by a board member is a direct response to the post.
- If a board member posts on social media, and a member of the public then responds, and a second board member responds to the public member's comment, the second board member has responded to the thread, but is this a direct response to the first board member's post?

[7] Brown Act, Government Code section 54954.2 (c): "Nothing in this section shall impose the requirements of this chapter upon any of the following: (1) Individual contacts or conversations between a member of a legislative body and any other person that do not violate subdivision (b)."

- Board members can comment on a post by a member of the public. If a board member does so, and then two additional board members also respond to the comment by a member of the public, will that be considered "discussing among themselves"?
- Now that social media posts are specifically regulated under the Brown Act, will they be subject to disclosure under the California Public Records Act?

5. Bottom Line

The following are clearly prohibited:

- AB 992 prohibits board members from directly responding to social media posts from other board members regarding district business on an "Internet-based social media platform."
    - It is safe to assume that "liking" another board member's post, or using other digital icons to express a position or opinion, will be considered a direct response.
    - It is suggested that the same rules apply to posting on ANY social media platform.
    - The most protective advice would be not to post regarding board business if you see that other board members are active on the site or have commented on the issue.
- A board majority cannot use an internet-based social media platform to discuss district business among themselves. This includes communicating by way of sharing, forwarding, or "retweeting" posts or using emojis and icons to express an opinion or position.
    - It is suggested that the same rules apply to posting on ANY social media platform.
    - The most protective advice would be not to weigh in on district business on a social media site once it has been observed that a board member has commented.

Beyond these clear requirements, here some additional tips for board members:

- AB 992 highlights the need for board members to stop and carefully consider any social media post that involves district business, and whether it is necessary to comment on that particular platform. Special care should be taken on any platform in which other board members participate.
- In general, it would not be prudent for board members to post on social media how they intend to vote on a particular issue. Since voting comes after deliberation and consideration of information presented to all board members at a public meeting, posting a specific position in advance could be perceived as bias or prejudgment.
- Pause when you to want to respond quickly and emotionally to negative information.

- Be careful not to post student or personnel information that may be confidential and is personal, or information that may be legally protected such as attorney-client communications.
- Remember that individual board members do not speak for the district, so avoid posting messages that may be perceived as coming from the district.
- Speak with your superintendent about issues prior to requesting information from the public on social media posts or distributing information regarding district business; this will help ensure you are not working at cross-purposes with staff who may be working on the same issue.
- For K-12 districts, review board policy such as Board Bylaws 9012 (Board Member Electronic Communications), 9110 (Public Statements), 9200 (Limits of Board Member Authority).

Please contact our office if you have questions about this topic.

- Grant Herndon

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